Case No: HQ15C04535

Neutral Citation Number: [2017] EWHC 2318 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/9/2017

Before :

SIR ROBERT NELSON

- -

Between :

XX	**Claimant**
- and -	
Whittington Hospital NHS Trust	**Defendant**

- -
- -

Claire Watson (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Charles Feeny (instructed by **Bevan Brittan LLP**) for the **Defendant**

Hearing dates: 13th to 15th June 2017

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Judgment

Sir Robert Nelson :

1. As a consequence of the Defendant's admitted negligence in failing to detect signs of cancer from smear tests in 2008 and 2012 and biopsies in 2012 and 2013, the Claimant developed invasive cancer of the cervix for which she required chemo-radiotherapy treatment that led to infertility and severe radiation damage to her bladder, bowel and vagina. This trial is quantum only, the Defendant having also admitted causation.

The Facts

2. The Claimant was 29 when she was diagnosed with stage IIB cervical cancer. She suffered from recurrent urinary tract infections/cystitis type symptoms whilst the cancer remained undiagnosed, and vaginal discharge, offensive at times, from 2011 onwards. She had shooting pains in the vaginal and lower pelvic area with abdominal bloating. She experienced pain and bleeding during sexual intercourse.

3. The delay in the diagnosis caused the Claimant anxiety and stress, knowing that she was experiencing considerable pain and discomfort and unusual and troubling symptoms which were discounted whenever she attended hospital. When the correct diagnosis was made she experienced shock and anger, which in part she directed against herself, feeling that she should have been firmer with the hospital staff. This was an understandable response, but as she recognized herself, she was not in fact in any sense to blame.

4. A consequence of the late diagnosis was that the Claimant, because of the increased size of the tumour, was unable to have fertility sparing surgery, which would otherwise have been, and should have been, available to her. She has therefore suffered a complete loss of fertility, which is a terrible blow to her as one of her central ambitions in life was to found her own family. She was so devastated by the news that she would be unable to bear children that she postponed her cancer treatment on two occasions in order to take a second and third opinion on whether fertility sparing surgery was indeed no longer available to her.

5. It was not, so on 16 July 2013 she underwent a cycle of ovarian stimulation and egg harvest which produced 12 eggs, which have been cryopreserved by vitrification.

6. On 24 July 2013 the Claimant underwent surgery followed by a course of chemo radiotherapy in August and September 2013.The latter treatment caused irreparable damage to her uterus and ovaries and she is now unable to conceive or become pregnant or bear children. She has entered a premature menopause and before she started hormone replacement therapy experienced bad night sweats and decreased energy.

7. The Claimant and her partner have decided to have their own biological children by surrogacy. The Claimant has always wanted a large family and would wish to have 4 children, (she also said 3-4 to Dr.Gessler) using donor eggs if her own cryopreserved eggs do not result in a sufficiently large number of children. The Claimant comes from a large family as does her partner; her sister and her husband have 10 children at their home in Scotland, but the Claimant at present finds it difficult to visit them as it is upsetting to her to look at small children when she feels that she may never become

a mother herself. Their first choice for surrogacy is California, where XX's partner has a relative, primarily because surrogacy is lawful and binding there and without the problems of partial illegality facing aspiring parents in the UK.

8. The chemo radiotherapy has resulted in severe physical injuries. The Claimant has vaginal stenosis, atrophy of the vaginal tissues making the area tender and sensitive and penetrative sexual intercourse too painful to have. She uses vaginal dilators but finds them painful and a reminder of the extent of her injuries.

9. She has numerous and regular problems with her bladder; episodes of urinary urgency, urinary frequency, excessive night time urination, painful urination and blood in her urine. She has been diagnosed with late onset radiation-induced cystitis. As she has episodes of incontinence she has to wear pads, which have to be changed several times a day.

10. The Claimant suffers from severe problems with her bowels; she has radiation proctitis, bile salt malabsorption and functional diarrhoea. Her condition has led to bowel frequency and urgency, loose stools and occasional incontinence. She has occasional abdominal pain.

11. One of the consequences of her bladder and bowel problems is that her ability to travel and go where she wishes is severely limited. Every journey has to be carefully planned in advance so that there are stopping points with known toilet facilities. This applies even to relatively short journeys by e.g. tube. She has at present ceased to fly as this causes pain and may cause bleeding. Her occasional incontinence of both bladder and bowel has affected her confidence about what she is able to do and caused her anxiety and embarrassment. When she has a stomach upset her bowel is uncontrollable. Recently she had to return to her house from the bus stop, because of a stomach upset, three times, before she was able to get work. Someone else had to open the store at XX's employer at St. Pancras, where she works, as she was late.

12. At work the Claimant faces the difficulty that there is no toilet in her store so that she has to go to a public lavatory where she may have to queue. This causes her considerable anxiety about soiling herself but she has coped well at her work, gaining a promotion recently, though she had to turn down an earlier offer of promotion because of the travel problems that would have caused.

13. The Claimant is able to do much of what she could do before around the house except that she now leaves the heavy work to her partner. She could do even the heavy work, but that and picking up heavy items, may cause pressure on her bladder so that she does less now. She may have a bladder episode causing pain and blood in her urine with a burning sensation on urinating every two weeks or so.

14. The bladder and bowel problems are likely to persist. The extent to which they cause severe continuing problems will depend on the effect of the various treatments and medication and a controlled and careful lifestyle, but I am sure that her continuing disability arising from the Defendant's negligence will, in any event, cause her considerable difficulties in her life.

15. It is agreed between the parties that provisional damages should be awarded to the Claimant for the risk, small but undoubtedly real and significant with potentially

grave consequences, that she will develop radiation enteritis, a condition which may result in gastrointestinal failure and may cause the need for home parenteral nutrition, i.e. intravenous feeding.

16. The Claimant also experiences a constant heavy feeling in her legs that interferes with her sleep. This problem is likely to be permanent.

17. As a result of the failure in diagnosis the Claimant suffered from mild depression and anxiety though this has now been successfully treated. Dr. Gessler, a consultant psychologist who was called on behalf of the Claimant, said that that by the end of her treatment, the Claimant was normal though she considered that there was a risk that the Claimant might, if the surrogacy was not successful, revert to ruminative and intrusive thoughts resulting in a condition worse than to begin with. This would represent some of the symptoms of post traumatic stress disorder but not the full condition. Although Dr. Gessler said that the response to failed surrogacy, if such a response occurred, might be catastrophic, she thought that the condition would not be long lasting, expressing the view that treatment, as it had been in the past both in the Claimant's youth and in respect of her post diagnosis condition, would be successful. She said that she would hope that after one year of psychological treatment no further treatment would be needed.

18. The overall effect of the failure to diagnose the cancer soon enough were well summed up by Claire Watson on behalf of the Claimant in her closing submissions:

    a) The development of invasive Stage IIB cancer, which necessitated surgery to remove her lymph nodes and transpose her ovaries, and chemo-radiotherapy

    b) The complete loss of fertility where XX has no children but had always wanted to found a family of her own.

    c) Radiation induced bladder injury leading to urinary urgency, urinary frequency, excessive night time urination (nocturia) painful urination (dysuria), blood in her urine (haematuria) and urge incontinence for which she wears pads

    d) Radiation induced pelvic pain

    e) Radiation induced bowel injury: radiation proctitis, functional diarrhoea and bile salt malabsorption causing bowel frequency and urgency, loose stools and occasional incontinence.

    f) Vaginal stenosis and impairment of sexual function

    g) A constant heavy feeling in both legs with pins and needles, which interferes with her sleep at night

    h) Loss of hormone production leading to premature menopause

    i) Anxiety and depression associated with the diagnosis of cancer, the radiation induced injuries to her bowel, bladder and vagina and her inability to conceive or carry a pregnancy

j) The risk of recurrence of cancer and the associated fear of the same.

Pain, suffering and loss of amenity

19. I have considered the cases referred to by the parties and the Judicial College Guidelines. The latter are as follows:

> Chapter 6(F) Infertility, whether by reason of injury or disease, with severe depression and anxiety, pain and scarring. The bracket, with 10% uplift, is £96,030 - £141,630
>
> The level of awards in this area will depend upon whether the affected woman already had children or whether her family was complete, scarring, depression or psychological scarring and whether a foetus was aborted.
>
> Chapter 6(I)(c) Bowels – severe abdominal injury causing impairment of bowel function often necessitating temporary colostomy (leaving disfiguring scars) and/or restriction on employment or diet. The bracket is £ 37,000 - £58,300
>
> Chapter 6(J)(c) Bladder – serious impairment of bladder control with some pain and incontinence. The bracket is £53,520 – £66,830.

20. No case cited is a good comparator with the Claimant's case but I am satisfied that her injuries are from the upper middle towards the upper end of the JCG.

21. Ms. Watson on behalf of the Claimant submits that the global award for PSLA should be a total of £190,000 or £200,000 if the court determines that there should be no provisional damages award in respect of the risk of deterioration in the Claimant's psychological condition and no damages are to be awarded for surrogacy either in California or the UK. Mr. Charles Feeny, for the Defendant, submits that the global award should not be less than £125,000, but considerably less than £190,000 as that represents a level equivalent to awards for serious brain damage cases or paralysis, which is not a reasonable level for this Claimant's injuries.

22. Having taken into account the parties authorities and submissions I award the global sum of £160,000 for PSLA. This figure takes into account the fact that, for the reasons expressed below, there will be no award for provisional damages for the risk of deterioration in the Claimant's psychological condition, and no damages in respect of surrogacy in California. I have allowed for an additional £15,000 to cover these two matters. (£145,000 + £15,000).

Life Expectancy

23. Mr. Feeny contends that the Claimant's life expectancy is reduced based on the report of Professor Luesley, the Defendant's expert in Gynaecological Oncology, and that of Mr. Hammond, the Claimant's expert Gynaecological Oncologist. Professor Luesley states in his report of 12 November 2015 that the chance of a recurrence of cancer was probably less than 15% at that time as the Claimant had been disease free for

approximately two years and most recurrences had occurred in that timeframe. He agreed with Mr. Hammond's opinion that 70% of recurrences occurred within 12 months of completing treatment so that in December 2014 when he wrote his report, the Claimant's chance of cure was 80%. At the time of trial some 2.5 years after Mr. Hammond's report and 1.5 years after Professor Luesley's report the Claimant remained disease free.

24. It is contended on behalf of the Claimant that this material does not amount to evidence of a reduced life expectancy. Ms. Watson points out that Professor Luesley does not state how much less than 15% the chances of recurrence were by November 2015, and it may be that if there were to be a recurrence it would be spotted quickly and treated.

25. I would add that there is no evidence before the court as to what the chances of recurrence were by the time of the trial in June 2017 1.5 to 2.5 years after the experts' reports. I am not satisfied that there is any proper evidential basis for finding that the Claimant's expectation of life is reduced and I reject the Defendant's submission on the issue.

Provisional damages

26. Whilst the parties are agreed that there should be an award of provisional damages in respect of the risk of radiation enteritis, there is no such agreement in respect of the risk of deterioration in the Claimant's psychological condition as a result of failed surrogacy.

27. The risk arises if there is complete failure in surrogacy. If there is one successful pregnancy with her own eggs the outlook for the Claimant is, in Dr. Gessler's opinion, likely to be largely positive. Her concern is that ruminative and intrusive thoughts may return, even worse than before, if there were to be a final loss of fertility. This would not fulfil the full diagnostic definition of PTSD though depression could develop. Dr. Gessler describes the Claimant as using a 'stoic' coping mechanism to deal with her problems, which enabled her to continue working well but made her quite fragile. She assessed the risk of a catastrophic response in the event of a failed surrogacy at 30–40%.

28. In her evidence Dr. Gessler said that if the Claimant's psychological condition did get worse following a failed surrogacy she thought treatment would be successful and expressed the hope that one year's psychological treatment of 45 sessions would be sufficient.

29. The test for determining whether an award of provisional damages is appropriate is threefold. Firstly whether the risk of deterioration is real rather than fanciful, secondly whether the deterioration will be serious, and thirdly whether the case is a proper one in which to depart from the normal rule of awarding damages on a once and for all basis at the date of trial. The court is exercising its discretion in considering the test and must take into account in doing so the likely clarity of any future risk and the ease with which it can be separated from the existing medical condition. (Wilson v Ministry of Defence (1991) 1 AER 638, Kotula v EDF (2011) EWHC1546 QB, Yale-Helms v Countess of Chester Hospital NHS Foundation Trust Lawtel 10 November 2015, Curi v Colina The Times 14 October 1998.)

30. Applying those tests to these facts I am clear that the risk of deterioration at 30 – 40% even though it only arises if the surrogacy fails, is real rather than fanciful. The second limb of the test presents a more difficult problem. It is difficult, in my judgement, to hold that a deterioration which may be severe but which is likely to be temporary and treated successfully in about one year can properly be regarded as serious under the test for provisional damages. This is not one of those rare cases where the normal rules for the awarding of damages should be displaced. The Claimant can be properly compensated within the normal rules. There is also the problem, which may arise, of establishing the origins of a particular psychological condition or its exacerbation. It is not therefore an appropriate case in which I should exercise my discretion in favour of an award of provisional damages regarding psychological injury.

Surrogacy

31. The Claimant and her partner wish to enter into a commercial surrogacy arrangement in California and have a clear preference for doing so there rather than in the UK or elsewhere. The advantages over the UK, where commercial surrogate arrangements are illegal are clear; the system is well established, the arrangement binding and the intended parents can obtain a pre-birth order from the Californian court confirming their legal status in relation to the surrogate child. By contrast, in the UK, not only are commercial surrogate arrangements illegal, but it is a criminal offence to advertise either for a surrogate or to be a surrogate. Surrogacy Arrangements Act 1985 ss.2 and s.3. (SAA) Any such arrangement is unenforceable. Surrogacy is permitted if it is non-commercial and only reasonable expenses are paid to the surrogate mother. It can be arranged privately, with e.g. a relative provided the rules as to reasonable pregnancy expenses are observed, but is often done through one of the established recognised agencies such as COTS (Childlessness Overcome Through Surrogacy). Where legal surrogacy is carried out the surrogate mother is the legal mother of the child. In theory, although it is rare in practice, the surrogate mother could refuse to give the child to the intended parents. It is necessary for the intended parents to apply to the courts in the UK for a parental order post birth.

32. Another disadvantage of the UK system in the eyes of the Claimant is that it is the surrogate mother who chooses the intended parent rather than the other way round. The Claimant says in her witness statement that the idea of being at the mercy of someone else's choosing, and attending informal parties to meet surrogate mothers frightens her. She states that that is not something she could do. In her evidence however she said that she is so determined to have children that she would use the UK system if the court does not award her the expense of surrogacy in California.

33. I accept the evidence she gave in court, which was supported by her partner. I am satisfied that her desire to found a family and her determination to do so is so great that she will overcome her fears about the UK system and use it if California is not open to her. She will do so even though it carries greater potential stress for her. I approach her surrogacy claim on the basis that it is in the alternative, California or alternatively the UK. That is the way her amended schedule presents her claim.

34. The claim is for the expense of 4 pregnancies either in California or the UK using her own eggs and if necessary donor eggs. The reports of the Reproductive Medicine experts, Dr. Raine-Fenning for the Claimant and Dr. Hamilton for the Defendant

agree that on the balance of probabilities the Claimant will achieve two live births (Dr. Raine-Fenning 18 May 2017) - one pregnancy per cycle of 6 (Dr. Hamilton April 2017) from her 12 cryopreserved eggs, based upon the more optimistic data from the USA, which both experts prefer. Mr. Feeny's submission that the prospects of success do not indicate more than one child by surrogacy is based on the National HFEA data in the UK, of 39.2% chance of a live birth, whereas both experts rely on the USA data or the data from the Centre for Fertility & Genetic Health (CRGH) in the UK which are both higher. The data for donor eggs gives a slightly lower prospect of success.

35. Whether a claim can be brought to recover the costs of surrogacy was considered in Briody v St Helens and Knowsley Area Health Authority (2002) QB 856. The Claimant in that case sought to recover the cost of surrogacy in California using her own eggs. The case is in distinct contrast to XX's case on the facts in that the chances of a live birth in Ms. Brody's case were only 1%. The claim was rejected at first instance on the grounds that it was unreasonable since the chances for success were so low and since the surrogacy arrangement would not comply with English law. At the appeal Ms. Briody sought in addition to put her claim forward on a different basis, namely that she would enter into a new arrangement using eggs from a donor which would comply with English law.

36. The Court of Appeal dismissed the appeal. The Californian surrogacy arrangement was unlawful in the UK and the chances of success using the Claimant's own eggs were so vanishingly small that it was unreasonable to expect the defendant to pay the expense of it. The expense of a surrogacy arrangement using donor eggs would also, had the new proposal been properly before the Court of Appeal, fail as such a course would not in any sense be restorative of the Claimant's position before she was injured, but would be seeking to make up for some of what she had lost by giving her something different, since neither the pregnancy nor the child would be hers.

37. Lady Justice Hale, as she then was, said that if in California commercial agencies were permitted and surrogacy arrangements binding, the proposals for surrogacy in California were contrary to the public policy of this country, clearly established in legislation, and that it would be quite unreasonable to expect a defendant to fund it (para 15). Lord Justice Judge, as he then was, said that the entire surrogacy agreement was unlawful in the UK. The damages sought were for the express purpose of enabling Ms. Briody to be provided with the wherewithal to pay for an unlawful contractual arrangement. That was not, Lord Justice Judge said, a principled basis on which to make a compensatory award. (para 39)

38. The Court of Appeal left open the question of whether the cost of a surrogacy arrangement using the mother's own eggs would be recoverable from a tortfeasor. Such an arrangement, if it complied with English law, would not be contrary to public policy and if the chances of a live birth were reasonable "should be capable of attracting an award" (paras 29, 30, 32). Nevertheless, Lady Justice Hale concluded, obiter, that her tentative view was that such a case was 'a step too far'. The question was whether, to be reasonable, reparation had to produce not only a child to rear, but also a child who was the product both of one's own genes and of one's own womb. (paras 30, 32)

39. Mr. Feeny submits that I am bound, on the basis of this decision, to reject XX's claim for surrogacy expenses in California and that I should follow Lady Justice Hale's

tentative view on surrogacy expenses in the UK relating to a mother's own eggs and reject that claim too. Ms. Watson submits that the case of Briody was decided on its own facts, and did not exclude a claim for recoverable surrogacy costs in the UK or abroad. Furthermore, she submits that public policy considerations today are different to those that applied in 2001/2. The Human Fertilisation and Embryology Act 2008 (HFEA 2008) amended the Surrogacy Arrangements Act 1985 by permitting payment for arranging surrogacy through non-profit agencies such as COTS and the Family Courts now grant parental orders to intended parents who have entered into commercial surrogacy arrangements abroad, and have retrospectively authorized commercial payments to surrogates and surrogate agencies pursuant to s.54 of the HFEA 2008. Re L (2010) EWHC 3146 (Fam) and RE C (2013) EWHC 2408 (Fam).

40. The use of agencies such as COTS, Surrogacy UK, and Brilliant Beginnings, and the payments made to them is a lawful activity, so that any reasonable payment to them whether in the UK or abroad, Ms. Watson submits, cannot be contrary to public policy. Ms. Watson concedes that in the making of parental orders it is the welfare of the child, which is paramount, which is being considered, but submits that the courts have awarded sums in excess of 'reasonable' expenses on the basis that the amounts involved are not disproportionate to reasonable expenses and do not amount to an affront to public policy (Re C). Such expenses would have been permitted if the procedure had been done in the UK. Ms. Watson submits that these changes in the legislation, and the subsequent decisions, reflect a change in society as to what would and would not be contrary to public policy. She also relied on the evidence of Ms. Louisa Ghevaert, the solicitor who is an expert in English fertility and family law, who expressed the view, when giving evidence about the English system and its cost, that the law relating to surrogacy is "due for reform as life has moved on".

41. The Claimant also relies on a decision of the Supreme Court in British Columbia, Wilhemson v Dumma (2017) BCSC 616 (Can L11) as persuasive authority. The Claimant, a Canadian citizen, sought to recover the expense of surrogacy in the USA, an expense which would have been contrary to public policy in Canada under the Assisted Human Reproduction Act S.C 2004. (AHRA). The claim was permitted on the basis that the surrogacy fees were not sought to pay a surrogate in Canada but to allow her to embark on the lawful activity of compensating an American surrogate. The AHRA did not apply outside Canada and Canadian law was not contravened. The same considerations apply in XX's case, Ms. Watson submits.

42. Lady Justice Hale was wrong, Ms. Watson submits, when she concluded in Briody that using donor eggs was not truly restorative. XX has lost the ability to become a mother it is submitted, but that can be restored by allowing her to become a mother with donor eggs through surrogacy. This is no different to an amputee having a prosthetic limb, which enables him to walk again, albeit with something that is not of his own genetic material.

43. There are also welfare considerations for the Claimant. She may suffer psychologically if she has to use the UK system. These should be taken into account it is submitted on her behalf.

44. Alternatively the Claimant submits, Briody does not preclude an award of costs of surrogacy in California where the amount claimed would be permitted in the UK. If however the court considers itself bound by Briody it is still open to it to make award

for an arrangement in the UK which conforms with UK law using the Claimant's own eggs.

45. I am grateful to counsel for their argument, both oral and in the skeleton arguments, closing submissions and pleadings and have been greatly assisted by them. I am clear in my conclusion that in so far as the claim for Californian surrogacy expenses is concerned, it must fail. I am bound by Briody on this issue. Commercial surrogacy arrangements are still illegal in the UK and thus contrary to public policy. I note that Ms. Ghevaert in paragraph 4.1 of her witness statement stated that there is a public policy prohibition in the UK against commercial surrogacy. It matters not, as was held in Briody, if the contract is made in California; in the UK it is an unlawful contractual arrangement which cannot found the basis for a claim for expenses. Nor can the expenses which are in excess of "reasonable" be severed; the contract would still remain illegal and contrary to public policy.

46. The legislation since Briody was decided does not alter that position. The HFEA does not make commercial surrogacy contracts legal, only non-profit arrangements. Commercial surrogacy arrangements remain illegal. The parental orders made by the Family Courts do not affect this issue; they relate to the welfare of the child in respect of children already born and are not concerned with either the welfare of an intended mother or any claim she may have, either directly or by analogy. As Mrs. Justice Ebbsworth said in Briody at first instance, whether one should award damages in order to bring a new child into the world is a quite different question from how one should look after and pay for a child who is already here. This comment was made in relation to IVF claims and before the HFEA and SAA but remains apposite.

47. I am attracted by the judgement in Wilhelmson but the Claimant was there seeking to pursue a claim based on an arrangement which was and remained illegal in the country where the claim was brought. I doubt if that decision would be followed in the UK but in any event I am bound by Briody.

48. Ms. Watson and Ms. Ghevaert may be right in saying that attitudes have changed and are indeed changing in relation to surrogacy but such change must be brought about by the Law Commission and Parliament, or perhaps the Supreme Court.

49. The situation in so far as the claim relating to the UK is concerned is, in my judgement different. It is not illegal nor contrary to public policy to use an agency to find and use a surrogate mother provided the requirements of the Act are fulfilled. As Lady Justice Hale said in Briody when dealing with this situation obiter, given the right evidence of the reasonableness of the procedure and the prospects of success such a case should be capable of attracting an award. (para 32) It is also correct that she said that her tentative view was that such a claim was a step too far. If however, as here, the prospects of success of a live child being born are reasonable if not good, and the Claimant has delayed her cancer treatment to ensure her eggs were harvested, I find it difficult to see why, both on general principle, and based upon Lady Justice Hale's own view, such a case should not be "capable of attracting an award", and why the claim relating to the UK should not succeed.

50. The use of a mother's own eggs is however to be contrasted with a claim based on the use of donor eggs. I am bound by the decision in Briody to reject such a claim. (para 25) The loss that the injured mother sustains is the inability to have her child, not a

child. The use of donor eggs is not therefore restorative of her loss. Even if that part of the decision were technically obiter I would adopt the reasoning of the Court of Appeal and reject any claim in respect of donor eggs. If the loss was to be properly regarded as the loss of a child it would not be reasonable or proportionate to require a defendant to pay for the cost of donor egg surrogacy.

51. I therefore limit the claim for surrogacy in the UK, using the Claimant's own eggs, to the cost of surrogacy for 2 children, as I am satisfied on the balance of probabilities on the expert evidence that the Claimant will achieve two live births.

52. It cannot be properly argued that the claim for surrogacy costs should be diminished or rejected because the Claimant will have substantial other funds by way of damages. The other heads of damage are compensatory and should not be treated as a substitute for another valid head of claim. This does not alter the fact that a successful Claimant may choose to spend her damages as she wishes.

53. The Claim is for £40,780 per surrogacy including VAT. The point is made by Mr. Feeny that that sum includes £15,000 for expenses to the surrogate mother whereas Ms. Ghevaert said the average payment in the UK for this was £10,800. Further, the need for legal advice was reduced, he submitted because of the Claimant's own extensive research. Accordingly, Mr. Feeny suggested that the amount per surrogacy should be reduced to £32,000. There should be a reduction but not to that extent. I allow £37,000 for each of the surrogacies, including VAT making a total of £74,000 for this head of damage.

Future Loss of Earnings

54. The Claimant returned to her work as a manager of XX's employer store at St. Pancras on 5 February on a phased return basis. The store does not have toilet facilities, as indeed none of her employer's station stores do, and this causes her great problems; she has to use the public lavatory and regularly has to queue. This causes her anxiety about soiling herself.

55. She has had to have time off work including a number of days off sick because of flare ups in her condition in the last few months; 3 days off in November 2016, a day or two off in January 2017 – both because of bladder problems, and 3 days off in May 2017 because of bowel symptoms. In order not to trigger the company's sickness policy the Claimant uses her holiday allowance instead of sick leave. She has been promoted recently and does not wish to endanger her new position. She did however have to decline another offer of promotion, which would have involved operating as dual site manager at both Liverpool Street and Victoria and higher pay, as she was worried about the long tube travel and needing a toilet in between stores.

56. I am not surprised, having seen the Claimant give evidence that her employers wanted to promote her. She is clearly an intelligent woman with determination and resolve. I accept that she has fought hard to overcome her disabilities and adopted a 'stoic role' as Dr. Gessler says, but I am satisfied that she is an excellent employee who seeks to and does, do her job well and enjoys it. There is a possibility that her employers will want to offer her another promotion or another store which will cause her travel problems, but I doubt that they will require her to accept it and run the risk of losing her as an employee if she remains as efficient as she is now.

57. Nevertheless there remains a real risk that over the years, as Ms. Watson submits, her resilience will diminish and she may require more time off work. I am clear that she will suffer a real handicap on the labour market as a result of her injuries, and in particular the bladder and bowel problems, which affect her ability to travel as well as her confidence about dealing with the difficulties these conditions give rise to. There is a risk of a bowel/bladder accident, as well as the fear of one, on a regular basis.

58. The Claimant has long had an ambition to become a counsellor and return to university to train for that work, but she went back to her old job and threw herself into it. Long term however she would still like to consider becoming a counsellor, when the case has finished. She emphasised that she still liked her current job.

59. It is submitted on the Claimant's behalf that her disability is such that she is disabled within the meaning of section 6 of the Equality Act 2010 and also within the definition of disability under the Ogden Tables. Accordingly, it is submitted, the correct approach is to apply a multiplier/multiplicand to calculate her potential loss of earnings over her lifetime.

60. The Defendant submits that the Claimant does not come within the definition of disabled either under the Equality Act or the Ogden Tables, the former because she has not established a substantial adverse effect on her ability to carry out normal day to day activities and the latter because she has been able to carry out the same kind and amount of paid work as before the accident. Furthermore, Mr. Feeny submits, even if the Claimant is disabled under the Act and the Tables, her claim for damages for future loss of earnings should still be calculated on the basis of the Smith v Manchester approach, by making a broad assessment of the present value of the Claimant's likely future loss of earnings as a result of handicap on the labour market, rather than the multiplier/multiplicand approach. He relies on the case of Billett v Ministry of Defence (2015) EWCA Civ 773. If the broad assessment approach is to be used the Claimant says it should be 5 years loss of earnings and the Defendant says it should be 2 years.

61. I find that the Claimant is disabled as defined under the Equality Act. Her lifestyle is undoubtedly seriously restricted by her bowel and bladder symptoms on a regular basis. It is a matter of degree and I conclude that her regular dysfunction as a result of these problems does have a substantial effect on her ability to carry out normal day-to-day activities. It is more difficult to assess whether the Claimant is disabled under the Ogden Tables definition as she is still able to work in the same employment, and indeed has done so for three years since the accident, for the same hours (with some days off for ill-health) and at an increased level of pay. Nevertheless her having to turn down the dual store promotion offer demonstrates that her ability to carry out work of the same kind is to some extent affected and I conclude that she does fall within that definition of disability as well.

62. Nevertheless, as the Court of Appeal found in Billett, the multiplier/multiplicand approach, even though commended in the Ogden Tables as the system to use where disability is established, may produce "hopelessly unrealistic" results and where it does the Smith v Manchester approach should be adopted. (para 96 – 99 Billett)

63. The Claimant's calculations for loss of future earnings produce a claim for £258,265, which in my view is clearly excessive when her disabilities and circumstances are

fully considered. It represents nearly 30% of all her future earnings which, in my judgement, does not reflect the handicap which she suffers on the labour market as a result of her injuries. It is quite unrealistic and suggests a much greater handicap than she in fact has. The broad approach I adopt results in an award of 4 years earnings, which at the agreed annual net figure of £25,027.20 amounts to £100,108.80.

64. I have taken into account in reaching this figure that the Claimant may choose at a later date to qualify as a counsellor and may therefore become self-employed.

Future cost of treatments and medication

65. The Claimant's case under this head of damage is that she will not generally use the NHS either for treatment or for medication. As she will have the funds to do so it is contended that she will use private medicine and prescriptions. In her evidence she described problems with obtaining prompt advice and help on the NHS and her consequent partial use of private treatment.

66. In so far as medication is concerned the Claimant has taken HRT provided on the NHS, but, as yet, no drugs specifically for her bladder or bowel conditions. She was prescribed Cholestagel (Colesevelam) for her bile salt malabsorption by Dr. Preston in March 2017 but has still not taken it. I accept her evidence that Dr. Preston told her that the side effects were possible incontinence, urgency, diarrhoea and vomiting so that she needs time off work before she can try this particular medication. As she has just taken on a new store however she did not feel able to take the time off immediately.

67. The evidence is that in the past the Claimant has taken medication such as beta-blockers and diazepam for anxiety, and I accept that she will take medication for her bowel and bladder conditions in the future. I am also clear, having heard her evidence, that she will not rush to taking drugs but will take them provided she is satisfied by her own research, by her confidence in the advice she has been given, and if she finds them helpful.

68. The Cholestagel prescribed by Dr. Preston was on the NHS but the Claimant's GP told her that it was a very expensive drug and he could only prescribe it once. The urogynaecological and urology experts note that the range of therapies may be limited by some local commissioning groups and that some GPs will not be able to prescribe some drugs. An example they give within their own area of experience is Elmiron, a drug for treating radiation cystitis, which on the NHS is on a named patient basis and not automatically agreed.

69. The gastroenterologist experts are however agreed that Cholestagel is available on the NHS 'at the discretion of the GP' (Professor Silk for the Claimant) and with 'no restrictions and'..... with Questran its alternative ..... 'readily available on the NHS' (Dr. Smithson for the Defendant).

1. Future Colorectal treatment

Cholestagel

70. The claim is for this drug to be privately prescribed for the Claimant's life, applying the agreed multiplier (in the absence of any reduction for loss of life expectancy) of 72.55 is £67,906.80.

71. This is excessive. The agreed evidence of the experts in the relevant field of expertise is that the drug is available on the NHS. I am satisfied that the Claimant will probably be able to obtain Cholestagel on the NHS. I find that she will use the NHS for that purpose, as she does for HRT at present. There may however, on occasions in the future, be difficulties in obtaining this drug on the NHS, taking into account the GP's response to the prescription and the urology experts' evidence as to the drugs in their field of work. There should therefore be an award of damages to cover this contingency. I assess this as the cost of Cholestagel of £936pa to which a multiplier of 10 should be applied. This item is therefore £9,360.

Cholestagel £9,360

There is no claim for Questran as well, as this is an alternative drug.

Multidisciplinary Treatment

72. It is agreed that the Claimant will require multidisciplinary treatment for 'at least 5 years'. The claim for that period is agreed as follows:

Consultant Gastroenterologist	£5,100
Dietician	£3,060
Clinical Psychologist	£4,080
Consultant Psychiatrist	£1,530

Life time follow up

73. The Gastroenterologists have agreed that the Claimant may need to consult and be treated by the multidisciplinary team for a period longer than 5 years. Professor Silk considered that, excluding the development of radiation enteritis, which is covered by my award of provisional damages, there is a 20% chance of multidisciplinary treatment being required beyond 5 years. Dr. Smithson said that he couldn't be sure, but that the range was from minimal specialist involvement and self management with oral medication and dietary modification to regular outpatient reviews and nutritional support. If treatment was required beyond 5 years it could be required for a considerable time.

74. These are very serious and complex injuries and the interaction that there will be between them is not known. The evidence satisfies me that there is a real risk that further treatment will be required beyond the 5 years and I adopt Professor Silk's assessment of a 20% chance of that occurring. The Claimant has taken 20% of the multiplicand of £3,600, the total of the multidisciplinary disciplines treating the Claimant, and then applied a multiplier of 67.55 (i.e. 72.55 less the 5 year period already allowed) to produce a total of £242,820. This is an incorrect approach. It is the multiplier not the multiplicand to which the 20% chance should apply. The Defendant submits that £5,000 - £10,000 should be awarded to cover this contingency. That in my judgement is too low. I have allowed a multiplier of 10 for the chances that follow up beyond 5 years will be required. This produces a total of £36,000.

Life time follow up £36,000

75. The claim under this head of damage includes one for 'specialist care for radiation enteritis'. I allow £4353.00 for this. (£800.00 x 72.55 x 0.075)

2. Future Urogynaecological treatment

76. The joint expert reports from Dr. Chaliha the consultant urogynaecologist on behalf of the Claimant and Professor Sethia the consultant urologist on behalf of the Defendant put forward a number of different medications which they consider may assist the Claimant in dealing with her serious and ongoing conditions. They state that: a range of drugs may be available on the NHS but in some areas GPs may be restricted in prescribing them by local commissioning groups; anticholinergics may not be available on the NHS and a GP may be obliged to prescribe a generic drug, such as oxybutynin, which is less effective and has side effects; the data available on some drugs is scant and unclear (Elmiron and Cystistat) and in the case of Mirabegron it has not been on the market long enough for its efficacy to become clear; Elmiron is available on the NHS but on a named patient basis and not automatically agreed; it is will take 10 years before the Claimant's condition and response to treatment can be assessed, and after that it is very difficult to predict what the situation will be; maintenance therapy on an ongoing basis is required for 10 years and will still be required afterwards but whether one or two drugs will be needed is not known; the efficacy of the different drugs for the Claimant varies from 50% - 60% (Elmiron and Cystitat) to less than 50% (anticholinergics) and 20% (Oestrogen). In the latter case however Oestrogen may help vaginal discomfort and atrophy and make the use of vaginal dilators easier.

77. This complex picture presents a very difficult task for the court, which has to attempt to assess future unknowns and make an award, which properly compensates the Claimant, and is fair and just to both parties. Provisional damages are not sought in respect of future medication, no doubt for the very good reason that the situation is too complex and varied for such an award to be workable even if the provisional damages system applied to such a claim.

78. The main issue is the multiplier. The Claimant's schedule of loss and damage sets out a life time multipliers of 72.55 in respect of four items of claim under this head of damage totalling nearly £250,000 whereas the Defendant puts forward a total of £22,000 in respect of these items. Neither of these positions is correct. The court must weigh a number of different factors in arriving at an appropriate multiplier. I start

with the finding that the Claimant will use the NHS for obtaining medication when it proves to be readily available from that source, as she does with HRT. I have taken into account the uncertainty of NHS availability for medication, the extent to which the drug may be effective in treating the Claimant's condition, whether one or two drugs will be needed for maintenance therapy, the extent to which the Claimant will continue to take medication, if it is not working and if she does not have confidence in the advice she is receiving, (e.g her reluctance to see Dr. Okrim again or follow his advice). I have looked at each individual drug claimed to see how these factors apply to that particular drug.

Anticholinergic agents

79. I note that even though there is a less than 50% chance of the symptoms being controlled to the Claimant's satisfaction, it may make her bladder more manageable with less voiding day and night. This would improve her ability to do everyday tasks and her sleep.

80. When all the above factors are taken into account I consider that £45 per month rather than the £60 per month claimed is appropriate and that the full life multiplier should be halved to 36.28. This produces a total of £19,591 (45 x 12 x 36.28).

Anticholinergic agents	£19,591

Elmiron

81. Both experts recommend this medication in their joint reports even though it was first raised by Professor Sethia and not put forward by any treating doctor. It is not put forward as an alternative to the anticholinergic agents and I reject the Defendant's submission that if Elmiron forms part of the award there should be nil awarded for the anticholinergic medication. The data is not however clear and it may not improve her symptoms to the Claimant's satisfaction though the experts consider it has a 50% – 60% chance of providing useful long term benefit. It may not be available to the Claimant on a named basis through the NHS but it may be. There is, as Mr. Feeny submits, no evidence that the Claimant has researched this drug or has expressed any desire to take it but I am satisfied that if this drug is recommended by a doctor in whom the Claimant has confidence and works to her satisfaction she will take it.

82. I assess the multiplier as 36.28, half the full life multiplier, having taken into account all the above factors. The award is therefore £87,072.

Elmiron	£87,072
Cystitat – agreed	£7,272

I do not add anything for the 10% possibility that the Claimant will require additional cystitat after 10 years.

Bladder retraining - agreed	£600

Oestrogen replacement therapy

83. The experts agree that this treatment has only a 20% chance of improving bladder symptoms, but note that it will be of value in the treatment of vaginal discomfort and atrophy and make it easier for the Claimant to use dilators. This could therefore have a beneficial effect on the Claimants' general comfort and perhaps reduce her discomfort if she attempts penetrative sexual intercourse. I am satisfied that the Claimant will undergo this treatment when the litigation is concluded.

84. Oestrogen is available on the NHS but may be restricted in a local area. The experts do not however refer to any specific limitations in relation to this drug. (cp anticholinergics and Elmiron).

85. I am satisfied that this head of damage is properly recoverable. A multiplier of 10 is appropriate in all the circumstances, which results in a total of £3,600.

Oestrogen replacement	£3,600

Pain Management

86. There is, the experts agree a 50% chance of the Claimant requiring pain management. I award her half of the amount claimed i.e. £500 (50% of £1,000).

Pain management	£500

Consultant Urologist follow up

87. The first year will require a consultation every three months and then annually for 10 years at a total of £3,500 (Joint Expert Report 4 June 2017). Thereafter the exacerbations of her bladder symptoms creating the need for such follow ups will as an average occur once every five years at £1,000 each time (£200 pa) the experts estimate.

88. On the basis of this evidence a multiplier of 52.6 as the Defendant submits is appropriate. The total for this element of claim is therefore £14,020. (£3,500 + 52.6 x £200).

Consultant Urologist follow up	£14,020
Ultrasound scans – agreed	£900

3. Future Psychosexual and Fertility treatment

89. The first item in this head of claim, for treatment for vaginal stenosis, set out in Ms. Watson's closing submissions is a repeat of the claim for oestrogen replacement, which I have already dealt with under the previous head of damage. It is not recoverable twice.

Psychological counselling - agreed	£2,400
Ongoing HRT on NHS	nil
and bone density scanning	£1,000
I allow as claimed	
Cryopreservation of eggs	£1,100
Fertility specialist input	£250

I allow a multiplier of 4 to cover two surrogacies between which there may be a gap. (£275 x 4)

4. Future Psychological support

90. I have awarded the Claimant the cost of two surrogacies in the UK. The evidence is entirely clear that she will be at risk during that time and I am satisfied that she will need psychologist support for those surrogacies. I award the amount claimed by the Claimant for the first two pregnancies i.e. £6,541.56

Future Psychologist support £6,541.56

91. Even if I had made no award in respect of the cost of surrogacies I would still have made an award for psychologist support as I am sure that the Claimant would have undergone at least one surrogacy whether or not she had been awarded the cost of doing so.

Ongoing prescriptions and medication £10,000 (agreed)

Future travel expenses (agreed) £5,000

Summary	£
Pain suffering and loss of amenity	160,000
Interest on damages for PSLA –agreed	5,996.71
Past loss including interest –agreed	17,183.45
Future loss:	
Earnings	100,108.80

Surrogacy	74,000

Colorectal treatment:	
Cholestagel	9,360
Consultant Gastroenterologist	5,100
Dietician	3,060
Clinical Psychologist	4,080
Consultant Psychiatrist	1,530
Life time follow up	36,000
Specialist care for radiation enteritis	4,353
	63,483
	£63,483

Urogynaecological treatment:	
Anticholinergic agents	19,591
Elmiron	87,072
Cystistat (agreed)	7,272

Bladder retraining (agreed)	600
Oestrogen replacement	3,600
Pain management	500
Consultant Urologist follow up	14,020
Ultrasound scans (agreed)	900
	£133,555

Sexual function and fertility Treatment:	
Psychological counselling (agreed)	£2,400
Fertility specialist input	£250
Bone density scanning	£1,000
Cryopreservation of eggs	£1,100
	£4,750
	£4,750

Future Psychologist support	£6,541.56
Ongoing prescriptions and medication	£10,000
(agreed)	
Future travel expenses (agreed)	£5,000

Total	£580,618.52

Conclusions

92. I therefore award this seriously injured Claimant the total sum of £580,618.52 damages.

93. I also make an award of provisional damages in respect of the risk of the Claimant developing radiation enteritis causing gastrointestinal failure and the need for home parenteral nutrition. I reject the claim for provisional damages in respect of the risk of future psychological harm.

94. I have also found that the Claimant's life expectancy is not reduced.

95. I have allowed the claim for the cost of two surrogacies in the UK but rejected the claim in respect of surrogacy in California.

96. The parties should draw up the order and agree any outstanding claim for interest as well as the order for provisional damages.