

Neutral Citation Number: [2024] EWHC 1509 (KB)

Case No: E90NE092

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**MIDDLESBROUGH DISTRICT REGISTRY**

**Sitting in the Leeds District Registry**

Leeds Combined Court  
1 Oxford Row  
Leeds LS1 3BG

Date: 17/06/2024

**Before:**

**HH JUDGE MARK GARGAN**  
**sitting as a Judge of the High Court pursuant to section 9 of the Senior Courts Act**

**Between:**

**MRS SAMANTHA DANYELLE CLARKE**

**Claimant**

**- and -**

**(1) MATTHEW POOLE**  
**(2) ANDREJ BORISENKOV**  
**(3) GREAT LAKES INSURANCE SE**

**Defendants**

**David Rivers** (instructed by **Slater and Gordon**) for the Claimant  
**Steven Snowden KC** (instructed by **Weightmans LLP**) for the Defendants

Hearing dates: 12<sup>th</sup> April 2024 and 17<sup>th</sup> June 2024 (for judgment)

## **Approved Judgment**

.....  
HH JUDGE MARK GARGAN

**HH Judge Mark Gargan:**

***(1) Introduction***

1. This is the defendants' application for an Order that the claim, or at least all claims for any future loss, be stayed unless the claimant submits to neurophysiological testing as suggested by the

defendants' expert neurologist. The defendants want such testing to be undertaken in order to determine whether the claimant is suffering from active/symptomatic myotonic dystrophy (MD) which is a genetic disorder that causes progressive muscle loss and weakness.

## **(2) Background**

2. The claim arises out of a road traffic accident which occurred on the 10<sup>th</sup> July 2018 when the claimant was 31. Liability has been agreed and judgment has been entered against the defendants on the basis that the claimant will recover 100% of her damages. The court is not concerned with any question of apportionment between the defendants who have resolved that issue in a confidential agreement.
3. The claimant sustained complex and life changing injuries, in particular a severe traumatic brain injury. She continues to suffer difficulties with cognitive and physical impairments. She has weakness in the right upper and lower limbs with spasticity which, together, affect her balance and mobility. She has impairments in memory, mental flexibility and speed of processing. She suffers from sleep disturbance, fatigue, pain and psychological problems. She will not work. It is agreed that she will require significant care for the rest of her life. However, the defendants argue that, even if she had not been injured in the accident, she would have developed symptoms as a result of MD which would have rendered her unable to work and/or would have led to her needing substantial care.
4. The claimant's provisional schedule of loss values the claim at about £22.5 million with just over £15 million of that being the claim for future care for which the lifetime multiplier is about 50.
5. The without prejudice counter schedule prepared by the defendants for a JSM in June 2022 valued the claim at about £5 million with about £3.5 million of that being the claim for future care based on a multiplier of about 31.
6. The counter schedule argues that, but for the accident, the claimant's life would have been significantly limited by her MD such that:
  - 6.1 She would have had to give up work as a dancer at 35-40;
  - 6.2 Thereafter she would only have been able to do part-time sedentary work until about 45-50 when she would have had to give up work completely;
  - 6.3 she would have required additional care from 45-50;
  - 6.4 she would have needed single level accommodation from about 50-55 and a live-in carer from the age of 60;
  - 6.5 her life expectancy would have been reduced to the age of 65. However, given the complications arising from the accident her life expectancy was now likely to be further reduced to 60.
7. The claimant's case is that she does not have the MD gene or, even if she does have the gene, that she is asymptomatic or has such low-level symptoms that MD would have had no material effect on her health.
8. As Paul Rose KC, then leading counsel for the Claimant, put it in his note for the CCMC in June 2022, the dispute about the potential future effect of MD on the claimant's health disclosed a "*fundamental issue which impacted very significantly on the valuation of the claim*".

## **(3) The medical evidence about MD**

9. The defendants rely on the evidence of Prof Shapira, a consultant neurologist. The claimant relies on the evidence of Dr Turner, a consultant neurologist, and Mr Simmons, a consultant ophthalmic surgeon.
10. It is agreed that the claimant's mother has been diagnosed with MD which is asymptomatic. The experts agree that there is a 50:50 chance of the claimant having the gene.
11. There are two types of MD to which the experts refer as DM1 and DM2. The experts agree that it is DM1 that is relevant in this case not DM2. To avoid confusion, I shall simply refer to MD.

12. Whether the claimant has the gene could be determined by genetic testing. However, the claimant has consistently refused to undergo such testing both before and since her accident.
13. Prof Schapira's initial report in 2021 was based on a video consultation because the claimant was isolating because of Covid. In the course of that examination Prof Schapira identified some drooping of both eyelids (ptosis) and "frontalis overactivity" (the raising of the forehead in an attempt to open the eyelids further). These can be symptoms of MD. Prof Schapira acknowledged that it was very difficult to undertake a neurological examination by video and said that it was "essential" that he was able to examine the claimant in person in order to provide a definitive opinion as to whether she exhibited the features of MD. If the claimant was exhibiting symptoms of MD, Prof Schapira's prognosis was that summarised in the counter-schedule and above.
14. The claimant was jointly examined by Prof Schapira and Dr Turner on 15<sup>th</sup> November 2023. Prof Schapira has set out his views in a relatively brief letter dated 23<sup>rd</sup> January 2024 which has been revised but not re-dated. In the most recent version, he states:

In our examination, it was agreed that there was mild bilateral ptosis (drooping of the eyelids) with some frontalis (forehead) over-activity. These can be features of myotonic dystrophy. Other clinical assessments were negative for myotonia in the tongue or hand muscles.
15. Dr Turner examined the claimant remotely in 2022 and identified "*mild bilateral ptosis with possible mild eyelid myotonia*". When he examined the claimant in person in November 2023 he noted:

There was mild right-sided ptosis and possibly left-sided ptosis that may have improved compared to my memory of the examination in 2022. There was possible frontalis overactivity.
16. Therefore, the experts agree that there was a mild right-sided ptosis. Prof Schapira considers that there is left sided ptosis and frontalis overactivity whilst Dr Turner thinks it is "possible" that the claimant has the latter symptoms.
17. In his detailed report dated 21<sup>st</sup> January 2024, Dr Turner accepts that the ptosis and frontalis overactivity "can" be features of MD. However, in his view any such symptoms were caused by the accident given that the ptosis: (i) had been of rapid onset post-accident; (ii) had improved over time, a course inconsistent with the onset of MD; (iii) was either unilateral or at least significantly asymmetric, a finding which he had not previously encountered with MD; and (iv) could be explained by the injuries sustained in the accident.
18. Dr Turner also drew support from Mr Simmons who identified that the claimant was suffering from blepharitis in 2019 which can cause a slight secondary ptosis. Further, Mr Simmons points out that patients with ptosis due to MD often have posterior subscapular cataracts which are not present in either of the claimant's eyes.
19. Dr Turner also argued that, even if the claimant has the gene, she is likely to be asymptomatic or have only mild non-life limiting symptoms given her and her mother's clinical history. Prof Schapira does not agree. There is a complex argument between the experts as to the whether the claimant is likely to have a more serious form of MD than her mother which turns on the number of CTG repeats on the mutant allele of mother and daughter, something which can only be determined by genetic testing.
20. In his expanded letter, Prof Schapira states that, absent genetic testing:

... Neurophysiological studies are very important in order to advise the court on whether or not it is likely that the claimant suffers myotonic dystrophy. There is no other means (other than genetic or neurophysiological) to make the diagnosis beyond the clinical assessments already performed. The most important type of neurophysiological test in the context of myotonia is electromyography (EMG). This is a routine test frequently performed when a patient is thought to have a problem with

nerves or muscles. To be most effective for detecting myotonia this involves the insertion of a fine needle through the skin into the muscle. I have had several thousand patients undergo EMG over the years. The vast majority reported no problems or undue discomfort, a few reported some temporary discomfort akin to a blood test, none reported any psychological problems at follow up. The EMG needs to be undertaken by an experienced neurophysiologist. This can be done locally to Mrs Clarke in Newcastle or alternatively by a neurophysiologist who undertakes domiciliary visits such as Dr Youll.

21. Dr Turner accepts that:

If the EMG is positive for widespread my myotonic discharges and/or myopathic units, particularly in the face, then overwhelmingly Danielle is likely to have DM1. The probability of the EMG test being positive for myotonic discharges and myopathic units if Danielle was genetically positive is likely to be over 50% but is not approaching 100% which is the predictable value of a genetic test. There are few other likely diagnoses, especially with her positive family history for DM1, if EMG demonstrated myopathic units and myotonic discharges.

...

EMG can be a painful procedure but this can be reduced in experienced neurophysiological hands.

22. Dr Turner accepts that it may be clinically advantageous for the claimant to know if she has MD. However, in clinical practice he would counsel the patient to undergo genetic testing rather than EMG and would not proceed with such testing if the patient declined.
23. At the start of the hearing, I was not wholly clear whether the results of the EMG test would establish only that the claimant had the MD gene or whether they would also show that she was symptomatic. At the conclusion of the hearing, I invited submissions from counsel on the issue.
24. I note that the purpose of the test is to detect myotonia: see Prof Schapira's letter. Further, when explaining the diagnostic process, Dr Turner states that the claimant is likely to have MD if the EMG is positive for *widespread myotonic discharges and/or myopathic units*. Therefore, I understand the experts to agree that, if positive, the test will confirm that the claimant has symptoms of MD.
25. Whilst the neurophysiological indicators will be present if the claimant has active MD, my understanding is that they will not produce a definitive guide to the way in which her symptoms are likely to develop in future and I approach the case on that basis. There is certainly no medical evidence before me to suggest that the test results would provide such a guide.

**(4) The Claimant's approach to testing**

26. The claimant's GP notes (as summarised in Prof Schapira's report) show that she had undergone frequent ECG (electrocardiogram) and Echocardiogram testing before the accident. They also show that the claimant declined to undergo genetic testing in 2010 and 2015, although she indicated that she might reconsider if she planned to have children.
27. There is no record of the claimant undergoing neurophysiological testing in the summaries of the medical notes contained in the various expert reports. However, in paragraph 7 of her witness statement prepared for this application, the claimant states that she has undergone EMG tests in the past. It is not clear whether this is accurate but given that it is in the claimant's witness statement I consider that I must treat it as correct. There is no evidence about the results of those tests or what counselling the claimant had before they were undertaken.
28. The claimant's principal objection to undergoing testing is that she does not wish to know whether she has MD as such a diagnosis will have lifelong implications for her health, travel and

life assurance. She also refers to the invasive nature of the testing which she views as yet another insult to her body which has been so damaged by the accident.

29. There is a letter dated 23<sup>rd</sup> January 2024 from Dr Flaherty-Jones a Consultant Clinical Psychologist who is treating the claimant but who has not provided any reports for the litigation. The letter is not CPR compliant, and Mr Snowden KC invites me to place only limited weight upon it.
30. For my part, the principal significance of the letter is the record it contains of the claimant's views about testing which I accept Dr Flaherty-Jones has set out accurately. The claimant explains that being informed that she has MD would negatively affect her mental health and her outlook on life. She states that it would leave a "black cloud" hanging over her and potentially reduce her motivation to engage in rehabilitation. She explains that the consequences of the accident have taken away so many choices in her life and that she does not wish for her choice on this issue to be taken away from her by the court when she feels so strongly about it.
31. Dr Flaherty Jones then set out his expert view that any pressure on the claimant to undergo such testing would be likely to have a detrimental impact on her mental health. Whilst paying due regard to Mr Snowden KC's caveats about Dr Flaherty Jones, I have no hesitation accepting that view.

***(5) The law: the starting point***

32. Both parties agree that the starting point is the test set out by the Court of Appeal in **Laycock v Lagoe [1997] PIQR 518**.
33. In **Laycock** the claimant suffered relatively modest physical injuries in a road traffic accident in 1985. However, shortly thereafter he developed a marked change in personality as a result of which he lost his job and his marriage. Ultimately, the claimant was diagnosed as suffering from a manic-depressive psychosis and was admitted as a psychiatric inpatient. The claimant's expert concluded that the claimant's psychiatric problems were caused by the accident. In 1992 the claimant underwent an MRI scan of his brain and obtained a report from a consultant radiologist who considered that the scan showed evidence of brain damage attributable to the accident.
34. The defendants' psychiatric expert accepted the close temporal relationship between the accident and the onset of psychiatric symptoms but, before seeing the medical records, asserted that there was no suggestion of intracerebral damage or any focal neurological signs or symptoms. On that basis he concluded that there was insufficient evidence to link the claimant's symptoms to the accident. However, on seeing the claimant's notes, the expert accepted that they "*to some extent*" confirmed that there was frontal brain damage but asserted that it was "imperative" to obtain a further MRI scan if a definitive answer was to be given. The defendant's radiologist opined that the procedure was unlikely to be upsetting for the claimant and that the more modern and sensitive MRI scanners by then available should provide greater definition and therefore enable the radiologists: (i) to confirm or exclude cerebrovascular disease as a cause of the abnormalities on the 1992 scan; and (ii) to see whether there had been any further atrophy which would point towards a continuing cerebrovascular cause.
35. Kennedy LJ with whom Beldam LJ agreed, said this:

As my Lord indicated during the course of submissions, the matter can perhaps be more succinctly and more helpfully be put as a two-stage test. First, do the interests of justice require the test which the defendant proposes? If the answer to that is in the negative, that is the end of the matter. If the answer is yes, then the court should go on to consider whether the party who opposes the test has put forward a substantial reason for that test not being undertaken; a substantial reason being one that is not imaginary or illusory. In deciding the answer to that question the court will inevitably take into account, on the one hand, the interests of justice and the result of the test and the extent to which the result may progress the action as a whole; on the other hand the weight of the objection advanced by the party who declines to go ahead with the proposed procedure, and any assertion that the litigation will only be slightly advanced if the test is undertaken. But, if the plaintiff for example has a real objection,

which he articulates, to the proposed test then the balance will come down in his favour.

36. The Court then went on to find that the interests of justice plainly required a further MRI scan for the reasons set out by the defendants' consultants.
37. The court appeared somewhat sceptical of the reasons put forward by the claimant for opposing the test, but held that: (i) the risk of the claimant suffering claustrophobia during the scan should be discounted entirely; (ii) the risk of an adverse reaction to the dye used as a contrast for the scan was present but "*very small indeed*"; (iii) there was a possibility of the claimant needing anaesthetic or sedation for the second scan, although the claimant had not required either for the first scan and there was "*very little reason to think that there would be an adverse reaction*" if anaesthesia/sedation was required; and (iv) there was a small but real risk that the second scan might trigger a further psychotic episode.
38. Kennedy LJ concluded his analysis by stating:

Even putting the extra matters into the scale, in addition to the risk of a further psychotic episode, the danger to the plaintiff, if one may so express it, of a further MRI scan is, on the face of it, very slight indeed. On the other hand, in my judgment, it is impossible to describe it as anything other than a reason which he has put forward which is not imaginary or illusory and therefore has to be regarded as substantial, for not undergoing the test.

...

I have come to the conclusion that, having regard to the nature of the procedure which is proposed, and its possible effect upon the plaintiff, despite the benefit to the defendant of such a test, this is not a test which the court should require of the plaintiff by means of the step which is now proposed. In other words, this is not a case in which an order should be made to stay the action unless the plaintiff undergoes the test.

39. Mr Rivers contends that the decision is clear authority for a two-stage test in which the court must ask:
  - 39.1 Do the interests of justice require the test which the defendants propose? and, if the answer that question is Yes,
  - 39.2 Has the claimant put forward a substantial reason for that test not being undertaken: a substantial reason being one that is not imaginary or illusory.
40. Both parties agree that the court must ask these two questions. Further the parties agree that the defendants have established that the interests of justice require the test which the defendants propose.
41. Mr Rivers then invites the court to ask the second question and contends that the answer must be "Yes". Once that question is asked and answered in the affirmative, he contends that the outcome of the application is clear, namely that the claimant having articulated a real and substantial objection to the test, the balance must come down in her favour and the application must be dismissed.
42. Mr Snowden KC agrees that the court must ask the second question. He also accepts, more tentatively at the conclusion of his submissions than at the outset, that the claimant has put forward a substantial reason for objecting to the test which is neither illusory nor imaginary.
43. However, Mr Snowden KC contends that, properly construed, there is a third stage to the test which requires the court to consider the weight to be attached to the defendants' argument in favour of the test and the claimant's objection to it and perform an evaluative exercise to determine the just and proportionate outcome in all the circumstances.
44. Applying his proposed third stage of the test he contends that:
  - 44.1 There is a compelling argument for the claimant to undergo testing given the very significant difference a positive result would make to the outcome of the claim. Even

allowing for other factors in the valuation of the claim, if the claimant has MD and Prof Schapira is correct about the prognosis the value of the claim will be reduced by £10 million plus;

- 44.2 Whilst the claimant has a substantial reason for not undergoing the test which is not imaginary or illusory it has to be placed in context. In particular:
- .1 There is no risk of material physical injury from the test and any discomfort is relatively modest;
  - .2 The test can be carried out at home (or locally if the claimant prefers) further to reduce the stress of undergoing the procedure;
  - .3 The claimant's own expert accepts that there is a potential clinical benefit;
  - .4 It appears that the claimant has undergone similar testing in the past;
- 44.3 The claimant is not compelled to take the test. Whether to do so remains a matter for her. However, the court must remember that the claimant is asking the court to order the defendants to pay £22 million by way of compensation on the basis that she does not have MD. The defendants have the right to investigate that claim and should have the benefit of all the potentially available evidence, including neurophysiological tests;
- 44.4 When placed in the balance, the appropriate outcome is to limit the claimant's right to proceed with the claim to a just and proportionate extent unless she undergoes the testing.

45. I then turn to consider whether Mr Snowden KC is correct in his argument that there is a third stage to the appropriate test.

**(6) The Defendants' argument for a third stage to the test**

46. Mr Snowden argues that the court must start with the decision of the Court of Appeal in **Starr v National Coal Board [1977] 1 WLR 63** which was not cited in **Laycock**.
47. In **Starr** the parties agreed that it was necessary for the defendant to obtain a report from a consultant neurologist to deal with the claim that the claimant had sustained a nerve compression injury. However, the claimant objected to undergoing examination by the particular neurologist that had been instructed by the defendant although he was willing to undergo examination by another doctor of similar qualifications and experience. The claimant's refusal was based on his legal advisers' belief that the expert was overly pro-defendant.
48. In his judgment, Scarman LJ reviewed the previous authorities and stated the following principle at p.70:

In my judgement the court can order a stay if, in the words of Lord Denning MR in *Edmeades's* case, the conduct of the plaintiff in refusing a reasonable request for medical examination is such as to prevent the just determination of the cause.

Scarman LJ went on to hold that whether or not to order a stay was a matter for the discretion of the judge, exercised judicially on the facts of the case and went on:

For myself, I find talk about onus of proof in such a case inappropriate. There is, I think, clearly a general rule that he who seeks a stay of an action must satisfy the court that justice requires the imposition of a stay.

49. Mr Snowden KC submits that it is significant that Scarman LJ expressly stated that there is a balance between two fundamental rights—the right to personal liberty and the right of the defendant to defend himself in the litigation as it and its advisers saw fit: see p.70H.
50. Scarman LJ posed two questions:
- 50.1 Was the defendant's request for the examination of the claimant by Dr X a reasonable request; and
  - 50.2 Granted the reasonableness of the defendant's request was the claimant's refusal of it unreasonable.
51. Mr Snowden KC contends that the second question necessarily involves an evaluation of the respective reasons and a balancing of the respective interests. As Scarman LJ put it:

The test here must be related to necessity, so far as the court can assess it, of ensuring a just determination of the cause.

52. Further, Mr Snowden KC refers to the judgment of Geoffrey Lane LJ where he stated:

Providing the doctor is properly qualified, the defendants are entitled to insist that he should carry out the examination, unless it can be shown that such a course would in all the circumstances be unfair or unreasonable from the point of view of the plaintiff. What is unfair or unreasonable in the way of objection will, of course, depends necessarily upon the facts of each individual case.

Again, it is argued that this involves an evaluation and balancing of the respective factors.

53. Mr Snowden points out that **Starr** was not cited in **Laycock**. However, a number of first instance authorities were mentioned by Kennedy LJ at P523 of the report:

The learned judge approached the matter, with the assistance of counsel, on the basis of two authorities: *Prescott v Bulldog Tools Ltd [1981] All ER 869*, and *Hill v West Lancashire Health Authority ...*. Webster J attempted to set out the approach which courts should adopt in relation to an application of the kind which confronted the judge in this case.

He found that it was a three-stage approach. First, was the request made by the defendant reasonable; secondly was the plaintiff's refusal reasonable; and, thirdly, balancing on the one hand the defendants need further information against the refusal of the plaintiff on the other, and the grounds which each had, what conclusion should the court reach? That approach was the same as that adopted by the court in *Hill*, where Gage J said:

*“The principles upon which I should act are not in dispute there may be, between the parties, some dispute as to the emphasis on the principles but the basic principles are undisputed. They involve the court going through three steps.”*

which he then articulates.

54. It is in the next paragraph of the judgment that Kennedy LJ stated:

As my Lord indicated during the course of suggestions, the matter can perhaps be more succinctly and more helpfully put as a two-stage test.

The passage then continues as set out in paragraph 35 above,

55. Mr Snowden KC contends that it is difficult to reconcile the middle section of that quotation with the final sentence. He argues that the following section necessarily suggests that the court should carry out the balancing exercise which he envisages as the third stage of the test:

In deciding the answer to that question the court will inevitably take into account, on the one hand, the interests of justice and the result of the test and the extent to which the result may progress the action as a whole; on the other hand the weight of the objection advanced by the party who declines to go ahead with the proposed procedure, and any assertion that the litigation will only be slightly advanced if the test is undertaken.

56. Whilst Mr Snowden KC acknowledged that the final sentence suggests that “real objection” from the claimant will be conclusive he argued that such a conclusion could not have been intended.

57. Finally, Mr Snowden KC referred to the decision of Master Yoxall in **Dorrington v Basildon and Thurrock University Hospitals NHS Foundation Trust** an unreported case from 2020. Master Yoxall was referred to both **Starr** and **Laycock**. The question was whether the claimant, who claimed that she was suffering urinary incontinence as a result of the defendant's negligence, should undergo further urodynamic testing the defendant having no confidence in



the expert who had conducted the previous testing because she had been the subject to judicial criticism in another case. The claimant was reluctant to undergo intimate examination because she was suffering from an emotionally unstable personality disorder as a result of rape.

58. Master Yoxall held that it would not be just “*to saddle the defendant with the findings of an expert whom it did not choose and in whom it has no confidence*”. Therefore, it was reasonable for the Defendant to require the claimant to undergo testing by its own expert, which was to be carried out by an all-female team in an appropriate setting so as to reduce the distress the claimant was likely to experience. Master Yoxall said this of the claimant’s objections:

28.

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

29.

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

30.

I accept that the claimant expected that she would only have to undergo one test. It is regrettable that another test is necessary. I note that the defendant has made allowances for the claimant and sensitivities by changing from their original choice of urological expert, Mr. Harris, to a female - Professor Cardozo. I also bear in mind that the defendant originally agreed to a single expert to carry out the testing - again taking into account the claimant’s sensitivities. There is nothing in the defendant’s conduct which precludes a further examination.

31.

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

59. Mr Snowden KC argues that Master Yoxall is not merely considering whether the claimant has put forward an explanation that is “real” rather than “illusory or imaginary”. The court was evaluating the competing arguments in order to determine what was necessary to do justice between the parties and, having carried out that balancing exercise, finding that the defendant’s argument should be preferred.

### ***(7) The law: the Claimant’s response***

60. Mr Rivers’ primary argument was that the argument for a third stage to the test was simply not consistent with **Laycock** and, in particular:
- 60.1 Kennedy LJ’s comment that the matter should be put as a two-stage test;
- 60.2 The final sentence of the passage set out at paragraph 35 above in which Kennedy LJ states that “*if the claimant has a real objection ... the balance will come down in his favour*”;

- 60.3 Kennedy LJ's findings about the level of risk to which the proposed testing would expose the claimant suggested that whilst the claimant's concerns were *real* rather than *imaginary* or *illusory*, relatively little weight would have been attached to them in a balancing exercise.
61. He further supported his analysis by reference to **The White Book para 3.1.8.1** which identifies the principle that the court has jurisdiction to order a stay and then states:
- The decision whether to grant a stay involves the exercise of the court's discretion. A refusal to undergo an ordinary examination is likely to result in a stay: see **Starr v NCB** ... . Where the examination involves discomfort or risk of injury the question of whether a stay should be granted is more difficult. In **Laycock v Lagoe** ... : (defendant seeking MRI scan - stay refused), Kennedy LJ set out the approach which the court should adopt on an application for such a stay. There is a two-stage test.
- The **White Book** then sets out the passage from Kennedy LJ's judgment set out in paragraph 35 above, concluding with the sentence "*But if the plaintiff, for example, has a real objection, which he articulates, to the proposed test, then the balance will come down in his favour*".
62. Mr Rivers' argues that the editors of the White Book consider that **Starr** deals with those cases where the court is concerned with the identity of the doctor who is to carry out the test rather than the risk that the test will cause discomfort or carries a risk of injury. It is clear that the current test falls into the latter category and that the **White Book** states that the two-stage test from **Laycock** applies.
63. Mr Rivers also cited two first instance decisions from Master Sullivan and Master Stevens respectively.
64. In **Paling v Sherwood Forest Hospitals NHS Foundation Trust** [2021] EWHC 3266 Master Sullivan refused an application for a stay pending genetic testing in a clinical negligence claim involving a serious brain injury. The Master held that she should apply the two-stage test in **Laycock** which he refused the defendants' application for a stay. It should be noted that the defendants in this case do not seek an order for a stay pending genetic testing as they accept that such testing raises more complex issues than EMG testing.
65. In **Read v Dorset County Hospital NHS Foundation Trust + 1 other** the defendants applied for a stay pending a neurological examination by its expert witness. The defendants wanted to examine the claimant before serving a defence to his claim for damages for clinical negligence so as to be able to advance a positive case as to whether (and, if so, to what extent) the claimant's cauda equina symptoms were attributable to any breach of duty. Mr Rivers points out that the parties, represented by experienced counsel agreed that the two-stage test was appropriate.
66. The facts in **Read** were somewhat unusual and, in my judgment, not relevant to this application. The Master found that the defendant had not even satisfied the first limb of the test because there was no good reason why it could not serve its defence and then examine thereafter as was the usual course in clinical negligence claims. It was always open to the defendants to amend their defence(s) if appropriate. Further, there was no suggestion that the claimant would refuse to undergo an examination at the appropriate stage in the litigation.

## **(8) My analysis**

### **(8)(a) What will testing achieve?**

67. If the EMG test is negative, it will not conclusively determine whether the claimant has the relevant gene for MD. However, it would establish that any condition was asymptomatic. Whilst Prof Schapira has yet to provide a full report, it is likely to provide significant support for Dr Turner's argument that: (i) the claimant will remain asymptomatic (either because she does not have the gene or because of the repeats on the allele are such that no symptoms will develop) or (ii) any symptoms which do develop will be modest and not have a material effect on her claim for care/loss of earnings.

68. If the EMG test is positive, it will establish that the claimant has the relevant gene. Further, on balance, it will show that, at least in part, her ptosis and lateralis frontalis symptoms are attributable to MD. However, as I understand the medical evidence, there would remain a significant dispute between the experts as to how those symptoms are likely to progress. Therefore, a positive test result would not be sufficient to establish that the claimant's symptoms were likely to develop as set out in the counter schedule. Whilst the finding would provide support for Prof Schapira's view and would undermine Dr Turner's view that the claimant was likely to remain asymptomatic it appears that there would be a fairly wide ranging dispute between the experts about the extent to which the claimant would have developed symptoms in the absence of the accident which would have to be based on their expert opinions as to the course of the disease generally where a 37 year old claimant has those limited symptoms.

**(8)(b) The terms of any stay: Initial view**

69. The defendants' application did not identify the precise terms of the proposed stay. However, in his skeleton argument Mr Snowden KC suggested two alternatives namely that, unless the claimant underwent EMG testing:

69.1 The action was stayed generally; or

69.2 The claim for future loss was stayed generally.

70. In making the alternative suggestion Mr Snowden recognised the potential injustice of preventing the claimant recovering damages for the losses that she has sustained which would not have been affected by her condition.

71. However, in my judgment, a blanket stay on all future losses unless the claimant undergoes testing would also be much wider than necessary to ensure that the defendants is not unduly disadvantaged by the claimant's refusal to undergo testing. Even on Prof Schapira's prognosis there is a significant claim for future loss of care and a limited potential claim for loss of earnings. It is difficult to see why it would ever be just or proportionate to deprive the claimant of the damages to which she would have been entitled even if the results of the testing were positive and the defendants' expert correct.

72. In the course of argument, Mr Snowden KC accepted that any remedy to which he was entitled should be just and proportionate in all the circumstances and that it would be open to the court to draft the terms of the stay to achieve that result.

**(8)(c): My analysis of Laycock**

73. In my judgment the starting point is the legal background against which the Court of Appeal in **Laycock** delivered their judgment.

74. At P523 Kennedy LJ set out the test identified by Webster J in **Prescott v Bulldog Tools Ltd [1981] 3 AER 869** as follows:

First, was the request made by the defendant reasonable; secondly, was the plaintiff's refusal reasonable; and, thirdly, balancing on the one hand the defendant's need for further information against the refusal of the plaintiff on the other, and the grounds which each had, what conclusion should the court reach?

75. Kennedy LJ also noted that Gage J had applied the same test in **Hill v West Lancashire Health Authority**.

76. Having set out that background Kennedy LJ remarked:

As my Lord indicated during the course of submissions, the matter can perhaps be more succinctly and more helpfully put as a two-stage test.

77. In my judgment it is clear from this statement that Kennedy LJ was attempting to summarise and simplify rather than depart from the test that had been used by the High Court in the previous decisions. That 3-stage test obviously involved an evaluative process in which the weight of the

arguments in favour of testing should be measured against the weight of the objections put forward by the claimant.

78. Further, having posed the two questions which he considered would “*more succinctly and helpfully*” resolve the issue, Kennedy LJ stated:

In deciding the answer to that question, the court will inevitably take into account, on the one hand, the interests of justice in the result of the test and the extent to which the result may progress the action as a whole; on the other hand, the weight of the objection advanced by the party who declines to go ahead with the proposed procedure, and any assertion that the litigation will only be slightly advanced if the test is undertaken.

79. In my judgment, in that passage, Kennedy LJ is identifying precisely the type of balancing exercise which was envisaged by the third stage of the test applied in **Hill** and for which Mr Snowden KC now contends. For my part I do not see how such an exercise, which Kennedy LJ viewed as “*inevitable*” can be reconciled with Mr Rivers’ suggestion that any objection put forward by the claimant that is more than *imaginary or illusory* will trump any argument put forward by the defendant in favour of testing.

80. Further still, it is important to recognise that Kennedy LJ talks of a “*substantial reason for the test not being undertaken*” and “*a real objection*”. The terms *substantial* and *real* in this context necessarily involve a value judgment and, for my part, I consider that they should not merely be seen as meaning something just greater than *imaginary and illusory*.

81. Kennedy LJ identified the factors relied upon by the claimant as set out in paragraph 37 of my judgment above. At the start of the fourth paragraph on P524 he then states (my emphasis):

**Even putting the extra matters into the scale**, in addition to the risk of a further psychotic episode, the danger to the plaintiff, if one may so express it, of a further MRI scan is, on the face of it, very slight indeed.

82. In my judgment it is impossible to read that passage as anything other than the judge conducting a balancing exercise of the type proposed by Mr Snowden KC. Having conducted that exercise the Court of Appeal concluded that, on the particular facts, the very slight risk of the claimant suffering a psychotic episode as a result of undergoing the MRI test was sufficient to outweigh the interests of the defendant.

83. Therefore, I am persuaded that the test proposed by Kennedy LJ does require the court to undertake a balancing process rather than providing that any objection put forward by the claimant that is more than imaginary and illusory should be determinative.

84. In my judgment, put in modern terms, the overarching question is whether it is just and proportionate to order a stay unless the claimant undergo medical testing. Whilst the questions identified by Kennedy LJ by which that issue might be determined have the advantage of being succinct, in my judgment, there are advantages in taking a more step by step approach which ensures that all the material considerations are taken into account.

85. The starting point is whether the defendant has shown that, absent the claimant’s objections, it is in the interests of justice for the testing to be carried out. As Kennedy LJ points out, if the defendant cannot satisfy this test, then the court need go no further and the application must be dismissed.

86. The second question is whether the claimant has put forward a substantial objection which is more than imaginary and illusory. If the objection is “*imaginary and illusory*” then the outcome of the application must favour the defendant.

87. However, where there is a substantial objection, the court must embark on a third stage and balance the competing rights, namely (i) the defendant’s right to defend itself in the litigation; and (ii) the claimant’s right to personal liberty. In my judgment Kennedy LJ was right to suggest that when undertaking that exercise particular weight should be given to the claimant’s concerns

if the test is invasive and/or involves pain/discomfort and/or the risk of physical/psychological harm.

88. Finally, when carrying out the balancing exercise the court must identify the terms of the stay proposed as, in my judgment, it is important that the stay do no more than is reasonably required to enable the defendant properly to defend the claim.

**(8)(d): Applying the test in this case.**

89. It is agreed that both the questions posed by Kennedy LJ should be answered in the affirmative. Therefore, it is necessary to conduct the balancing exercise.
90. I start by considering what form of stay should be imposed. I repeat my view that a blanket stay on all future losses unless the claimant undergoes testing would be significantly wider than necessary to ensure that the defendant is not unduly disadvantaged by the claimant's refusal to undergo testing. Even on Prof Schapira's prognosis there is a significant claim for future loss of care and a limited potential claim for loss of earnings. It is difficult to see why it would ever be just or proportionate to deprive the claimant of the damages to which she would have been entitled even if the results of the testing were positive and the defendant's expert correct. Further, on the limited medical evidence before me, there remains a real dispute as to the likely prognosis of any active MD.
91. Whilst I am prepared to discuss the precise formulation of the order at any post judgment hearing, I consider that the terms of any relevant stay should be no more restrictive than an order along the following lines:

The claimant's claim for damages for future loss will be stayed until she:

EITHER

- (i) undergoes EMG neurophysiological testing with a view to determining whether she has active symptoms of myotonic dystonia;

OR

- (ii) concedes (for the purposes of the litigation only) that she does have active symptoms of myotonic dystonia and that damages should be assessed on that basis.

92. Having identified that as the potential basis of any stay, I then attempt to balance the parties' respective interests.
93. On any view the dispute between the medical experts as to whether the claimant has active symptoms of MD and the potential prognosis is likely to have a very substantial effect upon the damages awarded. The test will have a material bearing on the determination of that dispute.
94. The physical risks to the claimant of undergoing the test appear very modest and there are potential therapeutic advantages to her in determining whether she does have MD.
95. The claimant's anxiety about undergoing the procedure (as distinct from discovering the result) can be reduced by a domiciliary visit or an arrangement of local testing if she prefers.
96. I accept that discovering that she has active MD is likely to have an adverse impact on her psychological health. On the other hand, I would expect the claimant to derive significant comfort if the test were to show that she had no active symptoms of MD.
97. Further, although the claimant is not compelled to undergo the test any such stay will mean that she must do so if she is to obtain what she perceives to be just compensation for her life changing injuries. Equally, I consider that it would be a deep source of frustration to her were she to make the suggested concession and that she may well regard it as unfair that the

defendants should be wholly responsible for injuries and yet be able to limit the extent to which she can recover damages for them.

98. I accept that the period between the test being carried out and the results being known would be stressful in any event, but, in contrast to **Laycock**, the risk to the claimant's health flows not from undergoing the test but only if she finds out that she has active MD. In other words, the significant adverse psychological effects are only likely to follow if Prof Schapira is correct.
99. Having identified these factors and placed them into the scale, it does not seem me to be just that the claimant should be entitled to pursue her claim in full if the defendants are to be deprived of the opportunity of carrying out tests which will identify whether or not she has active symptoms of MD. In my judgment a stay on the basis proposed is the least restrictive order that could be made and should not unduly pressurise the claimant to undergo the tests. It should give the claimant a real choice as to whether she wishes to preserve her personal integrity and ensure that she does not have to suffer the adverse impact that discovering that MD might have upon her psychological health whilst allowing her to pursue a claim for damages based on the most favourable prognosis available in the circumstances rather than the scenario put forward in Prof Schapira's report.

### **(9) Conclusion**

100. For the reasons I have set out, I consider that:
- 100.1 Mr Snowden KC is correct in asserting that the appropriate test involves an evaluative stage balancing the competing arguments put forward in favour of and against medical testing taking place;
  - 100.2 the overarching question is whether it is just and proportionate to order a stay unless the claimant undergoes medical testing;
  - 100.3 when determining that issue the starting point is whether the defendant has shown that, absent the claimant's objections, it is in the interests of justice for the testing to be carried out. If the defendant cannot satisfy this test, then the court need go no further and the application must be dismissed;
  - 100.4 The second question is whether the claimant has put forward a substantial objection which is more than imaginary and illusory. If the objection is "imaginary and illusory" then the outcome of the application must favour the defendant;
  - 100.5 However, where there is a substantial objection, the court must embark on the third stage of the test and balance the parties' competing rights, namely (i) the defendant's right to defend itself in the litigation; and (ii) the claimant's right to personal liberty.
  - 100.6 When carrying out that balancing exercise:
    - .1 particular weight should be given to any claimant's concerns where the test is invasive and/or involves pain/discomfort or the risk of physical/psychological harm. However, such concerns are not necessarily determinative;
    - .2 the court must consider carefully the terms of any stay proposed to ensure that it is proportionate to the reasons for and likely consequences of any testing.
101. Having carried out the balancing exercise in this case I consider that the defendants have succeeded in establishing that there should be a stay on terms which should broadly reflect those proposed above although some fine tuning may be appropriate when the order is drafted.

**25<sup>th</sup> April 2024**

**HH Judge Mark Gargan**