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SCCO Ref: SC-2021-APP-006201
SC-2022-BTP-001160
(and in 5 linked matters)

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Hearing Dates: 27 to 31 March and 17 April 2023
Judgment 16 June 2023

Before:
COSTS JUDGE JAMES
- -

BETWEEN:

HD **Claimant**

- and -

NORTHERN DEVON HEALTHCARE NHS TRUST **Defendant**

Together with 5 associated cases brought by Fortitude law on behalf of Claimants referred to as HL, CB, CM, CD and CT

JUDGMENTS FROM
PRELIMINARY ISSUES HEARING COMMENCING 27/03/23

Mr Robin Dunne (Counsel) and Ms. Charlotte Wilk (Counsel) instructed by Fortitude Law, for the Claimants
Ms Margaret McDonald (Counsel) and Mr Ken Corness (Costs Lawyer) instructed by Acumension for the Defendants

Judgment on Letters of Claim

[1] Neither side addressed me on Conduct in the **CPR 44.11** sense; I do not say that that door is closed, but until I hear submissions, I have not formed a view and simply put on record that it has yet to be aired let alone decided.

[2] My decision focuses upon "HD" and I have not prejudged any of the other cases before me at this Hearing. However, of necessity I have considered all six Letters of Claim and it will be apparent that the wind is blowing in a particular direction. By way of indication it ***may*** be that other Letters of Claim would be decided in a similar way, absent any persuasive submissions from either party.

[3] Speaking of submissions I have been greatly assisted by both Ms McDonald and Mr Dunne; they have both done a sterling job for their respective clients on this tricky point and I am grateful to them.

[4] In respect of the Witness Statement of Mr Ashley of DACB concerning Letters of Claim from 'Firm A' and 'Firm B' being a small, boutique practice akin to Fortitude Law and a larger/nationwide firm (in fact his Statement exhibits Letters of Claim from Thompsons as well as Shoosmiths, both firms being major players in the PI sphere) I do not place any weight on that Statement for two reasons.

[5] Firstly it is at best a 'snapshot' of a couple of firms, hand-picked by Mr Ashley to make a point. I mean nothing pejorative by that, it is the essence of drafting a Witness Statement that it should tend to make the case from the Witness' perspective, but Mr Dunne quite rightly asserts that it does not prove anything much. Absent more detail (Mr Dunne refers to the full data set, which I cannot see the Defendant voluntarily releasing to Fortitude Law) I cannot say whether Mr Ashley has chosen two mid-range examples, two of the best examples or what. As 'proof' that Fortitude are out of step, his Witness Statement is in my opinion not helpful to the Court although for the record I do accept it is truthful.

[6] The second reason to give no weight to that particular Witness Statement is that I do not have to. As I stated in Court during the Hearing, I have worked in Costs for 30 years and have been sitting as a Judge for 20 years [including time as a Deputy]. In that time, I have seen thousands of letters before action, both as a Costs Draftsman [working for a Clin Neg specialist firm] and as an adjudicator. I bring that knowledge to bear in this Detailed Assessment as I indicated I would and as both parties accepted that I should.

[7] Ms McDonald likened the Letters of Claim to a [prolix] Skeleton Argument, and Mr Dunne likened them to a Pleading, arguing that, under the CHA, they had to be exceptionally detailed so as to put the parties in a position to settle at a Mediation before proceedings were even issued.

[8] Turning to the Claims Handling Agreement ('CHA') it required Fortitude Law to do certain things, enumerated at **Clause 4.2.2** [as exhibited to Mr Hanison's Witness Statement]. The Letters of Claim had to:

a. Be pre-action protocol compliant
b. Be accompanied by generic supportive independent evidence
c. If past 3 years' primary limitation period, address limitation; in any event confirm date of knowledge
d. Address Breach of Duty
e. Specify what, 'but for' the alleged breach, the Claimant would have done, to include non-surgical and (if relevant) surgical alternatives
f. Address Causation
g. If a *'Chester v Afshar'* Causation argument is relied upon, confirm this specifically
h. If any references, guidelines, or statistics were relied upon, provide copies with the Letter of Claim

[9] Looking at the Letters of Claim, I accept Ms McDonald's submission that requiring them to comply with the pre-action protocol is entirely normal; parties are expected to comply with any relevant pre-action protocol (and if there is none, to comply with the spirit of the Practice Direction on pre-action protocols). The protocol for Clinical disputes requires the Claimant to set out a clear **summary** of the facts on which the claim is based, including the alleged adverse outcome, and the main allegations of negligence; a description of the Claimant's injuries, and present condition and prognosis; an outline of the financial loss incurred by the Claimant, with an indication of the heads of damage to be claimed and the scale of the loss, unless this is impracticable; confirmation of the method of funding and whether any funding arrangement was entered into before or after April 2013; and the discipline of any expert from whom evidence has already been obtained.

[10] Looking at the Letters of Claim, and particularly at the letter in "HD", all of them contain substantial extracts from the medical records. In "HD" they cover fourteen pages of the Letter of Claim. Ms McDonald referred me to the time spent/work done sorting and indexing the medical records prior to drafting the Letter of Claim. Mr Dunne asserted that that time would cover all the records, not just the relevant ones, and should be viewed separately to the time spent on drafting the Letter of Claim itself.

[11] Whilst I appreciate that distinction, I have to say it is unhelpful to Fortitude Law. Whoever was sorting and indexing those records, knew that this was a vaginal mesh case; the task of highlighting,

underlining or otherwise tabbing up entries that could potentially have a bearing (such as notes regarding leaking, a sensation of something dropping down, pelvic or abdominal pain) from those which did not (such as, hypothetically, tonsillitis or an ingrown toenail) could and should have been done as part of that task. If it was not then that speaks to an unreasonable system of working; it was incumbent upon Fortitude Law to carry out this work at a reasonable and proportionate cost, and requiring the fee earner sorting and indexing the medical records (or the fee earner considering those records once they were sorted and indexed) to tab the most relevant entries to speed up the drafting of the Letter of Claim, is an obvious step and one that ought to have been taken in every case.

[12] The copying and pasting (or, as the case may be, copy typing – both techniques have been used) including copying and pasting of handwritten medical notes producing pages and pages of detail, was not necessary in and of itself nor was it required under the CHA. Looking at "HL"; on page 4 of that letter at paragraph 6 the drafter refers to the Claimant having urodynamic stress incontinence with a stable bladder and that Mr Sorinola intended to provide her with fluid advice, refer her to Physiotherapy for pelvic floor exercises and bladder retraining and also to discuss the insertion of a TOT to correct her stress incontinence. At paragraph 7 the drafter refers to the Claimant being seen on 4 June 2013 in clinic at Warwick Hospital, by Mr Sorinola who noted in the clinical notes that the operations were explained, the risks discussed at length and the risks of voiding difficulty and reoccurrence were also noted.

[13] These two matters take up 8 lines on page 4, yet by cutting and pasting the handwritten notes themselves (that mirror what the drafter has put in already) this stretches to a full page. At paragraph 10 on page 8 there are two lines explaining what the Hospital Drug and Discharge Summary says, but then the entire Summary is cut and pasted in, again taking this to a whole page without adding anything of pith.

[14] In my view this is not a mere question of stylistic preference. I have never seen professionally-drafted Letters of Claim like the ones produced by Fortitude Law; they are both unusually long and are in an unusual format. Given the ability to have flagged up the relevant medical records when sorting and indexing, it should not have been necessary to spend a vast amount of time extracting the relevant information to put into the letter even if this much detail had been required.

[15] In my view, nowhere near this much detail was required either under the CHA or as a matter of good drafting practice. Given that (pursuant to the CHA at 4.2.3) the Letters of Claim were accompanied by the Claimants' medical records as received by Fortitude Law at that date in chronological order, a reasonable and proportionate approach would have been the more 'traditional' approach of a

summary of the Claimant's pre-negligence health issues and the events complained of as well as her condition and prognosis, with dates included enabling the Defendant to cross-refer those allegations to the accompanying medical records in the usual way.

[16] After what I have found to be an unnecessarily and unreasonably prolix medical background in each Letter of Claim, the letters then all follow a similar pattern. Firstly there is a section headed **'The Applicable Law of Consent in respect of Medical Negligence'**. That section cites the case of *Montgomery v Lanarkshire Health Board* as well as the *Bolam* test which are, if not trite law, certainly very well-established and well-known tests to any Clinical Negligence expert. It is in my view doubtful as to whether the Solicitors at DACB tasked with dealing with these cases, benefited greatly from three pages largely comprising quotations from *Montgomery* at paragraphs 87, 89, 90, 91, 80, 83 and 104.

[17] The point is that those same three pages, quoting the exact same paragraphs in the same non-sequential order from *Montgomery*, appear in the letter on "CH" (pp 12 to 14), "HD" (pp 16 to 18), "CM" (pp 17 to 20), "CB" (pp 16 to 18) "HL" (pp 20 to 23) and "CT" (pp 26 to 28). Interestingly, on "CB" the underlining of the heading has gone wrong and it reads, "The Applicable Law of Consent in respect of Medical Negligence" and the exact same underlining appears on the letter in "HL". Be that as it may these are identical in every material particular and have clearly just been slotted in from a precedent available to the drafter.

[18] The letters then contain a section on **Causation**, referring to basic Tort principles and whether, 'but for' the Defendant's alleged failure adequately to warn the Claimant of the material risks and of any reasonable alternative and variant treatments, the Claimant would have refused TOT (or, as the case may be TVT) treatment, in which case she would be entitled to a remedy.

[19] The section cites *Montgomery* at paragraph 105, then *Chester v Afshar* setting out a list of six findings in *Chester* including a (sometimes underlined) passage asserting that the test of causation was satisfied as the risk that eventuated was within the scope of the duty to warn so the injury was caused by the breach of that duty. There is then a quote from Lord Hope of Craigshead and a concluding assertion (sometimes in bold type) that there needed to be a remedy to avoid the position that the law **would discriminate against those who cannot honestly say that they would have declined the operation once and for all if they had been warned.**

[20] Again, that section appears in "CH" (pp 15 to 16), "HD" (pp 19 to 20), "CM" (pp 20 to 21), "CB" (pp 19 to 20) and "CT" (pp 29 and 30). There are minor differences but again these sections are in every material respect identical and have clearly been drafted from a precedent.

[21] Next comes a section headed **Allegations of Negligence against [Defendant].** These obviously contain allegations specific to each Claimant's case, but there are still striking similarities across all six Letters of Claim.

[22] Under each heading (Law of Consent, Causation and now Negligence) the numbering starts again. It is notable that this section is poorly numbered e.g. on the first page there are two paragraphs 1 and two paragraphs 2, then over the page there is another paragraph 1 and then a few pages on, another paragraph 2 before paragraphs 3 through 19 appear, with many un-numbered paragraphs (or sub-paragraphs) also appearing. It is striking that the poorly-numbered opening paragraphs, set out in exactly the same order and (for the most part) worded exactly the same, appear across the Letters of Claim.

[23] Paragraphs 1 and 2 set out what the Defendant would have to show in order to establish that consent had been properly obtained; there are two bullet points at paragraph 1. The second paragraph over the page 1 sets out what the Defendant should have done, and lists eight examples (i) to (viii) with item (ii) sub-divided into (a), (b), (c) and (d). That is in "CH" (pp 18 to 19), "HD" (pp 22 to 23), "CM" (pp 23 to 24), "CB" (pp 22 to 23), "HL" (pp 27 to 28) and "CT" (pp 32 and 33).

[24] There are minor differences e.g. in several cases only (vii) examples are given as not every case cites the 10% (on the borderline of very common and common) based on the latest Royal College of Obstetricians and Gynaecologists Governance Advice from December 2008 risk that the TVT (or TOT) would not provide any benefit at all to the Claimant's SUI. However, there does not appear to be any reason for that omission and in any event in every other material regard those sections are identical.

[25] The adverse reactions described in Ethicon's 'Instructions for Use' come next in every single letter and although there is some personalisation there are significant tranches of identical material elsewhere. These include paragraphs from 'Moreover, there are reasonable alternative and variant surgical treatments…' to 'Non-synthetic sling procedures: namely autologous, allograft or xenograft' which are all near-identical. All six letters note, 'whilst it is of no direct relevance here', the non-binding opinion of Lord Boyd of Duncansby in *AH v Greater Glasgow Health Board*. See (under

this heading) “CH” paras 16 to 19, “HD” paras 11 to 16, “CM” paras 13 to 16, “CB” paras 11 to 12, “HL” paras 12 to 15 and “CT” paras 12 to 15.

[26] There is then a section on **Causation** and again whilst there is a degree of personalisation there is a great deal of the precedent about this section as well. It cites the ‘Comparison of Treatment Options for SUI’ from the British Association of Urological Surgeons and the evidence of Dr Agur on ‘Retropubic Mesh for SUI Surgery’ and in effect state that each Claimant would not have agreed to TVT or as the case may be TOT surgery, had she been properly informed of the risks. That is in “CH” (pp 28 to 31), “HD” (pp 32 to 34), “CM” (pp 32 to 35), “CB” (pp 31 to 33), “HL” (pp 38 to 41) and “CT” (pp 42 to 45).

[27] There is then a section on **Limitation** which cites *Ministry of Defence v AB and Others*, Section 33 of the Limitation Act 1980, *Carrol v Chief Constable of GMP* and the Judgment of Yip J in *Mossa v Wise*, giving the identical three-line quote from that Judgment. That is in “CH” (pp 31 to 34), “HD” (pp 35 to 37), “CM” (pp 35 to 38), “HL” (pp 41 to 43) and “CT” (pp 45 to 48). “CB” is different because her operation was more recent and therefore Section 33 etc. are not cited (although *MoD v AB and Others*, is).

[28] The letters then conclude with Disclosure Requests and references to General and Special Damages; there is again a lot of common ground across these. The overwhelming impression is that Fortitude Law has drafted up a precedent section under each heading and that the fee earners tasked with drafting the Letters of Claim have had access to those precedent sections. Some have been tailored to a considerable extent, e.g. the medical histories (but against a background of many hours spent on sorting and indexing the medical records that should not have taken a great deal of time). Others appear to be identical, or near-identical, across all 6 letters.

[29] Something else that shows that there was a precedent for each of these sections, is the extent to which several of the letters have errors in them where the precedent has been either overwritten incorrectly (so that a completely different Claimant’s name appears) or not completed fully (so that, for example, three of the letters of claim call for a Reply by ‘……’ with a date four months hence having been omitted by oversight). There is nothing sinister in that and indeed, notwithstanding the individual journeys of each of the Claimants, as they have all suffered due to the same kind of treatment it makes sense to have drafted up a precedent for those sections of the Letter of Claim that were always going to be the same or at least very similar in content. The issue is simply that, having done so, the amounts of time spent on drafting individual Letters of Claim which are both excessively lengthy and largely precedent-led, are neither reasonable nor proportionate.

[30] As far as "HD" is concerned I am in no doubt that both the 62.3 hours claimed and the 50 hours offered to draft the Letter of Claim, are unreasonable and disproportionate and candidly I cannot see that letter having taken anything like the time claimed, to draw. Given a well-ordered and tabbed set of medical records and a set of precedent sections (which there clearly were) to drop into the letter, I think that the Defendant's offer of 15 hours is a reasonable one and I would allow Grade A x 3 hours, Grade B x 3 hours and Grade D x 9 hours on the Letter of Claim in "HD"[1].

Judgment on Letters of Response etc.

[31] The Preliminary Issue on 'Time incurred on the Letter of Reply' comes from the Precedent G at Point 11, where the Defendant ('D') stated that the documents time (in "HD") was disproportionate at 470.7 hours in a matter that settled pre-issue. Within that total the Defendant isolated 62.3 hours working on the Letter of Claim, upon which I decided earlier at this Hearing that 15 hours as to 3 hours Grade A, 3 hours Grade B and 9 hours Grade D, would be reasonable and proportionate.

[32] I referred in that decision to the Defendant's 'offer' of 15 hours; I can in fact see that the Defendant was offering 15 hours for drafting the Letter of Claim, considering the Defendant's Letter of Response, drafting the Claimant's ('C's') Response thereto and considering any further Response from the Defendant. To be clear I do not find that offer to be reasonable and proportionate and I do not resile from the award I made previously, namely 15 hours 'just' for the Letter of Claim. I now turn to look at how much more time I should allow for the issues around these Letters of Response and any correspondence flowing from that.

[33] To avoid confusion reigning, I have designated the relevant items as 'DR1' (D's Letter of Response), 'CR1' (C's Response thereto) and 'DR2' (any further Response from D).

[34] Mr Dunne expressed concern that the Preliminary Issue was framed in terms of dealing with the Letter of Response which I understood him to mean CR1. Despite having attempted to clarify matters with the Defendant in correspondence, Mr Dunne asserted that Ms McDonald was now trying to widen the ambit of that Preliminary Issue to include DR1 and DR2.

[1] At a Hearing on 17 April 2023, after submissions by Ms McDonald for the Defendant and Mr Dunne for the Claimant, I confirmed that the 'cap' for Letters of Claim in the other 5 cases I have seen, is 15 hours, as to Grade A 3 hours. Grade B 3 hours and Grade D 9 hours. I rejected the Defendant's submission that I should pro rate this allowance in cases where the Letter of Claim took much less time to draft, than was the case in "HD". That to me seems to impose double jeopardy, or at least to penalise the Claimant for getting better/quicker at drafting these Letters of Claim as time progressed.

[35] With great respect to Mr Dunne who (like Ms McDonald) has been of great assistance in this matter, I disagree with that submission. The Precedent G on "HD" made it clear that the Defendant intended to challenge 66.1 hours spent considering DR1, drafting CR1 and considering any DR2. It sets out the dates of the times spent under this heading and in my view Fortitude Law knew (or had sufficient notice) that the Defendant wished to look at this whole series of letters.

[36] It would also be a step away from goodness to isolate CR1 in the way that Mr Dunne invited me to do. I appreciate that Fortitude Law had to consider DR1, draft CR1 in response thereto and then consider DR2 (if there was one). However, what I understood Mr Dunne to be submitting (on instructions) is that the time spent considering DR1 must be separated entirely from the time spent drafting CR1 and that is not in my view a reasonable nor even a workable submission.

[37] When DR1 came in, Fortitude Law had to consider it, not as an abstract piece of work but as the case which they were going to have to answer by way of CR1. The time spent considering DR1 was (or should have been) time that prepared Fortitude Law to draft CR1. If they separated the two out as if they were not connected then again (as with the tabbing of relevant medical records referred to in my earlier Judgment) that would indicate an unreasonable system of work. In fairness I do not think that Mr Dunne ever put it as high as that, he simply highlighted that the Court would be looking at three items not just at CR1.

[38] D's wish to look at DR1, CR1 and any DR2 together is by no means an 'ambush' point. The purpose of running at this Hearing of Preliminary Issues is understood by both parties to be so that they can go away and on a best case scenario settle the remaining Bills. Failing that, they can at least seek to narrow the issues significantly in the knowledge of how the Court has tended to look at those issues on the six sample cases before it at this Hearing. That being the case, isolating CR1 in the way that Mr Dunne suggested, would in my view take away a lot of the benefit from this exercise and I accept the Defendant's submissions that I should not do so.

[39] It is incumbent upon Fortitude Law to conduct cases in a reasonable and proportionate manner and albeit DR1 was an important document, it was not a particularly lengthy one (and certainly not by comparison to the Letters of Claim looked at I looked at the previous day). It needs to be read with CR1 and DR2 and I therefore now turn to look at these items of correspondence.

[40] I have looked at "HD" and "HL" which are TOT claims and at "CH", "CM" and "CB", which are all TVT claims; "CT" is described as a TVT 'Abbrevo'. There is a lot of common ground within correspondence across these six matters; that is absolutely nothing sinister. The Letters of Claim said

quite a lot of the same things because they had to, much as, say, Mesothelioma claims all have to cover what Asbestos does to the human body, when that became a known fact and whether the particular Claimant had been exposed in any way that might have been his/her own 'fault' e.g., as a manager who was responsible for Asbestos safety. Hence it was only to be expected that the DR1s would do likewise, as would the CR1s and any DR2s sent.

[41] Again, in each of the DR1s (as in the hypothetical Meso case above referred-to) there are 'bespoke' passages which deal with the facts in each specific case but that was still done by reference to common themes. For example, under **Limitation** the Defendant seems always to dispute Date of Knowledge and to assert that primary limitation expired exactly three years after the operation took place (unless that stage has not yet been reached). On "HL" the DR1 states that the case is statute-barred, but then goes on to refer to a standstill agreement (as does the other TOT DR1). The dates change but the legal argument (that a later date of knowledge will be opposed because 'insert fact indicating the Claimant had knowledge well before this') does not. The DR1 in the TVT cases does not refer to a standstill agreement.

[42] Under **Disclosure** (which is not present in every case, e.g. it is not in "CM"'s DR1 even though there is a 'Disclosure Request' for 13 items on page 39 of that Letter of Claim) the Defendant answers some questions put in the Letter of Claim (e.g., the surgeon's GMC registration number tends to be given) but not all; sometimes the Defendant will assert that the issue complained of has no causal link to the Claimant's alleged losses and therefore the disclosure is affirmatively refused rather than just ignored.

[43] Under **Breach of Duty** there is a list of TVT risks referred to in the Letter of Claim which is stated in identical terms in "CH", "CM", "CB" and "CT"; "HD" and "HL" give lists of TOT risks but there is a lot of common ground across all six, down to the percentage risk of each issue eventuating e.g. 10% risk of short term and 3% risk of long term voiding difficulty, 5% risk of erosion, exposure or extrusion, 1% risk of chronic pain etc.

[44] Again, this is nothing exceptional (or exceptionable); these are all women who have suffered similar symptoms pre-surgery, sufficiently badly (in the Defendant's view) to have warranted TOT or TVT placement rather than more conservative treatments (and often after unsuccessful attempts at such treatments). Some have suffered more than others but they are all in a similar position.

[45] The DR1 then gives the Defendant's response which is bespoke and fact-specific but is (of necessity) in fairly common terms across all of the cases. There are common themes, such as that the Claimant

was indeed warned of the risks, that more conservative treatments had already been tried and/or were not indicated at that point in time (e.g. a reference to chronic pain only becoming a factor to warn prospective patients of, in 2015) and/or were rejected by Cs who were described as keen to have surgery or to have a permanent solution after trying everything else in their quest for alleviation of their existing problems.

[46] *Montgomery* is distinguished on the basis it requires the Defendant to give the Claimant REASONABLE options; various options are listed but rejected because (similar to the above) the Claimant had already tried them, there was a long history of suffering, the Claimant wanted an end to it and this was the permanent solution of choice in (insert relevant year; evidently the 'gold standard' treatment in, say, 2010, was not necessarily the same in later cases).

[47] Under **Causation** the Defendant recites the Claimant's invariable allegation that 'but for' the Defendant's breaches in not explaining the risks properly and therefore not obtaining effective consent. Interestingly, given Ms McDonald's understandable insistence upon failures to adapt a precedent, being included in my Judgment on Letters of Claim, I note that the Defendant has fallen into the same trap. The date on which it is said that "CM" would not have had her TVT is the same date as "CB" (01/09/16) even though only one of them ("CB") actually HAD the operation on that date. That has not simply been copied across from the Letter of Claim in "CM" which says (on page 32) that had she been properly informed of the risks, the Claimant would not have had the surgery on 27/01/11.

[48] The response, whilst bespoke, does again cover a lot of common ground. The (TVT or TOT) treatment was appropriate given the extent of the symptoms suffered, every other suitable/more conservative treatment had either been tried already without any sufficient improvement in the Claimant's symptoms, or was offered as an alternative to surgery and rejected by the Claimant. Sometimes more conservative treatments are said to have been unsuitable for a patient in the Claimant's position and the Claimant is often put to strict proof that she would have done anything differently.

[49] **Damages** are invariably noted but not agreed, the **Summary** expresses regret that the Claimant is not happy with the outcome but (again invariably) invites her to withdraw the claim. Some letters go on to address **ADR** and **Funding**, others do not. The letters range between four-and-a-half pages ("CH", "CT") and 8 pages ("HL") but the 'unique'/bespoke content of each letter is considerably less in every case.

[50] Turning to CR1, the first point to note is that, just as DR1 cited large tranches of the Letter of Claim (although by way of precis) so CR1 cuts and pastes significant tranches of DR1. The most striking example is in "HL" where the CR1 is 25 pages long but something like ten pages of that is cut and pasted over from DR1. Looking only at the 'unique'/bespoke content gives a lower page count on every letter and even within that content there are again very significant common themes that should in my view have cut down on the time spent/work done on CR1.

[51] Pausing here, I note that Ms McDonald, upon instructions but inadvertently I have no doubt, made a submission early at this Hearing that appears to have been misleading. When addressing the question of Retainer, and in particular the question of BTE enquiries and the ATE Premium, Ms McDonald asserted that the Defendant had never received Notice of Funding. In terms of a formal Notice, I do not know whether that is correct; I was not taken to such Notice(s) by Mr Dunne so it may be that they were overlooked. In a post-LASPO CFA it remains to be seen what the Defendant will make of that if these matters continue to a line-item Assessment.

[52] However, in CR1s responding to those DR1s that referred to Funding, the Claimant has some form of wording to the effect that the Claimant has the benefit of ATE Insurance and that full details will be forthcoming prior to the Mediation. Curiously the DR1 in "HD", which deals with Limitation, Disclosure, Breach of Duty, Causation, Damages and Summary, does not address Funding despite the Letter of Claim clearly stating (on page 40) that Fortitude Law are instructed by her under a post-April 2013 (i.e., post-LASPO) CFA. The point is that the Defendant may or may not have received a formal Notice but they were very clearly 'on notice' of the CFA per the Letter of Claim and (if they asked the relevant question) of the ATE Policy from the reply in CR1.

[53] Turning back to the CR1s they do have significant common ground, and whilst again this is not sinister it ought to have sped things up considerably. For example, they tend to take 5 or 6 lines to say that they will not reiterate the Claimant's position on Limitation; they cite NICE 2013 and the medical journal of G. Al-Shaikh et al 2018; NICE 2006 on Duloxetine; *Montgomery* on it not being for the patient to question the medical professional as to what the risks and alternatives were, and the quote from *Mossa* in which Yip J referred to a medical practitioner's duty to maintain accurate records (as well as GMC Guidance on keeping such records).

[54] The inclusion of the quote from *Mossa* is striking given that it is the exact same quote as appears in the Letters of Claim; it is just one indication of the fact that Fortitude Law were cutting and pasting, not only from the DR1s but from their own Letters of Claim in drafting their CR1s. Whilst perhaps not the best drafting practice, in fairness it would not be unduly problematic were it not for the

amounts of time claimed for these drafts, which are much higher than the 'unique'/bespoke content within them, would in my view warrant.

[55] I note from DR2 the assertion that CR1 is a repetition of the Letter of Claim (which appears to be made in every case) and that in CR1 Fortitude Law has reached factual conclusions which neither party is entitled to do as the facts are a matter for the Court. They go on to say that matters of fact not agreed would need to be dealt with via Witness Evidence, and that medical issues would have to be dealt with by way of Expert Evidence in due course.

[56] The DR2s in every case make clear that the contents of each the Claimant's chronology are admitted only insofar as they are consistent with the contemporaneous records and that any other contents will be for the Court to determine; this has clearly been done in response to the comment in each CR1 to the effect that if the Defendant did not challenge the chronology then they must be taken to accept it.

[57] The DR2s are mostly brief (one-and-a-half to two pages); in "HD" there was a longer DR2 and in fact a CR2 as well, running to over 10 pages. Given that CR2 enclosed the Claimant's Witness Statement which would have contained her evidence on the facts it is not clear why that was deemed necessary, the DR2 on "HD" makes clear that the disputed areas were noted but would be a matter for evidence (Witness or Expert depending upon what was in dispute). Ironically, that DR2 also refers to a 'costs-building exercise' by Fortitude Law; CR2 certainly looks like a somewhat gratuitous attempt to do exactly what DACB had just pointed out it was not Fortitude Law's place to do, which was not (in my view) reasonable or proportionate.

[58] To give a figure/indication for the Letters of Response; they clearly were not the work of an hour or even of a handful of hours, but nor were they as big a task as the Letters of Claim, for which 15 hours were allowed in "HD" with an indication that the remaining cases were apt to go the same way, subject to submissions from the parties[2]. It was quite right of Ms McDonald to accept that the Letters of Response were probably not fit for a Grade D's input; the issue is that the Grade D has recorded a great deal of time without really producing anything useful as far as I can see, for example based upon the amount of time then charged by Mr Hanison. That does not appear to denote any solid foundations prior to his input into this correspondence.

[59] The Grade D time spent on sorting and indexing the Medical Records ought to have made this task much more straightforward, especially if they had been tabbed or otherwise marked up to make locating the relevant records easy to locate within the bundle. In fairness, if these matters come to a

[2] See previous footnote.

line-item Assessment, it needs to be recognised that sorting and indexing Medical Records is prime Grade D territory; Ms McDonald referred to using a Medical Reader, which some firms do (but then, under *Crane v Cannons Leisure* charge it at fee earner rates) but if I have reduced these items because the Medical Records should have been in good order prior to their being done, that sorting and indexing time (certainly at Grade D rate) is less likely to be reduced as much as times spent on Letters of Claim and DR1, CR1 and CR2.

[60] As such I allow **10 hours for this work (by which I mean the full claim of 66.1 hours** or thereabouts – during the Hearing we calculated a slightly lower figure – on DR1, CR1 and DR2) on "HD", at Grade A rate. I have not prejudged the other cases, but by way of indication would be minded to go the same way except if Mr Hanison has spent less than 10 hours. Then I would be minded to allow Grade B time (if any) to bring the total to 10 hours. If there is no Grade B time then I would be minded to let it rest at what Mr Hanison has spent; the Grade D was evidently floundering and in my view the Defendant does not have to pay for that, although I will of course listen to submissions from either side before reaching a final decision if they so wish.[3]

Judgment on Schedules of Loss

[61] This Preliminary Issue comes from the Precedent G at Point 11, items 20 to 22 – Documents, on pages 28/29 where the Defendant has isolated 20 separate attendances totalling 31.3 hours spent drafting the Schedule of Loss in "HD". In her Skeleton Argument Ms McDonald gives the following times and details in respect of this Preliminary Issue (the final, 'total' row is my own).

Claimant	Time spent	Preliminary Sched*	Updated Sched**	Dams (settled)	% of claim
"HD"	31.3h	367,948.00	597,424.06	47,500.00	7.95%
"CH"	10.2h	267,249.00	543,878.84	45,000.00	8.27%
"CM"	42.1h	546,587.20	719,362.38	40,000.00	5.56%
"CT"	8.8h	313,757.60	313,757.60	40,000.00	12.75%
"HL"	5.8h	292,553.08	757,990.87	30,000.00	3.95%
"CB"	5.2h	267,904.00	367,505.25	25,000.00	6.80%
Total:		**2055998.88**	**3299919**	**227500**	**6.89**

[3] At a Hearing on 17 April 2023, after submissions by Ms McDonald for the Defendant and Mr Dunne for the Claimant, I confirmed that the 'cap' for DR1, CR1 and DR2 together, in the other 5 cases I have seen, is 10 hours, at Grade A unless the Grade A time is less than 10 hours, in which case any Grade B time to bring it to 10 hours in total, should be allowed. I do not find that the Grade D input moved these matters forward and so if A plus B time is below 10 hours it rests there, but again I did not pro rate this allowance in cases where these matters took much less time, than was the case in "HD". That to me seems to impose double jeopardy, or at least to penalise the Claimant for getting better/quicker at drafting as time progressed.

[62] In her table, Ms McDonald stated that "CT" spent 8.8 hours 'plus general reviews of evidence', "HL" was said to be 5.8 hours 'plus general reviews' and "CB" was 5.2 hours 'plus 24 hours mixed with Letter of Claim.' That is unhelpful; I have already ruled upon Letter of Claim in "HD" and given an indication on the other Letters of Claim, including "CB". If I now rule upon those 24 hours under this heading it could constitute double jeopardy.

[63] Likewise, general reviews appear in the Points of Dispute as a separate heading: I think it best to rule upon a reasonable amount of time for the Schedule of Loss in "HD" and to avoid these 'overlapping' Points in giving an indication on the remaining Schedules. By all means, should it come to a line item assessment Ms McDonald can take me to the 'general reviews' and any 'mixed' items; if at that time the only explanation for them, has to do with the Schedules of Loss, then they will be liable to disallowance in the usual way.[4]

[64] Ms McDonald's submissions were short and to the point; the Schedules were pleaded at figures well in excess of the ultimate settlement value achieved; as such, far too long was spent in trying to plead completely unrealistic and over-pleaded Schedules. In "HL" a pleaded claim in excess of three quarters of a million pounds, settled at £30,000.00. Put as a fraction that claim was pleaded at over 25 times the amount achieved in settlement of the claim. The remaining claims were pleaded at approximately 18 times ("CM") 15 times ("CB") 12.5 times ("HD" and "CH") and 8 times ("CT") the amounts achieved in settlement.

[65] In fact, given that the settlement figures would have included an (unspecified) element of General Damages for pain, suffering and loss of amenity, the percentages and proportions must, per Ms McDonald, be even lower, although she acknowledged that because of the terms of the settlements, it is not possible to say how much of (say) Ms "HD"'s £47,500.00 represents General Damages and how much represents Special Damages.

[66] Mr Dunne asserted that the Schedules of Loss were time-consuming; various factors changed over time and in particular the discount rate changed during the currency of these cases. Other factors required adjustment, for example in "HD" the Claimant had thought that she would have to give up work, and had put forward a significant claim for future loss of earnings. Per Mr Dunne, only upon being able to secure less congenial, but well-enough paid employment (albeit in a different role) was

[4] It is apparent that there are numerous examples of the same items of time spent/work done being challenged under different items, as was canvassed at the Hearing on 17 April 2023. Whilst I accept this may be a function of the way that time has been recorded, the parties are reminded to be vigilant against disallowing the same items more than once. In the said Hearing it was more expedient to look at time ALLOWED rather than time DISALLOWED for this very reason.

the Claimant able to mitigate those future losses and abandon that element of her claim; this was, in his submission, a point in her favour.

[67] Ms McDonald did not see it that way and commented several times to the effect that this Claimant was seeking a six-figure sum for future loss of earnings and only dropped it on the eve of the Mediation when records (I believe from Occupational Health) showed that she had not been working reduced hours and had not lost any wages despite that claim. Nor did she accept Mr Dunne's submission that the low settlements reflected litigation risk: they were over-pleaded and should be assessed at their true values.

[68] To be clear, I have dealt with the Schedules of Loss on their own merits. If the Defendant is still minded to raise Misconduct/CPR 44.11 at the next Hearing in May 2023, this may be one of the issues to which they intend to refer – that was certainly the impression that I got at the last Hearing, but this is not a Judgment upon Misconduct. The served Schedules have many common features, as follows (I have looked at the draft/unserved Schedules as well):

Details (Schedule 1):	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
Key info: bespoke, contains:						
Date of birth	**08.08.71**	**14.11.76**	**13.02.65**	**05.09.59**	**14.09.62**	**14.06.65**
Date Special Damages started	12.12.14	26.04.10	27.01.11	29.01.13	11.11.13	01.09.16
Date of Schedule 1*	**06.08.19**	**29.05.19**	**09.07.19**	**29.12.19**	**11.12.19**	**05.08.19**
Claimant's age	47	42	54	60	57	54
Lifetime multiplier	**40.9**	**47.4**	**33.6**	**27.8**	**30.7**	**33.6**
Multiplier to retirement age (67) -0.75% disc. rate	19.95	26.93	12.27	6.91	9.87	12.27
JC Guidelines Chapter 6 14th Ed. Section J Bladder indicates:						
(a) Involves double incontinence £161,520-£123,310	Included	Included	Included	Included	Included	Included
(b) Being complete loss of function and control £123,310 - £70,090	Included	Included	Included	Included	Included	Included
(c) Serious impairment of control with some pain and incontinence £70,090 - £56,100	Included	Included	Included	Included	Included	Included
Other rates appear						

JC Guidelines Chapter 6 14th Ed. Section A Psychiatric and Psychological Damage: (a) Severe £108,620 - £51,460 (b) Moderately Severe £48,080 - £16,720	 No No	 No Included	 No No	 No No	 Included Included	 No Included
Schedule 1* continued:	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
(c) Moderate £16,720 - £5,130 (d) Less Severe £5,130 - £1,350	Included Included	Included No	Included Included	Included No	Included No	Included No
Section Chronic Pain (b) Other Pain Disorders (i) Involves severe cases with significant ongoing symptoms, resulting in an adverse impact upon ability to work £55,240 - £36,950	 No	 Included	 No	 No	 Included	 Included
(ii) involves moderate cases where symptoms are ongoing and have an impact that is less marked than in severe cases £33,750 - £18,480 **"CT", "CB" refer to complex regional pain syndrome as well**	Included No	No No	Included No	Included Included	Included No	No Included
A. Past Losses to [date]	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
1. Travel Expenses – C has incurred numerous of these as she could not walk or drive after the surgery and may have often used taxis. Still to be finalised.	 **TBC**	 **TBC**	Circa 40 at £10 each so £400.00 but still **TBC**	Circa 100 at £20 a time so £2,000.00 but still **TBC**	Circa 20 at £12.50 a time so £250.00 but still **TBC**	 **TBC**
2. Medical Expenses – C has required regular medication and treatment following the surgery. Still to be finalised.	£50/month since surgery x 57 months = £2,850.00 £10/week for incontinence pads x 57 mo = £2,470 but		£10.40/ month for pain meds x 4 years = £499.20 but	Still to be finalised; includes £25.20/wk for pads, for 342 weeks =	No meds £40/month for pads x 7 months =	

	TBC	**TBC**	**TBC**	£8,618.40 **TBC**	£280.00 **TBC**	**TBC**
Schedule 1* continued:	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
<u>3. Loss of Earnings</u>	No – no claim for past loss of earnings in Schedule 1	No	C working private care provider on £12,360/yr but **has been unable to work since the op** 7.5 yrs ago – loss = **£92,700.00**	No	Self-employed time off post-op 2 weeks at £538.46= £1,076.92 Has reduced hours by 50% so from £28k annual income £14k – over 5 yrs 6 mo = £76,999.96 **£78,076.88**	No
<u>3. Cost of Care*</u>** – C has required regular care and assistance from her significant other(s) of [number] hours/ week since the surgery. Contends for £6.50/hour for gratuitous care (£10/h in "CT"). *****4 in "CM"**	40 hours x 6 weeks x £6.50 = **£1,560.00** Thereafter 14 hours x 52 weeks x 4yrs 7mo x £6.50 = **£21,687.00**	14 hours x 472 weeks x £6.50 = **£42,952.00**	21 hours x 440 weeks x £6.50 = **£60,060.00**	Due to epilepsy C already had care needs but increased by 28h/wk 28h x 52 x 6.92 yrs = **£100,755.20**	28h/week for 5.55 years: 28 x 52 x 5.55 yrs = £52,525.20 From then = 10h/week x 27.4 weeks = £1,781.00 **£54,306.20**	56h/week for 4 weeks post-op at £6.50/h + Ongoing 28h/week over 2.8 yrs @ £6.50/h = **£29,411.20**
Past Losses total (Sched 1*)	**TBC**	**G'ter than £42,952.00**	**G'ter than £153,659.30**	**G'ter than £111,373.60**	**G'ter than £132,813.08**	**G'ter than £29,411.20**
B. FUTURE LOSSES	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
C/ her prognosis confirms she will continue to suffer current symptoms for life and will continue to incur the following losses:	Yes	Yes	Yes	Yes	Yes	Yes
<u>1. Travel & Medical Expenses</u> – C will incur numerous travel expenses	TBC	TBC	TBC	TBC	TBC	TBC

due to inability to walk or drive, and will frequently need to take taxis C also requires regular medication and may require further surgeries	Future private treatment TBC Pain relief £50/mo x 12 x 40.9 years = **£24,540.00**	TBC Omitted	Future treatment TBC Omitted	Future treatment TBC Omitted	Future private treatment TBC Omitted	Future treatment TBC Omitted
B. FUTURE LOSSES cont.	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
1. Travel & Medical Expenses	Incontinence pads £10/ week x 52 wks x 40.9 yrs = **£21,268.00**	Omitted	Omitted	Omitted	Omitted	Omitted
2. Cost of Care* – C will continue to require care provided for at minimum of [amount] for life. Care will, for draft Schedule 1* only, be calculated at the conservative rate of [amount]/hour *****still part of 1 in "CM"**	14 hours x 52 weeks x £6.50/hour x 40.9 (whole life multiplier) = **£193,538.00**	14 hours x 52 weeks x £6.50/hour x 47.4 (whole life multiplier) = **£224,297.00**	14 hours x 52 weeks x £10/hour x 33.6 (whole life multiplier) **£244,608.00**	14 hours x 52 weeks x £10/hour x 27.8 (whole life multiplier) **£202,384.00**	10 hours x 52 weeks x £10/hour x 30.7 (whole life multiplier) = **£159,640.00**	21 hours x 52 weeks x £6.50/hour x 33.6 (whole life multiplier) **£238,492.80**
2. Future loss of Earnings C will, as a result of her ongoing severe pain, be unable to return to work/at her current hours. She would have continued to age 67.	Intends to reduce her hours at an annual pay cut of £5,265 x 19 years = **£100,035.00**	No	12 years at £12,360/yr = **£148,320.00**	No claim for future loss of earnings in Sched 1	No	No
TOTAL SPECIAL DAMAGES AND FUTURE LOSSES (Schedule 1*):	**At least £367,948.00** (of which loss of earnings = £100,035.00)	**At least £267,249.00**	**At least £546,587.20** (of which earnings = £241,020)	**At least £313,757.60**	**At least £292,553.08** (of which earnings = £78,076.88)	**At least £267,904.00**
Changes in Sched 2?**	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
Date of Schedule 2**	**06.10.20**	**06.11.20**	**15.02.21**	**16.11.20**	**17.12.20**	**20.11.20**

C's age at date of Sched 2** **Lifetime multiplier** Multiplier to retirement age (67) – 0.25% discount rate:	49 **38.9** 17.88	43 **45.3** 24.06	56 **31.7** 11	61 **26.8** Not given	58 **30.7** 9.87	55 **32.7** Not given
A: PAST LOSSES:	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
1. Travel Expenses – C has incurred numerous of these as she could not walk or drive after the surgery and has often used taxis. Still to be finalised.	4 trips at 106 miles each at 69.07p/mile each way = **£585.71** 5 trips at 10 miles each at 69.07p/mile each way = **£69.07** TOTAL (receipts?) **£654.78**	At least 40 trips of 6.8 miles each at 69.07p/mile each way plus £6 to park = TOTAL (no receipts) = **£615.74**	At least 10 trips of 4.9 miles each x 69.07p/mile each way = **£67.69** At least 6 trips of 22.3 miles each at 69.07p/mile each way = **£184.83** TOTAL(no receipts) = **£252.52**	At least 30 taxi trips at £12 each = TOTAL(no receipts) = **£360.00**	At least 10 trips of 14 miles each x 69.07p/mile each way = TOTAL (receipts?) **£193.40**	Multiple trips TBC but includes 5 trips at £13 (taxi) = £65 Attending for a translabial scan at 69.07p/mile 153 miles each way = £211.35 TOTAL(no receipts) = **£276.35**
2. Medical Expenses – C has required regular medication and treatment following the surgery. Still to be finalised. Plus, should "HD" be £2/week not £2/month?	£2 per month on pain meds (OTC) x 5 yrs 9 months = **£138.00** Miscalculated 9 weeks not 9 months added	At least 100 prescriptions antibiotics & pain relief £9 each **£900** 4 /week pkt Paracetamol/ ten years £3 = **£1,638.00**	£10.59 prepaid scripts/ month x 120 months = **£1,270.80**	Omitted	Paracetamol at £8/month x 84 months = **£672.00**	Omitted

	Omitted	Omitted	Omitted	Omitted	Omitted	Translabial scan £240
2. Medical Expenses cont'd:	£1.50/week incontinence pads times 303 weeks = **£454.50** Receipts? **£592.50**	3 packs of incontinence pads/week /£6.75 times 548 weeks = **£3,699.00** No receipts **£6,237.00**	3 packs of incontinence pads/week /£4.50 times 524 weeks = **£2,358.00** No receipts **£3,628.80**	Extra pads at £8.70/wk for 205 weeks = **£1,783.50** No receipts **£2,143.50**	30 pads/mo (receipted) at 42p = **£151.20** 192 pads/mo at 42p = **£1,532.16** Some receipts **£2,355.36**	Omitted No receipts **£240.00**
3. Loss of Earnings	Had to change hrs from Aug 19 loss 1yr 1mo at £5,265/yr **£5,703.75**	No	£13,160/yr but unable to work for 8.5 years = **£111,860.00**	No	Can only WFH at cut rate/fewer hrs; lost 44 mo @ £1,845.92 **£81,420.48**	No
A: PAST LOSSES cont:	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
3. Cost of Care* ** – C has required regular care and assistance from her significant other(s). Now contends for £10.00/hr for gratuitous care (previously claimed £6.50/hr). ***4 in "CM"**	40h/week post-op for 6 weeks at £10/h = **£2,400.00**	40h/week from TVT surgery to second TVT surgery on 17.02.11 and for 4 weeks thereafter @ £10/hour for 46 weeks = **£18,400.00**	28h/week post-op x 16 weeks x £10 = **£4,480.00** Ongoing 14h/ week x 63 weeks x £10 = **£8,820.00** 28h/week post-op (2nd) x 4 weeks x £10 = **£1,120.00**	Omitted	Has needed 7h/week from Nov 13 onwards 7h at £10/h x 52 wks x 7.1 years = **£25,844.00** Cleaner @ £30/wk for 7.1 years = **£11,076.00** Gardener @ £39/month for 7.1 years = **£3,322.80** Window Cleaner @ £15/month for 7.1 years = **£1,278.00**	8 weeks at 21h x £10/h post-op = **£1,680.00** Ongoing @ 10.5h/week x 52 weeks x 4.17 years = **£22,222.20 Miscalc.?**
Cost of care at £10/h	Thereafter has needed 14h/week to	Thereafter has needed 14h/week to	Thereafter has needed 14h/week	Omitted	See above	See above

	date £10/h x 14 hours x 52 weeks x 5.9 years = **£41,860.00**	date £10/h x 14 hours x 52 weeks x 9.5 years = **£69,160.00**	to date £10/h x 14 hours x 439 weeks = **£61,460.00**			
Total past losses Sched 2:**	**£51,211.03**	**£94,412.74**	**£191,621.32**	**£2,143.50**	**£125,481.04**	**£24,418.55**
Compare to total (Sched 1*)	TBC	Greater than £42,952.00	G'ter than £153,659.30	G'ter than £111,373.60	Greater than £132,813.08	G'ter than £29,411.20
B. FUTURE LOSSES	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
C's prognosis confirms she will continue to suffer current symptoms for life and will continue to incur the following losses (NB numbering may differ)	Yes	Yes	Yes	Yes	Yes	Yes
B. FUTURE LOSSES Cont'd	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
<u>1. Travel & Medical Expenses</u> – C will incur numerous travel expenses due to inability to walk or drive, and will frequently need to take taxis C also requires regular medication and may require further surgeries	Travel not included in Schedule 2** Pain relief OTC £2/month x 38.9 years = **£933.60**	Travel not included in Schedule 2** Pain relief £3/week x 52 weeks x 45.3 years = **£7,066.80**	Travel not included in Sched 2** Pre-paid script at £10.59/mo x 12 mo/yr x 31.7 yrs = **£4,028.44**	Travel not included in Sched 2** Omitted **Omitted**	Travel not included in Sched 2** £8/mo x 12 x 30.7 years = **£2,947.20**	Travel not included in Sched 2** Omitted **Omitted**
In "CM" this is set out: **1. Cost of care** **2. Future medical expenses** **3. Future Private treatment** **4. Future Loss of Earnings** **I have set each case out to compare like with like.** **NB "HL" and "CB" claim**	Incontinence pads £1.50/week x 52 weeks x 38.9 years = **£3,034.20** Bladder injections 1st £2,100 then £1,950 over 38.9 years = **£99,600.00**	Incontinence pads £6.75/week x 52 weeks x 45.3 years = **£15,900.30** Yearly follow up appts. @ £250 each = **£11,325.00**	Incontinence pads £4.50/ week x 52 weeks x 31.7 yrs = **£7,417.80** Bladder injections 1st £2,100 then £1,950 x 31.7 yrs = **£66,108.00**	Incontinence pads £8.70/ week x 52 weeks x 26.8 yrs = **£12,124.32** Bladder injections 1st £2,100 then £1,950 x 26.8 yrs = **£80,490.00**	Incontinence pads £80.64/ month x 12 months x 30.7 years = **£29,707.77** Bladder injections 1st £2,100 then £2,925 over 30.7 years = **£91,897.50**	Omitted Bladder injections 1st £2,100 then £2,925 x 32.7 yrs = **£97,747.50**

Botox at £1,000 more than in the other cases?	Omitted Omitted	Omitted Omitted	Omitted Omitted	UTI meds **£804.00** UTI catheters **£2,010.00**	Omitted Omitted	Omitted Omitted
<u>Medical expenses cont'd:</u>	Omitted Omitted Antimuscarinic treatment at £1,300/year x 38.9 years = **£50,570.00**	Likely to want removal surgery **£20,000.00** Continence procedure **£6,500.00** Ditto treatment at £1,300/year x 45.3 years = **£58,890.00**	Requires removal surgery **£20,000.00** Physio at £424/year x 31.7 years = **£13,440.80** Ditto treatment at £1,300/year x 31.7 yrs = **£42,210.00**	Omitted Omitted Ditto treatment at £1,300/yr x 26.8 years = **£34,840.00**	Omitted Future private treatment incl. Urethral Bulking = **£22,000.00** Ditto treatment at £1,300/yr x 30.7 years = **£39,910.00**	Omitted Omitted Ditto treatment at £1,300/yr x 32.7 years = **£42,510.00**
<u>4. Loss of Earnings</u>	Will continue reduced hrs at £5,265/yr loss x 17.88 years = **£94,132.20**	No	Has had to cease working £13,160.00/ year x 11 yrs **£144,760.00**	No	Ongoing loss at £1,845.92/ month x 12 x 9.87 years to retirement = **£218,630.76**	No
Schedule 2 cont'd:**	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
<u>2. Cost of Care</u>* – C will continue to require care provided for at the minimum of the current level for life. Care calculated at the rate of £10.00/hour *****1 in "CM"**	£10/hour x 14 hours x 52 weeks x 38.9 years = **£283,192.00**	£10/hour x 14 hours x 52 weeks x 45.3 years = **£329,784.00**	£10/hour x 14 hours x 52 weeks x 31.7 years = **£230,776.00**	Omitted	£10/hour x 7 hours x 52 weeks x 30.7 years = **£159,640.00** Cleaner £30/wk for life **£47,892.00** Gardener £39/mo /life **£14,367.60** Windows £15/mo /life **£5,526.00**	£10/hour x 10.5 hours x 52 weeks x 32.7 years = **£178,542.00**
TOTAL SPECIAL DAMAGES AND FUTURE LOSSES (Schedule 2):**	**At least £582,679.03** (of which loss of earnings = £99,835.95)	**£543,878.84**	**£719,362.36** (of which earnings = £256,620)	**£132,411.82**	**£757,990.87** (of which loss of earnings = £300,051.24)	**£367,505.25**
Compared to Schedule 1*	At least £367,948.00	At least	At least	At least	At least	At least

	(of which loss of earnings = £100,035.00)	£267,249.00	£546,587.20 (of which earnings = £241,020)	£313,757.60	£292,553.08 (of which earnings = £78,076.88)	£267,904.00
Changes in Schedule 3?	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
Date of Schedule 3 C's age at date of Schedule 3 **Lifetime multiplier** Multiplier to retirement age (67) – 0.25% discount rate: **"HD" Sched 4 date** C age **Lifetime multiplier** Multiplier to retirement	**05.11.20** 49 **38.9** 17.88 **18.05.21** 49 **38** Not given	**21.06.21** 44 **43.2** Not given	**19.07.21** 56 **31.7** Not given (despite loss of earnings)	**17.04.21** 61 **26.8** Not given	Only two Schedules seen	**04.06.21** 56 **30.8** Not given
1. Travel Expenses – C has incurred numerous of these as she could not walk or drive after the surgery and has often used taxis.	Same as Schedule 1* **£654.78** **Ditto**	Same as Schedule 1* **£615.74**	Same as Schedule 1* **£252.52**	Same as Schedule 1* **£360.00**		Same as Schedule 1* **£276.35**
Schedule 3 continued:	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
2. Medical Expenses – C has required regular medication and treatment following the surgery.	Prescriptions £2/month x 5 yrs 10 mo = **£140.00** **Omitted** £1.50/week incontinence pads x 307 weeks = **£460.50** **Omitted** Omitted	Prescriptions **£900.00** OTC painkillers **£1,638.00** ADDITIONAL incontinence pads £4.50/ week x 582 weeks = **£2,619.00** Omitted	Prescriptions £10.59/mo for 125 months = **£1,323.75** ADDITIONAL incontinence pads £1.50/ week x 546 weeks = **£819.00** Omitted	Omitted ADDITIONAL incontinence pads £8.70/week x 226 weeks **£1,966.20** Omitted		Omitted Omitted Translabial scan **£240**
3. Loss of Earnings:	C had to change hours but then got better paid	No	£13,160/yr x 9 years =	No		No

	role; still lost **£7,044.33** **Not present**		**£118,440**			
3. Cost of Care* – C has required regular care and assistance from her significant other(s). C now contends for National Joint Council Payscales Basic rate discounted by 30% for gratuitous care. ***4 in "CM"**	In sched 3 Still claiming £10/hr Post-op 40hrs @ £10 x 6 weeks = **£2,400.00** Ongoing 14h/ week x £10/h x 5 yrs 10 mo = **£42,466.66**	Hourly rates well below £10/hr prev. claimed; gone from 40h to 30h/week, post-op	Hourly rates well below £10/hr previously claimed;	Omitted		Hourly rates well below £10/hr previously claimed;
At the rate of £4.80 per hour (less than half the £10 previously claimed) **So as to compare like with like, "HD" Sched 4 figures appear here:**	Care post-op (1st) 30 hours x 3 weeks x £4.80/hr + 30 hours x 3 weeks x £5.03 = **£884.70**	Care post-op (1st) 30 hours x 6 weeks x £4.80/hr = **£864.00**	Care post-op (1st) 28 hours x 14 weeks x £4.80/hr = **£1,881.60**	Omitted	Only two Schedules seen	
The above £884.70 is a miscalculation as the rate goes from £4.80 to £4.83, not straight to £5.03	Hence gap?	Care till next op 14 hours x 3 weeks x £4.80/hr = **£201.60**	Care till next op 14 hours x 66 weeks x £4.80/hr = **£4,435.20**	Omitted		
Schedule 3 continued:	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
3. Cost of Care*		Care post-op (2nd) 30 hours x 6 weeks x £4.80/hr = **£864.00**	Care post-op (2nd) 30 hours x 6 weeks x £4.80/hr = **£864.00**	Omitted		
		Care till next op 14 hours x 26 weeks x £4.80/hr = **£1,747.20**		Omitted		

		Care post-op (3rd) 30 hours x 6 weeks x £4.80/hr = **£864.00**		Omitted		
		Care ongoing 14hrs/week x 104 weeks x £4.80/hr = **£6,998.80**	Care ongoing 7 hrs/week x 27 weeks x £4.80/hr = **£907.20**	Omitted		
Rate increased to £4.83/hr from 1 April 2013		Care ongoing 14hrs/week x 91 weeks x £4.83/hr = **£6,153.42**	Care ongoing 7hrs/week x 39 weeks x £4.83/hr = **£1,318.59** Miscalc. by 52 weeks	Omitted		
Rate increased to £5.03/hr from 1 January 2015	Care ongoing 18hrs/week x 62 weeks x £5.03/hr = **£5,613.48**	Care ongoing 14hrs/week x 65 weeks x £5.03/hr = **£4,577.30**	Ditto 7hrs/week x 13 weeks x £5.03/hr = **£457.73** Miscalc. by 52 weeks	Omitted	Only two Schedules seen	
Rate increased to £5.36/hr from 1 April 2016	Care ongoing 18hrs/week x 52 weeks x £5.36/hr = **£5,016.96**	Care ongoing 14hrs/week x 52 weeks x £5.36/hr = **£3,902.08**	Ditto 7hrs/week x 52 weeks x £5.36/hr = **£1,951.04**	Omitted		Care post-op (1st) 30 hrs x 6 weeks x £5.36/hr = **£964.80**
Schedule 3 continued:	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
Rate increased to £5.53/hr from 1 April 2017	Care ongoing 18hrs/week x 52 weeks x £5.53/hr = **£5,176.08**	Care ongoing 14hrs/wk x 52 weeks x £5.53/hr = **£4,025.84**	Ditto 7hrs/wk x 52 weeks x £5.53/hr = **£2,012.92**	Omitted		Gap?
Rate increased to £6.03/hr from 1 April 2018	Care ongoing 18hrs/week x	Care ongoing	Care ongoing	Omitted		Care 10.5 hrs/week x

	32 weeks x £6.03/hr = **£3,473.28** Care post-op 30hrs/week x 6 weeks x £6.03/hr = **£1,085.40**	14hrs/week x 52 weeks x £6.03/hr = **£4,398.84**	7hrs/wk x 52 weeks x £6.03/hr = **£2,194.92**			44 weeks x £6.03/hr = **£2,785.86** Care post-op (2nd) 30 hrs x 6 wks x £6.03/hr = **£1,085.40**
	Care ongoing 18hrs/week x 13 weeks x £6.03/hr = **£1,411.02**					Care 10.5 hrs/week x 1 weeks x £6.03/hr = **£63.32**
Rate increased to £6.43/hr from 1 April 2019	Care ongoing 18hrs/week x 20 weeks x £6.43/hr = **£2,314.80** Care ongoing 14hrs/week x 52 weeks x £6.43/hr = **£2,880.64** Miscalculated **£4,681.04**	Care ongoing 14hrs/week x 52 weeks x £6.43/hr = **£4,681.04**	Care 7hrs/week x 52 weeks x £6.43/hr = **£2,340.52**	Omitted		Care 10.5 hrs/week x 52 weeks x £6.43/hr = **£3,510.78**
Rate increased to £6.60/hr from 1 April 2021	Care ongoing 14hrs/week x 59 weeks x £6.60/hr = **£5,451.60**	Care 14hrs/week x 63 weeks x £6.60/hr = **£5,821.20**	Care 7hrs/wk x 72 wks x £6.60/hr = **£3,326.40**	Omitted	Only two Schedules seen	Care 10.5 hrs/week x 61 weeks x £6.60/hr = **£4,227.30**
Total cost of care in Sched 3: In Schedule 4	£44,866.66 £33,310.66	£45,080.32	£14,509.32	Omitted		£12,637.46
Schedule 3 continued:	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
Total past losses in Sched 3: **Miscalculated – excludes travel plus no claim for**	**£53,166.27** **£33,310.66**	**£50,853.06**	**£142,272.87**	**£2,326.20**		**£13,153.81**

meds or pads at all?						
Compare to total (Sched 2**)	£51,211.03	£94,412.74	£191,621.32	£2,143.50		£24,418.55
Compare to total (Sched 1*)	TBC	Greater than £42,952.00	Greater than £153,659.30	Greater than £111,373.60		G'ter than £29,411.20
B. FUTURE LOSSES:	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
C's prognosis confirms she will continue to suffer current symptoms for life and will continue to incur the following losses:	Yes	Yes	Yes	Yes	Only two Schedules seen	Yes
1. Travel & Medical Expenses – C will incur numerous travel expenses due to inability to walk or drive, and will frequently need to take taxis	Travel not included in Schedule 3	Travel not included in Schedule 3	Travel not included in Schedule 3	Travel not included in Schedule 3		Travel not included in Schedule 3
C also requires regular medication and may require further surgeries **I have arranged the items to compare like with like.**	Incontinence pads £1.50/wk x 52 wks x 38.9 yrs **Not present** = **£3,034.20**	Extra Incontinence pads £4.50/week x 52 weeks x 2 years = **£468.00**	Extra Incontinence pads £1.50/wk x 52 weeks x 2 years = **£156.00**	Extra Incontinence pads £8.70/wk x 52 weeks x 2 years = **£904.80**		Omitted
Hence a gap indicates that item has not been claimed in that particular Schedule **Items in RED refer to "HD" Schedule 4; most of the items from Schedule 3 seem to be missing?**	Bladder Botox injections 50 injections at £1,950 plus initial jab at £2,100 = **Not present** **£99,600.00** **Not present**	Bladder Botox injections 56.6 injections at £1,950 plus initial jab at £2,100 = **£112,470.00** Prescrip'n meds £9/mo x 12 mo x 43.2 yrs = **£4,665.60**	Bladder Botox 41.3 injections at £1,950 plus initial jab at £2,100 = **£82,635.00** Prescrip'n charge £10.59 per month x 12 x 31.7 yrs = **£4,028.44**	Omitted Omitted Omitted	Only two Schedules seen	Bladder Botox 30.8 years at £2,925 plus initial jab at £2,100 = **£82,971.00** Omitted
B. FUTURE LOSSES cont:	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**

	OTC Meds £2/mo x 12 x 38.9 yrs = **£933.60** **Not present**	OTC Meds £3/wk x 52 x 43.2 years = **£6,739.20**	Omitted	Omitted	Only two Schedules seen	Omitted
I had assumed the Botox rendered the anti-muscarinic treatment null but it's been claimed in "HD" Sched 3?	Anti - muscarinic treatment £1,300/yr x 38.9 yrs = **£50,570.00** **Not present** Omitted **Not present**	Omitted Omitted Likely to want removal surgery **£20,000.00**	Omitted Omitted Requires removal surgery **£20,000.00**	Omitted Continence procedure **£1,950.00** Requires removal surgery **£20,000.00**		Omitted Omitted Omitted
<u>Medical Expenses</u>	**Not present** **Not present** **Not present**	Urethral bulking injections x 3 **£4,400.00** Lifelong physio for chronic pain 8 sessions/yr 43.2 years at £424/year = **£18,316.80** Omitted	Omitted Lifelong physio for chronic pain 8 sessions/yr x 31.7 yrs at £424/year = **£13,440.80** Lifelong pain mgt £1,000 /yr **£31,700.00**	Omitted Lifelong physio for chronic pain 8 sessions/yr x 26.8 yrs at £424/year = **£11,363.20** Omitted	Only two Schedules seen	Omitted Omitted Omitted
<u>2. Cost of Care</u> – C will continue to require care provided for at the minimum of the current level for life. Care calculated National Joint Council Payscales basic rate discounted by 30% for gratuitous care **Again, in "HD" 'before'**	£10/hour x 14 hours x 52 weeks x 38.9 years = **£283,192.00** £6.60/hour x 14 hours x 52 weeks x	£6.60/hour x 14 hours x 52 weeks x	£6.60/hour x 7 hours x	Omitted		£6.60/hour x 10.5 hours x 52 weeks x

Sched 3 and 'after' Sched 4 figures appear here	38 years = **£182,582.40**	43.2 years = **£207,567.36**	52 weeks x 31.7 years **£76,156.08**			30.8 years = **£110,990.88**
B. FUTURE LOSSES cont:	**"HD"**	**"CH"**	**"CM"**	**"CT"**	**"HL"**	**"CB"**
3. Loss of Earnings:	C will need to cut hrs after lockdown £6,123/yr x 17.46 yrs = **£106,927.99** **Not present**	No	£13,160 to early retirement at 60, 3.5 yrs = **£46,060.00**	No		No
TOTAL SPECIAL DAMAGES AND FUTURE LOSSES (Schedule 3):	**£597,424.06 At least (lost earnings = £113,972.32)**	**£425,480.02**	**£416,449.19 (of which loss of earnings = £164,500.00**	**£36,544.20**		**£207,115.69**
Compared to Schedule 2**:	£582,679.03 (At least, loss of earnings = £99,835.95)	£543,878.84	£719,362.36 (of which earnings = £256,620)	£132,411.82		£367,505.25
Compared to Schedule 1*	At least £367,948.00 (of which loss of earnings = £100,035.00)	At least £267,249.00	At least £546,587.20 (of which learnings = £241,020)	At least £313,757.60		At least £267,904.00
Schedule 4 ("HD")	**At least £216,547.80**					

[69] Going into such granular detail on the Schedules has taken a while but will hopefully assist, not only on this exercise but going forward with line-item assessments and on any Misconduct arguments that there may be. This exercise has revealed some very striking discrepancies across the Schedules, some of which are explicable but many of which appear to have no logical explanation.

[70] Examples of explicable discrepancies include only some Claimants seeking £20,000.00 for removal surgery; some had already undergone removal (per care claims post-op) so that makes sense. Another is Ms "CB" going for a translabial scan; nobody else in this cohort had one but that just suggests she was the only Claimant who tried that option.

[71] Ms "HL" was the only Claimant to seek the cost of a cleaner, a gardener and a window cleaner as a care cost, but that might simply mean that she was the only one relying on outside help. These cases

settled pre-issue, so the claims and evidence were not tested at Trial but I gather were 'reality checked' at the Mediations. Ms "HL" claimed in excess of £80,000.00 for domestic services (past and future) whilst her husband asserted (paragraph 9 of his Witness Statement of 7 December 2020) that during his four-day rest periods he did all the 'day to day' house cleaning and grocery shopping etc.

[72] This statement was in the context of the hours of care Mr "HL" said that he was providing for Ms "HL" during the week. She would presumably have been reality checked at the Mediation on a claim for 'care' by an able-bodied man doing household chores in his own home, as well as on the assertion that she needed this level of paid domestic support when she continued working (albeit at a reduced rate per hour/fewer hours) as a self-employed Exercise Specialist/trainer.

[73] None of this is intended as any criticism of Ms "HL". Claimants often have no idea of what they may or may not claim (or expect) in the way of damages, but a boutique firm specialising in vaginal mesh claims might have been expected not to encourage Ms "HL" to believe she was likely to recover over three quarters of a million pounds (including General Damages for PSLA, see below) when in fact her claim settled for £30,000.

[74] Examples of other, less explicable discrepancies are many and varied. Before leaving Ms "HL", in Schedule 1 there is a claim for past loss of earnings but no claim for future loss of earnings; it then crops up in Schedule 2 (at £218,630.76) so must have been overlooked. That is a very striking omission from a boutique Clin Neg firm, Grade D fee earner or no; in fact, it appears Fortitude Law is claiming 2.5 hours Grade A, 7.6 hours Grade B and 21.2 hours Grade D time which makes such a (six-figure) omission all the more extraordinary.

[75] There is no claim for past loss of earnings by Ms "HD" in Schedule 1 but she indicates she intends to reduce her hours in future; in Schedule 2 she claims she reduced her hours from 19 August 2019 (which would be less than two weeks after Schedule 1) and is <u>currently</u> losing £5,265.00 per year. In Schedule 2, dated 6 October 2020, she claims to have lost £5,703.75 and in Schedule 3 (5 November 2020) she claims to have lost £7,044.33 which is a significant increase in just one month.

[76] To be clear, those are very clear assertions of actual loss <u>already</u> incurred and as such I do not think that Mr Dunne's submissions (which I appreciate were made on instructions) to the effect that she <u>thought</u> she would have to reduce her hours but then secured better paid (but less congenial) work

and did not have a loss after all, rescues the position. She was claiming £7,044.33 of past losses and from that springboard was claiming a further £106,927.99 of future losses when, as Ms McDonald submits and as appears to be the case, she did not have any such losses and abandoned those claims on the eve of the Mediation.

[77] In fairness to Ms "HD" I do not understand why the abandonment of her claim for lost earnings in Schedule 4 was accompanied by the abandonment of almost everything else; she had claims for OTC pain relief and incontinence pads, future private treatment including bladder Botox and antimuscarinic treatment and past and future losses worth six figures in total, which are simply absent from Schedule 4; aside from travel expenses and cost of care, everything else has fallen away. Again, that appears to be simple oversight.

[78] Looking at Mr "HD"'s Witness Statement, he refers to 14 hours per week of care but this includes cooking dinner, doing most of the housework and carrying shopping or pushing the trolley when Ms "HD" is shopping as she can no longer manage this by herself. I appreciate that Mr "HD" may have thought that he was doing this for his wife but the idea of an able-bodied man doing some household chores around his own home, sounding in damages for past or future 'care' is something that I would expect to have been 'reality checked' at mediation.

[79] Post-op care requiring some medical skill, or helping one's wife with personal care and toileting, might be tasks that the most devoted husband would not expect to do, but much of the 'care' in the various Witness Statements before me looks like what used to be classed as 'natural love and affection' for one's partner a.k.a. doing one's own share around the house. Such claims would have been open to challenge since well before these Schedules of Loss were drafted; a care expert (for example) would have separated the wheat from the chaff, and most of what I have seen, seems to be the latter.

[80] When compared in table form other discrepancies between claims are very striking. Returning to Ms "CB", her translabial scan is claimed but there are no pain meds in her Schedule, despite her Witness Statement saying that *"I have been prescribed multiple pain medications and trialled multiple medications and treatments for the severe urinary incontinence symptoms…"* (para 21, 24 November 2020). Her husband's Witness Statement refers to having to bathe and toilet her (paras 15 and 16, 24 November 2020) which sounds more like 'care' of the sort that sounds in damages. However, despite claims in her Witness Statement that she uses between 7 and 10 incontinence pads per day and

suffers recurrent UTI's, 3 to 4 times per year, neither pads nor UTI meds are included in Ms "CB"'s future loss claims and it can only have been due to oversight. The sums claimed for pads etc. vary quite widely between Claimants which may just be down to regional variations or the quality/quantity per pack, but the lack of any future provision for Ms "CB", who is so debilitated by incontinence, is striking.

[81] Antimuscarinic treatment is claimed across the board in Schedule 2, at £1,300.00 per year, but by Schedule 3 it has been dropped from all but "HD". I had assumed that this was because it was an either/or option with the bladder Botox injections and that the latter, more expensive, option had been left in, but in "HD" both options appear. Both are, of course, available on the NHS as well; Claimants are entitled to price up private treatments but 'reality checking' at Mediation may have factored into these claims for otherwise fairly non-invasive and free treatments. Certainly, either these two were mutually exclusive or they were not, so why are they in "HD" and only "HD" as at Schedule 3? It is over £50,000; should it have been left out of that Schedule or included in the other 5?

[82] Looking at Ms "CT", her Witness Statement is dated 16 November 2020 and in it she explains that she is forced to take 3 to 4 doses per day of Codeine which barely affects her severe pain; she also states that she is prone to frequent and painful UTIs requiring antibiotic treatment (para 28, 16 November 2011). Yet in Schedule 1, only incontinence pads are accounted for under medical expenses; this is not remedied in either Schedule 2 or Schedule 3 despite the 'General Damages' narrative referring to chronic and severe pain, chronic and painful UTIs requiring antibiotics and strong anti-depressant medication, none of which is in the Schedule.

[83] Most worrying is a claim, in Ms "CT"'s Schedule 1, for 28 'extra' hours per week of care, over the past 6.92 years (since her surgery) totalling £100,755.20, and ongoing at 14 'extra' hours per week, £202,384.00. That is a claim for £303,139.20 which most people would regard as a life-changing sum, but by her Schedule 2 (dated the same date as her Witness Statement above) there is no claim for past nor future care, and nor do these appear in her Schedule 3 dated 17 April 2021.

[84] In her Witness Statement, Ms "CT" details certain pre-existing conditions that mean she has had a carer supporting her with tasks such as cleaning, laundry, shopping, attending medical appointments with her and cooking, since long before the surgery complained of. Her late husband fulfilled the role until he passed away in 2011 and thereafter paid carers have come in. Although she speaks movingly

(and with a ring of truth) about the considerable hardships she has encountered during her life, Ms "CT" does not attempt to suggest that she has needed any more than the paid care above referred-to. However, that begs the question, why did a claim for £303,139.20 go into Schedule 1, to begin with?

[85] The impression given is that Fortitude Law has given every Claimant a baseline care claim of a multiple of 7 hours per week and only when personal circumstances (here, the absence of a significant other who could have undertaken such 'care') prevent such a claim getting off the ground, has it been abandoned. That is extremely troubling and the sheer amount of time spent/work done quantifying these 'care' claims is both significant and almost entirely worthless in terms of advancing the Claimants' interests.

[86] There are a lot of arithmetical errors, for example when the National Joint Council Payscales Basic rate (discounted by 30% for gratuitous care) was substituted, on "CM" the person drafting Schedule 3 misread the dates and calculated time spent from 1 April 2013 to 31 December 2014 at £4.83/hour, as 39 weeks (it should have been 91 weeks as in "CH"). Similarly, when the time spent from 1 January 2015 to 31 March 2016 at £5.03/hour was calculated in "CM" it was calculated at 13 weeks (it should have been 65 weeks). That is over £3,500.00 omitted from that Schedule by arithmetical error.

[87] Similarly, the bladder Botox is generally stated to have been £2,100.00 for the first injection, and £1,950.00 every 9 months for ongoing injections. However, in "HL" and "CB" someone has, enterprisingly, worked out the ANNUAL cost, but they have got it wrong. If it costs £1,950 every 9 months, then the annual cost would be (£1,950.00 divided by 3) times 4, which is £2,600.00 not £2,950.00 – I appreciate that is £350.00 but across those two matters it was being claimed for 63.4 years, which is £22,190.00 for an arithmetical error.

[88] One of the most striking problems with the first two Schedules is the hourly rates that they use to calculate past and future care costs. These are either £6.50 or £10.00 per hour (presumably £6.50 is a rough approximation of 2/3 of £10.00 per hour). However, by Schedule 3 the National Joint Council Payscales Basic rates have been used instead. That is an improvement, but it is unclear why those rates were not used before; the earlier rates are described as 'conservative' but they were quite simply wrong.

Conclusion

[89] It will be apparent from the foregoing that I am not impressed by these Schedules of Loss. A reasonable system of work would have been to draw up a checklist of potential claims based upon an understanding of what is and is not recoverable. That would have required an understanding of what counts as 'care' and an understanding of the difference between (e.g.) claiming for all incontinence pads used in Schedule 1 and only in later Schedules restricting the claim to the 'extra' pads allegedly attributable to the Defendant's actions. It would have involved cross-referring to the Witness Statement and indeed to the narrative within the Schedules on General Damages, to ensure that obvious claims for ongoing incontinence pads and pain meds and UTI antibiotics were not simply overlooked.

[90] Speaking of General Damages, I apologise if I have missed it but I have not found any reference to a Claimant who was rendered doubly incontinent (i.e. bowel as well as bladder) by this surgery. Why, then, do the Schedules include JC Guidelines Chapter 6, 14th Edition, Section (J) Bladder (a) involves double incontinence £161,520 - £123,310? The Claimants, on reading that, could have been lulled into a sense of entitlement to sums that were never going to be realised.

[91] Fortitude Law's website (according to Ms McDonald's Skeleton at para 8) states, *"Fortitude Law has already helped, and is currently helping, many UK women to secure compensation of £100,000 or more in respect of negligent Mesh Implantation Surgery – and our unique approach means that the individuals we act for receive compensation from the insurance which the private medical consultants, private hospitals and NHS Trusts are required to have in place."* It is not clear to me what 'unique approach' Fortitude Law is claiming, but as yet I have not seen a single claim that realised even half of £100,000 despite claims pitched well in excess of that sum and (in the case of "HL") in excess of three quarters of a million pounds if one includes PSLA.

[92] I do not find the Schedules to have been drafted systematically or with the care and attention to be expected of a boutique Clin Neg firm specialising in vaginal mesh claims, frankly the six I have seen are all over the place. It follows that I am in considerable doubt as to the times claimed for these Schedules; the times may well have been spent but based upon the above they were not reasonably spent. Much time was thrown away on calculations based on the wrong premises, plus arithmetical errors and other oversights as detailed above.

[93] I allow in "HD" the amount offered by the Defendant, namely 7.9 hours; since Mr Hanison put his name to it, I would allow 1 hour at Grade A and the rest at Grade D. I have not formed a view, but by way of indication, a similar amount is apt to be allowed on the others unless less than 7.9 hours has been claimed; in that case I would allow the time as claimed subject to anxious scrutiny of any Letter of Claim/General Review time as above referred-to.

Response to parties' comments on draft Judgment on Schedules of Loss

[94] Following circulation of the Judgment contained within paragraphs 61 to 93 above, the parties made certain written submissions, the gist of which appears below together with my rulings. I accept that the matters seen by me, were never tested at Trial, and therefore it is impossible to be certain as to what might have happened to the various heads of claim pleaded, however, I have done the best I can with what I have seen.

[95] For the Claimant, it was stated that (as was submitted at the hearing) the Defendant's own CHA unusually required a Schedule of Loss to be provided at the outset with the Letter of Claim, pre receipt of all medical evidence (as the Mediation took place 21 months after service of the Letter of Claim) and before all Financial Records including the DWP Records and Occupational Health Records had been allowed (under the terms of the CHA) to be obtained. Per the Defendant, on the other hand, this is not correct as the "HD" Letter of Claim was dated 07 October 2019 so is covered by the original CHA dated 30 September 2019. This provides at Paragraph [4.3] for service of a Schedule of Loss with expert evidence after the Letter of Claim/Letter of Response/Replies process has concluded. Whilst it is correct (per the Defendant) that an early draft of the CHA, proposed by Fortitude in May 2019, provided for the Schedule of Loss to accompany the Letter of Claim this requirement was omitted from the revised draft sent by the Defendant in June 2019 and was at that time replaced with the requirement in Paragraph 4.3 for service of the Schedule later [the same requirement which then appeared in the agreed Claims Handing Agreement dated 30 September 2019]. As to it being *before all Financial Records including the DWP Records and Occupational Health Records had been allowed (under the terms of the CHA) to be obtained* the Defendant asserts that the CHA did not prevent the Claimant from obtaining these Records, nor did it say when the Claimant should obtain these Records, either.

[96] To be clear, I have looked at the CHA in "HD", signed and dated 30 September 2019, and its terms are as the Defendant describes. The Claimant's assertions that the Schedule of Loss had to accompany the Letter of Claim, and that they were not 'allowed' to obtain DWP or OH Records any

sooner, is not borne out by the CHA within their own Bundle, see "HD" Docs [Mediation] Bundle pp 6 to 10.

Future Loss of Earnings

[97] Per the Claimant ("HD"), the Future Loss of Earnings ('FLoE') claim was put into the Schedules as, prior to receipt of the DWP records and Occupational Health Records on 18.02.21, the Solicitor had been informed by the Claimant that due to the injuries suffered as a result of the Mesh Surgery she was no longer able to work 37.5 hours a week and could only manage 30 hours a week. Once the Solicitor had obtained and considered in detail those DWP and OH records and upon detailed discussions with the Claimant it was their view that the FLoE claim was - on the balance of probabilities only – a claim that would fail at Trial as those records provide evidence that although the Claimant had mitigated the position by changing roles to a less physically demanding 'desk based' role, the Court would find that she had 'chosen' to work 30 hours and that on balance she could, with careful management of the pain issues – i.e. by resting in the evenings and at weekends (hence the continued care/assistance claim at 14 hours a week), have worked 37.5 hours a week.

[98] However, in the Solicitor's view, the DWP and OH records did not/do not confirm that Mrs "HD" could have worked 37.5 hours. The FLoE claim is reasonable – it is just that on the balance of probabilities it was the Solicitor's advice to Mrs "HD" (and to which she agreed) that a Court would ultimately find that she could have worked 37.5 hours a week. The Schedule of Loss was always put on the basis of a FLoE claim of minus 7.5 hours per week for Mrs "HD"'s working life, however and through discussions with her for the purposes of the Mediation, it was agreed that on the balance of probabilities a court would find that she could have worked 37.5 hours a week.

[99] For the Defendant, two queries were raised [a] Please clarify whether there are attendance notes to support the submissions made, and [b] If there are no attendance notes then on what evidence are these submissions made?

[100] To be clear, I have not seen any attendance notes of conversations with Ms "HD" on this issue; correspondence in the Bundle around the time of settlement (May 2018) has been redacted although this appears to be multiple copies of a couple of items rather than dozens of separate redacted items, it still makes it difficult to follow. Given that the FLoE claim was abandoned before Mediation, the Employment and OH records are not (as far as I can see) in the Bundle; again, it does not help that a 2,000-odd page Mediation Bundle is not presented by reference to numbered pages.

[101] It appears that the 'Mediation' correspondence starts on page 638 and that within that correspondence is a letter from the Defendant (email) dated 22 February which states that, *"In respect of the OH records, we note that the OH department very clearly state that the Claimant is fully fit for her normal role.* [letter refers to other health issues which led to the Claimant taking extended periods of absence]. *Her other health issues appear far more significant in respect of number of and length of absences from work. It appears that the Claimant was offered a new role as a Band 5 in continuing healthcare assessments and wanted to take this (despite OH telling her she was fit for her current role). It is clear from these records that the Claimant did not require to change her job role due to her gynaecological issues (and sustain loss of earnings as a result) as claimed in your Schedule of Loss. Please confirm that you are dropping this claim, which amounts to £94,138.20 for future loss and £5,703.75 [sic] for past loss?"*

[102] There is also a letter (email) dated 19 February 2021 to the Claimant that refers to a telephone conversation that afternoon where the Claimant confirmed that, *'...you have struggled working 37.5h/week and therefore would not <u>continue</u> doing so long term even if it were possible to continue working from home."*

[103] I have also seen NHS payslips dated April, May, June and July 2019 showing standard hours 37.5 per week, net pay April £2,184.17, May £1,903.56, June £2,080.98 and July £1,992.73 so average £2,040.36 net pay across those 4 months. There are NHS payslips showing standard hours 30 per week in 2019 and 2020 (going as far as October of that year) so that it is not clear when the Claimant went back up to 37.5h/week although as I understand it, she does accept that at some point she did so.

[104] In the Schedule of Loss dated 6 October 2020, Ms "HD" claimed already to have reduced her hours to 30 (from 37.5) per week, a claim repeated in a Schedule of Loss dated 5 November 2020. In the draft Medical Report of Dr Wael Agur (dated 8 September 2020) there is no reference to her injury impacting on her work, yet in her Witness Statement dated 15 September 2020 she states (at para 54) *"In August 2019 I had no option but to give up the job I loved and had fought to keep and change my job to Nurse Assessor for continuing healthcare at Northern Devon Healthcare trust. This has allowed me to continue working as it is less physically demanding, although I am now only able to work 30 hours a week over 4 days which has resulted in a reduction in my salary of one fifth…"*

[105] I accept that the issue now appears somewhat different to how I framed it in the Judgment set out at paragraphs 61 to 93 above, in that there is clearly evidence to the effect that the Claimant had started a working pattern of 4 days per week, although at some point going back up to 37.5h/week. From the

Schedules the loss to the Claimant was calculated on a gross rather than a net basis. Her salary at 37.5h/week is stated as £29,608.00, rising to £30,112.00; upon taking up the new role she is on the same salary, but pro rata it comes to £24,089.60. That is a gross reduction of £6,022.40 per annum but after tax and NI would be somewhat less 'out of pocket' for her, even before reckoning a return to a five-day week upon lockdown and the ability to work from home.

[106] In terms of recovery on the Standard Basis it matters not; the point is that the Claimant was pursuing what turned out to be an unmeritorious claim for lost earnings, given a belated acceptance that she could not prove she switched jobs due to this incident as she was (a) unwell due to a number of other medical issues and (b) well enough according to OH to have worked a 5-day week in her old job had she chosen to stay on.

[107] That, together with the issues around using the wrong care rates in the first two Schedules, what does and does not count as 'care', claims for incontinence pads, meds et cetera, means that on the Standard Basis I am – to put it mildly – in some doubt as to whether the time spent on these Schedules of Loss was reasonably and proportionately spent[5]. I therefore stand by the allowance already made for the Schedules of Loss in "HD".

Future medical treatment

[108] The Claimant asserted that this claim was not "overlooked" or missed off later schedules in "HD". Once again, it was removed because of changing circumstances and the pro-active approach that Fortitude Law take towards their clients mitigating their loss. The future treatment/medication claim which was valued based on Dr Agur's Expert Report and was calculated on the basis that the Claimant told him that her wish was for all future care to be untaken on a private basis as she had lost faith / trust in the Defendant NHS Trust's ability to provide her with adequate care, was removed from her third Schedule of Loss as following detailed telephone discussions the Solicitor had with Ms. "HD" in May 2021 in preparation for the Mediation in the drafting of the Mediation statement – Mrs "HD" confirmed that as she continued to work for the Defendant NHS Trust she would be prepared (as she was at that time very concerned as to how it would look/affect her standing within the Defendant NHS Trust if it were to become known that she was having treatment on a private basis) to mitigate those future expenses by having any required further medical treatment under the NHS – thereby negating the costs of private treatment.

[5] At a Hearing on 17 April 2023, after submissions by Ms McDonald for the Defendant and Mr Dunne for the Claimant, both confirmed that their respective clients would be content for the 'cap' for Schedules of Loss to be, as in "HD", 7.9 hours with 1 hour at Grade A rate and the remainder at Grade D, hence that is how the remaining five cases will be approached.

[109] D makes the same points as before i.e. are there any attendance notes and if not, how does the Claimant propose to prove this assertion?

[120] There is no such attendance note. The correspondence is not helpfully presented as it is not a perfect set of unique items in date order, instead every email string is included in full so that the same messages appear multiple times and it is only vaguely in date order. However, I have looked, and I have not found anything to substantiate what is now claimed. I did say in my covering note on 6 April 2023 that if Mr Hanison could direct me to documents in the Bundle that might change my view I would consider them, and he has not done so.

[121] More strikingly, even if I accepted the argument about private bladder Botox etc., where does that leave pain medication, antibiotics on prescription (for multiple UTIs per year) and incontinence pads? It does not stack up and with all due respect to the Claimant it appears that Fortitude Law have simply overlooked those potentially substantial claims. Hence, I stand by my Judgment on this as well.

"HD" et al Medical Reports

[122] In "HD", Dr Wael Agur wrote a Report dated 8 September 2020 (following on from a telephone examination on 12 August 2020). Nothing hinges upon the fact that he examined the Claimant over the telephone; this was during the Covid-19 pandemic and I accept that either lockdown prevented a face-to-face meeting or (if it should be that in certain cases there was a brief retreat from lockdown at the relevant time) public health and safety concerns prevented a face-to-face meeting, certainly on the 6 cases currently before me.

[123] His Report in its served form has 33 numbered pages, but as with the Schedules of Loss there is a lot of common ground between his Report in that case and the Reports in the other 5 cases upon which I am considering Medical Reports as a Preliminary Issue. Looking at all 6 I note the following:

Expert Report section	**"HD" (Agur)**	**"CH" (Agur)**	**"CM" (Riad)**	**"CT" (Agur)**	**"HL" (Agur)**	**"CB" (Agur)**
Cover: bespoke, contains:	Page 1	Page 1	Page 1	Page 1	Page 1	Page 1
Report date	08.09.20	02.11.20	14.01.21	11.11.20	11.12.20	23.11.20
Date of birth	**08.08.71**	**14.11.76**	**13.02.65**	**05.09.59**	**14.09.62**	**14.06.65**
Examination date	12.08.20	12.08.20	08.12.20	12.10.20	13.10.20	03.09.20
Examination method	**Telephone**	**Telephone**	**Telephone**	**Telephone**	**Telephone**	**Telephone**

Contents: **1. Introduction** 2. Issues addressed/ instructions **3. Current condition** 4. Prognosis **5. Liability** 6. Causation	Page 2 **pp 3-4** p4 (3 lines) **pp 5-9** pp 9-10 **p 11 (3 paras)** pp 11-16	Page 2 **pp 3-4** p4 (3 lines) **pp 5-7** pp 8-9 **p 10 (3 paras)** pp 10-13	Page 2 **pp 3-4** p 5 (3 lines) **pp 6-9** pp 10-11 **pp 12-13** pp 14-18	Page 2 **pp 3-4** p 5 (3 lines) **pp 5-7** pp 8-9 **p 10 (3 paras)** pp 10-16	Page 2 **pp 3-4** p 4 (3 lines) **pp 5-10** pp 10-11 **pp 12-13** pp 13-19	Page 2 **pp 3-4** p 4 (3 lines) **pp 5-7** pp 8-9 **p 10 (3 paras)** pp 10-16
Appendices: **1. References** List of Abbreviations **2. Experience/ Qualifications** 3. Declaration/ Statement of Truth	**p 17** no **pp 18-31** pp 32-33	**p 14** no **pp 15-28** pp 29-31	**p 19** p 20 **p 21** pp 22-23	**p 17** no **no** pp 18-19	**p 20** no **no** pp 21-22	**p 17** no **pp 18-31** pp 32-33
Obviously common pages with barely any unique content	Appendices 17 of 33pp	Appendices 18 of 31pp	Appendices 4 of 23pp	Appendices 3 of 19pp	Appendices 3 of 22pp	Appendices 17 of 33pp
Expert Report section	**"HD" (Agur)**	**"CH" (Agur)**	**"CM" (Riad)**	**"CT" (Agur)**	**"HL" (Agur)**	**"CB" (Agur)**
Bespoke pages, more unique than not	Cover 1pg	Cover 1pg	Cover 1pg	Cover 1pg	Cover 1pg	Cover 1pg
	Intro and issues 2pp	Intro and issues 2pp	Intro and issues 2pp	Intro and issues 2pp	Intro and issues 2pp	Intro and issues 2pp
	Current cond. 4pp	Current cond. 3pp	Current cond. 3pp	Current cond. 3pp	Current cond. 5pp	Current cond. 3pp
Pages with considerable common features	Prognosis 2pp	Prognosis 2pp	[Prognosis 2pp]	Prognosis 2pp	Prognosis 2pp	Prognosis 2pp
	Liability 3 paras	Liability 2pp	[Liability 2pp]	Liability 3 paras	Liability 7 paras	Liability 3 paras
	Causation 6pp	Causation 4pp	Causation 5pp	Causation 6pp	Causation 7pp	Causation 6pp

[124] The following points arise. Taking "HD" as the prime example, although the Report has 33 numbered pages, 17 of them are obviously common, with barely any unique content. The details of Dr Agur's qualifications and experience are about as long as the entire Report (in fact, given the format, probably longer if one were to undertake a word count on them).

[125] Of what remains, only the cover sheet, intro and issues and current condition (in effect the history taken from Mrs "HD" over the telephone) are more unique than not. That totals 7 pages of the 33 (21%) and even within those 7 pages there is a lot of common ground or else straightforward admin material, e.g. Dr Agur's introductory paragraph, a list of documents provided and reviewed, and the issues to be addressed and statement of instruction.

[126] The meat of the dispute between the parties really lies within the last category, which I have termed as pages with considerable common features. Another term might have been, pages *without* more unique content than not. In "HD", these total approximately 7 pages out of 33, or 21% of the Report. Taking each of the components of that category in turn, I note the following.

Prognosis

[127] One might think the prognosis in these cases would be unique and there are certainly unique/bespoke features. However, there are multiple common features, for example:

- In every case it is stated that the chronic pain is permanent and that the Claimant will need to continue long term analgesia for life. Where the Claimant has undergone removal surgery, Dr Agur refers to the statistic that, as is the case with at least 50% of cases, removal surgery did not improve the Claimant's chronic pain ("HD", "CT", "CB"). Where the Claimant has not undergone removal surgery, Dr Agur recommends that she should, but adds that the success rate in improving chronic pain, will only be 50% ("HL"). In "CM" Mr Riad refers to further surgery but does not refer to the 50% chance of her chronic pain persisting thereafter; he simply says she will need pain relief for life. Her Schedule of Loss includes a pre-paid monthly prescription (for pain meds) for life. In "CH", Dr Agur refers to her two partial removal surgeries, scarring and pain: again 50% is not mentioned but pain meds for life, are included in her Schedules as well.

- In almost every case the Expert states that he expects an 80% or 90% chance of requiring Botox bladder injections every 6 to 12 months (hence the 9 months in the Schedules of Loss). The wording is for all practical purposes identical as is the wording of a follow-up paragraph regarding a 20% risk of developing a UTI. It does not appear that bladder Botox was foreseen for Ms "CH" by Dr Agur and yet her Schedule

3 claims **£112,470.00** by way of future losses for this treatment. In contrast, bladder Botox was foreseen for Ms "CT" but her third Schedule does not contain it, whereas her second Schedule contained a claim of **£80,490.00** for bladder Botox.

- In every case the Expert recommends Antimuscarinic medication at a cost of £1,300.00 per year. The pain and scarring are stated to have caused the Claimant permanent loss of sexual function for "HD", "CH", "CM" and "HL" but not for "CT" or "CB". Ms "CT" is a widow with serious health issues aside from the TVT-O surgery and Ms "CB" is married but was already being helped with personal care by her husband after several strokes left her requiring ongoing care and assistance.

[128] Obviously, the above indicate some personalisation across the 'Prognosis' in the medical Reports and of course there is nothing sinister in there being a high degree of similarity even allowing for two separate Experts being involved. These ladies all had fairly similar prior histories/symptoms leading to them being recommended for TVT or TOT surgery, and all alleged fairly similar post-operation sequelae leading to their claims against the Defendant. Even something as specific as 'drain-pipe urethra' gets multiple mentions but that just suggests that multiple Cs could be at risk of developing it after a repeat continence procedure ("HD", "CT", "HL", "CB").

Liability

[129] In four of the six Reports, Dr Agur sets out his opinion on Liability in three almost identical paragraphs. He states that he has read and understood the Letter of Claim and what it says about consent pursuant to *Montgomery* and *Chester*; he refers to the GMC Consent Guidance [2008] and then asserts that, in his expert opinion, the clinical team 'clearly' did not comply with this guidance and therefore, and in his expert opinion, in breach of their duty of care, the clinical team did not provide (Ms "HD", Ms "CH", Ms "CT", Ms "CB") with adequate information by way of setting out, explaining and discussing with her all the risks of, and all the alternative treatment options available to her rather than, TVT, TVT-O or TOT surgery.

[130] In his fifth Report ("HL"), Dr Agur again sets out the three standard paragraphs but adds to them the national standard of clinical practice taken from IPG262 NICE 2008, which suggested that evidence on the safety and efficacy of this type of surgery was inadequate, and that it should only be

performed within the context of a Research Study; he adds that he found no evidence that she had signed a separate consent form for this surgery to be performed within such a context. He adds that the specific TOT used in that case had not yet been evaluated in clinical trials, which the clinical team had a duty to inform her.

[131] In his Report ("CM"), Mr Riad goes into rather more detail; he refers to her mild SUI and to a Urodynamic Study on 13 January 2010 and to pelvic floor exercises undertaken by her following delivery of her child in 1990 and to the fact (taken from her medical records) that she was neither offered nor received supervised pelvic floor exercises for mild SUI. In his view, offering her TVT Surgery instead, fell below the acceptable standard of care: he refers to NICE 2006 to assert that pelvic floor exercises for at least 3 to 6 months, should have been tried, and that the failure to offer that, or Duloxetine, or a continence vaginal pessary, meant that her care fell below an acceptable standard. He goes on to address flaws in the Consent Form (not least that it was signed on the day of the operation) and to assert that no information leaflet was provided. He deals with a bladder perforation that occurred and went undiagnosed. He then gives the three standard paragraphs more or less exactly as Dr Agur did.

[132] The contrast between Mr Riad's and Dr Agur's Reports on Liability is striking. On four out of five Reports, Dr Agur states that he understands the law, he understands what the clinical team were supposed to do and says that they 'clearly' did not do it. However, this is presented as a bald statement; he has the Medical Records but does not refer to them or give the relevant extracts to show how the clinical team 'clearly' did not do what was required. In his fifth Report he goes into a little extra detail but does not really get into the Medical Records on Liability.

[133] Looking for example at DAC Beachcroft's letter of 21 May 2020 to Fortitude Law on "HD", they say, *"...we have provided you with a copy of the patient information leaflet which was given to the Claimant. You have indicated that the Claimant denies receiving this. The patient information leaflet box on the consent form has been ticked, which is contemporaneous evidence that a PIL was given. We also have witness evidence which confirms that the leaflet (the specific version forwarded to you) was given to the Claimant. It is a matter for the Court to decide whose evidence is preferred…the factual assertions raised in respect of risks, benefits and complications discussed and consent given are noted and will be addressed in witness evidence…"*

[134] There is more in similar vein regarding known risks in 2014, one consent form for both procedures, severity of symptoms pre-injury based upon contemporaneous records, the viability of other treatments that the Claimant alleged should have been tried et cetera. There is obviously a significant

dispute on the facts, between the Claimant and the Defendant, as to what the Claimant was told or provided with by the Defendant in the way of advice, alternatives to surgery and printed materials, yet all that Dr Agur has to say is that the Defendant 'clearly' failed to comply with the guidance, without anything cogent to show that he weighed the contemporaneous evidence in the Medical Records against the history given to him over the telephone, and preferred the latter for [list of reasons]. That is a common, and worrying, theme in his Reports.

Causation

[135] Dr Agur and Mr Riad split this into Clinical Causation and Factual Causation and it is fair to say that across these pages there is bespoke content, but there is understandably a lot of common content as well. For example, under Clinical Causation a near-identical paragraph dealing with stand-alone chronic pain and other neurological pain conditions due to nerve damage appears in "HD", "CH", "CM" (even though that Report was by Mr Riad), "CT", "HL" and "CB". However, there is then an explanation of how the chronic pain and other symptoms (such as loss of sexual function, incontinence and UTIs) can be linked to the specific surgery undergone by the Claimant.

[136] Under Factual Causation in "HD" Dr Agur again refers to stand-alone chronic pain, as well as the 2006 NICE Guideline, a 2007 systematic review of the literature by the Birmingham team (Latthe et al), an FDA mesh warning in 2008, the 2009 Cochrane systematic review, a 2010 landmark study by Richter et al, a 2010 study by Cholhan et al, a 2011 Leicester Study, a study by Freeman et al also in 2011, the York Report commissioned by the MHRA, a 2018 systematic review and meta-analysis from the Cochrane Collaboration (Dumoulin et al), a 2013 systematic review and meta-analysis (Li et al), a 2010 large randomised trial (Richter et al – this appears to be the 'landmark study' above referred-to), and a 2019 study by Ong et al.

[137] Each of these has a paragraph devoted to it, with 13 paragraphs in all; they all appear in "HL" as well. 12 of them appear in "CT" (Cholhan is absent), 9 appear in "CM" (Cholhan and the 2011 Leicester and Freeman studies are missing), 8 appear in "CB" and 6 in "CH". Cholhan dealt with dyspareunia, pain before, during or after sex, so its absence from "CT" and "CB" makes sense but its absence from "CH" and "CM", both of whom were said to have ongoing loss of sexual function, is harder to understand. In any event the basic point is that there is a great deal of the same content across all 6 Reports under this heading.

[138] Other paragraphs explain how these various studies impact upon the Claimant's claim; again, there are many common paragraphs across all 6 Reports including that of Mr Riad on "CM". In "HD"

these include a paragraph stating ('For the avoidance of any doubt') that synthetic mesh devices are designed to treat only SUI symptoms; this also appears in "CH" and "CT". There is a paragraph referring to the likely outcome had all the risks of surgery been pointed out, explained to and discussed with the Claimant; that paragraph appears in all 6 Reports.

[139] There is a paragraph referring to the outcome had the Claimant received non-surgical treatment; that appears in 5 out of 6 Reports but each is tailored to list the specific non-surgical treatment(s) relied upon. There is a paragraph regarding the outcome had the Claimant received the original, well-established non-mesh native tissue surgery e.g. colposuspension or autologous fascial sling; that is again present in 5 out of the 6 Reports.

[140] There is a paragraph explaining the lower risk of adverse outcomes in native tissue as compared to synthetic mesh implantation, which appears in all 6 Reports. This leads to an odd result in that the reference to a better outcome from native tissue surgery appears in the Report on "CB", but the paragraph suggesting that she should have undergone colposuspension or autologous fascial sling surgery, does not. It does look like another failure to adapt a precedent.

[141] There is a paragraph referring to the risks of stand-alone chronic debilitating pain and other adverse sequelae being absent from non-mesh procedures or treatments; that appears in all 6 Reports (it is part of another paragraph in "CT" and interestingly appears to have been cut and pasted into that Report as it has come out in a different point size). Finally, there is a paragraph referring to the relatively lower success rate versus the lack of a causal link between urethral bulking agent injections and stand-alone chronic pain, nerve damage, pain, chronic and recurrent UTIs or OAB. That again appears in all 6 Reports.

[142] There is absolutely nothing sinister about this, for the reasons already given. However, it does mean that in "HD" (for example) of 27 separate paragraphs or sub-paragraphs under the heading of, "Factual Causation" 20 are held in common with at least some other Reports; "HL" has 19, "CT" 17, "CM" 15, "CH" 13 and "CB" 12 such paragraphs. It is clear that the genuinely unique content in each Report is no more than a handful of pages.

Conclusion

[143] What, if anything, does all of this mean? I refer to the Point of Dispute ('PoD') on Dr Agur's fee in "HD" in which it is stated that the evidence was not complicated and the expert is routinely

instructed by Fortitude Law in these cases. The assertion (within the PoD) that the expert has not highlighted inconsistencies between the Claimant's history and what is in the Medical Records from the time, is borne out by what I have seen. I note the assertion (within the PoD) that the Mediator raised those issues with the Claimant and that the Claimant appeared to have no idea this would come up, but I have not seen any evidence of that at present and so I have not factored it into this Judgment although if borne out it might be relevant to Conduct matters in due course.

[144] Dr Agur's Reports, in particular on Liability, do not engage with the Medical Records and any problems they may pose for these cases going forward. Whilst there is such a thing as a Claimant-minded Expert versus a Defendant-minded Expert, one would expect Dr Agur even as a Claimant-minded Expert, to fulfil his duty to the Court, and put the Claimant herself on notice, of such matters rather than blandly saying the Defendant is 'clearly' liable. The Reply refers to Dr Agur having received 1,265 pp of Medical Records but that figure does not add anything to the issue; Dr Agur has not delved into the records in any great depth as far as his Report (certainly – but not only – on Liability) shows.

[145] As to the failure to provide a breakdown between Dr Agur and the agency (Speed Medical) I note that in "HD" the Reply does not state that a breakdown has been sought. I find it curious that Speed Medical's invoice has space on it for an accident date and a vehicle registration number, which (together with the Company's name) suggests that this is an agency more used to Reports in Road Traffic Accident cases. Even so, I do not think that *Stringer v Copley* assists the Defendant on the facts in this case.

[146] What does assist the Defendant, and which came to the fore during the Hearing (although it was referred to in the PoD) is the fact that Dr Agur does so many Reports for Fortitude Law and that there is so much common material across not only his Reports but also the Report of Mr Riad in "CM". There was some reference to the way in which Defence lawyers (whether Counsel or Solicitors) are paid well below market rates because of the bulk nature of the work that they do. In the above table it is noted that between 12 August 2020 (when he took a medical history from both Ms "HD" and Ms "CH" over the telephone) and 14 January 2021 (when the Report on Ms "CT" was produced) Dr Agur produced 5 Reports which contain a preponderance of common/precedent material. I do not have any information upon how many more Reports he has produced, during that period or overall, but the sample I have seen is sufficient to enable me to conclude that the fee charged for each of them, is too high. With this level of involvement/instruction and making use of a precedent as he clearly has (and as was clearly reasonable to have done) Dr Agur ought to have been

able to make some economies of scale. I do not see that Dr Agur's fee in "HD" reflects that very obvious fact.

[147] As to the Reply stating that, *"The evolution of attacks on medical agencies obviously (and rightly) requires medical evidence to be subject to robust tests, therefore it is vitally important that it is done thoroughly and properly after a discussion with the Claimant,"* that does not address the issues raised in the PoD. It is a statement of what should happen in every case rather than an explanation of how Dr Agur's Report in "HD" meets that standard. For the reasons above referred-to I think some of the Defendant's criticisms of Dr Agur's Report have been borne out.

[148] I do not think that the £1,500.00 offered by the Defendant is sufficient, that is more the level of fee I would expect for an Orthopaedic Report. However, for the Report I have seen in "HD" I would not allow the 'as drawn' amount nor the £3,500.00 offered by the Claimant in the Reply either. Instead, I would allow £3,000.00 plus VAT. By way of indication only, I would anticipate reductions to Dr Agur's fees in the other cases seen by me.

[149] As to Mr Riad's fee, I am not sure how he came to have the same precedent letter as Dr Agur; given that I find that using a precedent in cases with so many similar features was a reasonable and proportionate way to proceed I do not think that it matters, save to say that as with Dr Agur I would expect that precedent to generate a significant saving. That will be a matter for argument when the Preliminary Issues in "CM" are addressed[6].

Misconduct under CPR 44.11

[150] So far as Misconduct under CPR 44.11 is concerned, that is a matter for another day. The payslips bear out what the Claimant was claiming and it took quite strenuous efforts by Fortitude Law to get hold of the Claimant's OH and employment records. Her Employer (North Devon District Hospital) is, if not one and the same as, certainly closely linked to the Defendant (Northern Devon NHS Healthcare Trust). No doubt the parties will develop arguments upon this issue in due course.

[6] At the Hearing on 17 April 2023, Dr Agur and Dr Riad's fees were not raised; I take this to mean that the £3,000.00 allowed on "HD" has been accepted by the parties on the remaining 5 cases. If not that should be clarified before this Judgment is handed down.

[151] I agree that it is premature to argue Conduct until the preliminary issues in all 6 cases have been decided. Hopefully the considerable work done by everyone up to now, will enable that to be done at the next Hearing[7].

Judgment on Hourly Rates

[152] I gave my Judgment on Hourly Rates ex tempore during one of the Hearings, but Ms McDonald has suggested that, if this Judgment is to be of maximum benefit as a 'template' for future ADR or, failing that, Assessments on costs (bearing in mind that Fortitude Law represented several hundred Claimants) then the Hourly Rates should be incorporated somehow. Ms McDonald sent (on 6 May 2023) an email transcribing her own note of my decision, and Mr Dunne (who was copied in) has not objected to its contents. The note from Ms McDonald accords with my own recollection; this part of the Hearing could be transcribed if there were any dispute but given Mr Dunne's silence (which implies no criticism of him whatsoever) I think that is unlikely. As such I think the fairest and most transparent way forward, is to copy and paste the contents of Ms McDonald's note, to which I have added several footnotes, as follows:

'*This is my judgment on hourly rates applicable to "HD" but others likely to be similar.*
Reasonable to use Band 1.
The Reply concedes to £325 for ***Grade A***
Do not think a Wraith[8] argument was made – reasonable to instruct Band 1.
Extent to which lay clients don't have a clue explains a lot.[9]
Still think rates are on high side. Run from home office set up. Seek above rates so something to be said on rates point. Some overheads.
Complexity & 7 pillars[10].
Look at 2010 rates & 2021[11] rates. Mood of court towards sliding scale.

[7] Subject to the above footnote, it was, and I am grateful to the parties for their assistance.
[8] *Wraith v Sheffield Forgemasters Limited* [1998] 1 All ER 82
[9] I have included this as it was in Ms McDonald's note; I would have to see a transcript for the full context but am certain any reference to the Claimants not having a clue (about hourly rates) would not have been intended as a criticism of them. They were given a retainer containing hourly rates to which, as lay people, they could not be expected to apply any legal knowledge.
[10] The rules set out in CPR 44.4 (3) have come to be known as the pillars of wisdom; the Court will take into consideration: *"the conduct of all parties,… the amount or value of any money or property involved, the importance of the matter to all the parties, the particular complexity of the matter or the difficulty or novelty of the questions raised, the skill, effort, specialised knowledge and responsibility involved, the time spent on the case, the place where and the circumstances in which work or any part of it was done…"* That makes seven; the eighth *"…the receiving party's last approved or agreed budget"* is not relevant on the facts in the cases covered by this Judgment.
[11] Guideline Hourly Rates for Solicitors in England and Wales, set in 2010, were updated in 2021; case law suggests that the rates towards the end of that period, should start approaching the 2021 rates rather than being tethered to the 2010 rates.

By 2021 rates came in Ophen and PLK[12]. Not a case guideline rates applicable. RTA, slip & trip, not most complex or valuable clinical negligence cases. There is a degree of specialisation claimed. Rates allowed on basis appropriate clinical negligence Band 1 and a degree of work by Grade A.

Grade A	***£285***
Grade B	***£250***
Grade D	***£120***
Costs Lawyer	***£120***
Costs Draftsman	***£120'***

[12] *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC Civ 2423 and *PLK and Others* [2020] EWHC B28 (Costs) are two such cases. Both allowed rates significantly higher than the 2010 GHR that were, then, still in use.