Neutral Citation Number: [2022] EWHC 607 (QB)

Case No: H90LS740

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY

The Combined Court Centre,
Oxford Row Leeds

Date: 11/04/2022

Before

His Honour Judge Gosnell sitting as a Judge of the High Court

- -

Between:

Rachael Coote **Claimant**
(by Ann Coote her mother and Litigation Friend)

- and -

First Defendant

Augustus Ullstein QC

-and-

Hodge Jones and Allen Solicitors Limited

Second Defendant

- -
- -

Mr Michael Redfern QC and Mr David Berkley QC (instructed by Blacks Solicitors LLP) for the Claimant
Ms Leigh-Ann Mulcahy QC and Ms Laurentia de Bruyn (instructed by DWF Law LLP) for the First Defendant
Mr Daniel Shapiro QC and Ms Nicola Atkins (instructed by Reynolds Porter Chamberlain LLP) for the Second Defendant

Hearing dates: 8th and 9th March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE GOSNELL

Hearing bundle references are by bundle letter followed by page number

Draft Judgment submitted to counsel for approval on 17th March 2022

His Honour Judge Gosnell:

Introduction

1. The Claimant brings these proceedings through her litigation friend for professional negligence against her former Leading Counsel (the First Defendant) and Solicitors (the Second Defendant). The Defendants jointly allege that the claim has no real prospects of success and so they both applied to the court for an order that the claim be either struck out pursuant to CPR 3.4(2)(a) or (b) or for reverse summary judgment under CPR 24.2(a)(i) and (b). I heard the applications over a two-day period with the benefit of helpful oral and written submissions from Leading Counsel for all three parties at the conclusion of which I indicated that I would reserve judgment. The background to the claim is both sad and complicated.

2. Rachael Coote was born on 31st July 1987 after a relatively uneventful delivery. On 22nd February 1989 her mother Ann (in common with many other parents) arranged for her to have the MMR vaccine. On 3rd March 1989 she was admitted to hospital with febrile convulsions and discharged shortly afterwards. She was further admitted to hospital on 8th November 1989 with further febrile convulsions. In approximately July 1990 she was diagnosed with epilepsy and developmental regression which has proved to be a lifelong disability. Understandably, Ann was concerned about how her daughter came to suffer from this disability and wondered if it was connected with the MMR vaccine. There was considerable concern at the time about the possible side effects of this vaccine subsequently fuelled in part by the publication of a paper in the Lancet in 1998 which suggested a possible link between the MMR vaccine and the onset of autism.

3. Ann instructed a solicitor, Richard Barr, to act on her behalf and Rachael became one of the Claimants in a group action which sought to make claims against the manufacturers of the vaccine. Rachael had been given the Pluserix vaccine which was manufactured by SmithKline Beecham PLC ("SKB"). Richard Barr changed firms and became a partner in the Second Defendant in May 1998. The Claimant issued a writ against SKB on 11th January 1999 in the (with hindsight) mistaken belief that this would protect her position for limitation purposes. The group litigation then ground on for several years facing a number of obstacles which proved difficult, if not impossible to overcome. Mr Justice Bell determined that the alleged link between MMR and Inflammatory Bowel Disorder and autism should be tried as a preliminary issue in 2001. The Claimants were dealt a fatal blow when it emerged that ten of the twelve authors of the original 1998 Lancet paper retracted the interpretation placed by the lead author Dr Andrew Wakefield and his research methods were subsequently discredited. Legal Aid funding was removed from the MMR Group Action for these claims as a result.

4. The Claimant's claim was however different as she was claiming a link between the MMR vaccine and epilepsy. After some difficulties legal aid funding was re-instated for non-autism Claimants including Rachael. The solicitors acting for these Claimants attempted to obtain expert evidence to prove the causal relationship between the MMR vaccine and epilepsy but were initially unsuccessful. This caused legal aid funding to be withdrawn again. Anne had to appeal this decision and she was surprisingly successful against the odds and legal aid was restored limited to the stage in proceedings where SKB would serve a defence. Anne's solicitors were eventually able to obtain the report of an expert witness who would support the link between the MMR vaccine and

the development of her epilepsy, Dr Marcel Kinsbourne, and this enabled Particulars of Claim to be drafted and served in July 2007. On 13th December 2007 the Solicitors on behalf of SKB served a defence denying that there could be any causal link between the MMR vaccine and the Claimant's epilepsy condition but also contending that the claim was statute barred for limitation.

5. It would appear (and I put it this way as it is not conceded by the Defendants in the professional negligence litigation) that the Defendants had believed that the ten year limitation period under the Consumer Protection Act 1987 ran from the date that the vaccine had been administered to the patient. It was subsequently discovered that the limitation period ran from the date the vaccine was shipped from the factory, in this case on 14th December 1988. This meant that the writ had been issued out of time and there was no provision to permit the extension of time or any suspension of the limitation period based on the Claimant's disability. The allegation of negligence in the professional negligence proceedings is therefore that the Defendants failed to advise the Claimant accurately about the limitation period under the Consumer Protection Act 1987 with the result that her claim against SKB was issued out of time and therefore doomed to failure. She accepted advice from the Second Defendant to discontinue her claim which she did on 17th January 2008. Her claim against both Defendants is for damages to compensate her for the value of the claim she would have been able to pursue against SKB if she had been competently advised.

The Defendants' applications

6. These proceedings were issued on 31st March 2021 and a claim form and Particulars of Claim were served on both Defendants. Orders were made on 4th May and 19th May 2021 extending time for the Defendants to serve their defences. Rather than serve their defences, the First Defendant issued his application on 15th June 2021 and the Second Defendant issued its application on 16th June 2021. Due to difficulties with counsel's availability the application could not be listed for hearing until 8th March 2022. The First Defendant did serve a draft defence on 10th August 2021 denying liability.

7. The First Defendant relies on the evidence of John Bennett who has filed and served two witness statements. The Second Defendant relies on the evidence of Timothy Bull who has also filed and served two witness statements. The Claimant relies on the evidence of Anne Coote and Luke Patel in reply. The statements exhibit several documents which form part of the overall evidence in the application which ran to five lever arch files. I have read and considered each of the statements together with those documents which were referred to by counsel at the hearing.

The submissions made by the Defendants

8. These were partly contained in the evidence I read, the skeleton arguments of counsel and their oral submissions. I intend to summarise them as succinctly as I can but if I fail to mention any particular point, it does not mean that I did not hear and consider it as part of my overall assessment. Both Defendants deny breach of duty, but concede that this is a triable issue and accordingly accept that the court may assume that breach of duty is proved for the purposes of this application only.

9. The Defendants submit that the Claimant cannot prove, on the balance of probabilities that, had she received correct advice about the limitation period, she would have proceeded with her claim to a point at which she would have recovered some damages by way of settlement or judgment because:

> (a) The Claimant would not have had funding to pursue her claim against SKB after service of the defence by SKB in December 2007. She only had legal aid up to that point. Legal aid (which required the prospects of success at least to exceed 50%) would not have been extended without additional supportive expert evidence on causation, which the Claimant had not and could not have obtained. The evidence establishes, and the Claimant expressly admits, that the Claimant could only proceed with her claim if she had legal aid as she could not privately fund it;
>
> (b) The Claimant would not have established causation against SKB by expert evidence (indeed, she still cannot do so). The only supportive medical evidence that the Claimant ever obtained was from Dr Marcel Kinsbourne, who was completely discredited as an expert in the USA Autism Omnibus Proceedings in 2009. All other medical evidence obtained on behalf of the Claimant did not support causation. In contrast, the First Defendant has served expert reports from a leading neurologist and neuroradiologist which reflect the evidence which SKB would have been obtained in the original litigation had it ever progressed to the point of service of expert evidence confirming that there was zero chance that the vaccination could have caused the Claimant's epilepsy and developmental delay;
>
> (c) The Claimant would not have obtained a settlement from SKB. SKB made clear at the time that they would not settle any claims and were ready to adduce evidence from international leading experts in every relevant discipline to contest causation at trial. No MMR claimant has ever succeeded in their claims. The Claimant would have been in no different position to those claimants, especially given her poor prospects of success in establishing causation against SKB;
>
> (d) Further or alternatively, the Claimant cannot show that she has lost any real and substantial chance of recovering damages as a result of issuing her claim out of time because she had no real prospect of being able to prove defectiveness and/or that her epilepsy and developmental delay had been caused by administration of the MMR vaccine.

10. Extensive legal submissions were made by both parties. There was a measure of agreement about the appropriate test when evaluating the loss of a chance in professional negligence cases but one significant difference in approach. The legal test for dealing with an application for summary judgment was effectively agreed although both sides encouraged a particular outcome.

11. It is accepted that in a professional negligence claim where the claimant alleges that there has been the loss of an opportunity to bring a claim to a successful conclusion the Claimant must establish that the Defendants' breach caused her loss on the balance of probabilities. The Claimant must show that she has "*lost some right of value, some chose in action of reality and substance*"[1]. It is only if the Claimant has lost something of value that the court will proceed to evaluate in percentage terms the full value of the claim that was lost. The Defendants emphasis the importance of distinguishing issues of causation from assessment of quantum. Since the decision of the Supreme Court in *Perry v Raleys Solicitors* [2020] AC 352 it has been accepted that the Claimant must prove the causation element of the claim on the balance of probabilities. If the Claimant satisfies the court in relation to this first stage then the court must evaluate the financial advantage that has been proved to have been lost by assessment of the loss of a chance.

12. The additional gloss placed upon this so far unchallenged summary of the law by the Defendants in this case arises as a consequence of the Claimant having to pursue the claim against SKB with the benefit of legal aid coupled with the understandable concession that without legal aid she would have been unable to properly pursue the claim further. The Defendants submit that the Claimant has to prove, on the balance of probabilities, not only that she would have issued proceedings in time against SKB had she had competent advice, but also that she "*would actually have pursued the action to the point where she would, subject to court's assessment of the prospects, have recovered something*"[2].

13. The Defendants submit that the Claimant needs to prove she would have converted the competent advice into "*some financial (or financially measurable) advantage*"[3]. This would involve consideration of what the Claimant would have done and with what funding. The Claimant would effectively have to prove that she would have continued to attract the support of the Legal Services Commission to the point where she would have succeeded in her claim to some extent either by court verdict or settlement. Given that the Legal Services Commission are likely only to have given their support to a claimant with at least a 50% chance of success the Defendants contend that the Claimant cannot prove this and has no real prospect of convincing the court on this application that she could do so at trial.

14. Another dispute between the parties relates to the admissibility of what is known as "after-coming" evidence. This is evidence which did not exist at the time when the original trial was likely to have taken place, namely in or about 2009. Normally such evidence should only be taken into account if it would have been available at the time of the notional trial or settlement unless there are exceptional circumstances. The evidence in question is the expert evidence of Professor Walker and Dr Jarosz which, the Defendants submit, merely reflects the evidence which SKB would have deployed in order to meet the Claimant's claim against it.

15. The Defendants also submit that there are no compelling reasons why a trial should be heard if the Claimant is found to have had no real prospects of success against them arising from the fact that the original litigation would also have failed.

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[1] *Kitchen v Royal Air Force Association* [1958] 1 WLR 575
[2] *Harrison v Bloom Camillin (No2)* [2000] Lloyds Rep. PN 89
[3] *Perry v Raleys Solicitors* [2020] AC 353 par 25

16. As an alternative, the Defendants submit that the claim should be struck out because the Claimant's Particulars of Claim fail to plead causation adequately or at all, despite numerous attempts being made to persuade the Claimant's solicitors to adequately set out her case on causation. It is also contended that the failure to properly plead causation some ten years after the Claimant's solicitors were first instructed amounts to an abuse of the court's process.

The submissions made on behalf of the Claimant

17. The Claimant submits that she did lose something of value when she lost the opportunity to pursue her claim against SKB. Her prospects of success were more than fanciful. The Claimant relies on the fact that she was vaccinated with the Pluserix product which contained the Urabe strain mumps vaccine virus. The Committee on Safety of Medicines advised this strain was associated with an unacceptable risk of aseptic meningitis and it was withdrawn from use in the UK in 1992 due to this unacceptable risk.

18. The Claimant relies on the fact that she had her first seizure on 3rd March 1989 only nine days after she was vaccinated and that it is likely she suffered periods of hypoxia / anoxia in this episode. In the Claimant's skeleton argument it was alleged that this was a meningoencephalitic illness although the basis for this assertion is not clear. The Claimant alleges that the Second Defendant had a duty to obtain medical evidence to establish a biologically plausible mechanism explaining causation of the Claimant's injury supported by epidemiology.

19. The Claimant relies on the expert medical evidence of Dr Marcel Kinsbourne, consultant paediatric neurologist, who opined that the MMR vaccine was a biologically plausible cause of seizures. He concluded that in Rachael's case it was the vaccination which caused her intractable mixed epilepsy and that her learning difficulties were the sequelae of a vaccine related epilepsy. Mr Redfern QC in his oral submissions relied on statements which had been made by employees of the Second Defendant praising the expertise and suitability of Dr Kinsbourne to act as an expert in the underlying claim. He submitted in the light of these statements it ill-behoved the Second Defendant now to question his expertise or competence.

20. The Claimant relies on four epidemiological studies which connected aseptic meningitis as a consequence of the mumps element of the MMR vaccination. Although the Second Defendant initially instructed a Dr Green, paediatric neurologist, to report the Claimant relies on the fact that the Second Defendant subsequently described him as "*discredited"* and contrasted his reputation with that of Dr Kinsbourne. The Claimant also relied on the fact that leading and junior counsel instructed by the Second Defendant assessed the Claimant's prospects of success in the original litigation at 60%. The Claimant denies that Dr Kinsbourne was discredited in the American litigation. He may have been criticised and another expert's evidence preferred but this is a normal consequence of adversarial litigation it was submitted.

21. In his oral submissions Mr Redfern QC appeared to question whether the medical history had been fully investigated, in particular for how long Rachael was without oxygen on 3rd March 1989 and whether she had a further seizure in June 1989 as certain of the medical notes seemed to suggest. He suggested that it would be wrong to speculate what evidence SKB may have relied on in defence of the claim and that the

court should be limited to analysis of the expert evidence which was actually in existence before the anticipated trial date of 2009 and not any after-coming expert evidence obtained solely for the purposes of the professional negligence litigation. It was submitted that after-coming evidence can only be admissible if it is fact specific and uncontested. The report and findings of Dr. Kinsbourne were referred to and recommended to the court as credible expert evidence that should not be dismissed without a proper trial of the issues.

22. Mr Berkley QC for the Claimant was careful to caution the court about granting summary judgment to the Defendants at this early stage in the proceedings when disclosure has not taken place and no evidence has been exchanged. The court was warned not to engage in a "mini-trial". Although he gave the impression that the Claimant might rely on further evidence it was not clear what form that evidence might take.

23. The court was commended to consider the four principles set out by Lord Justice Simon Brown in *Mount Barker v Austin* [1998] P.N.L.R 493. This places a heavier burden on a Solicitor Defendant who seeks to prove that the underlying claim was valueless when they have failed to advise their client of the hopelessness of their case whilst acting for them in the litigation. It also may mean that the court will give a more generous assessment of the prospects of success than it may have done otherwise.

24. The Claimant also relies on the principle in *Armory v Delamirie* (1772) 1 Stra. 505 which raises an evidential, rebuttable presumption in favour of a Claimant where the Defendant is responsible for losing the chance of success. This should apply at each stage of the loss of a chance assessment.

25. The Claimant agrees with the Defendants that at trial the Judge will have to draw a clear distinction between causation of the loss of a chance and quantification of that loss. Where there is uncertainty as to what may have happened in a counter-factual situation it depends whose acts are in question. If there is uncertainty about what the Claimant would have done this is decided on the balance of probabilities, if it is about what a third party would have done then this is an assessment of the loss of a chance. In the Claimant's submission, the issue about whether the Legal Services Commission would have continued to support the Claimant throughout the litigation with SKB is a question about the acts of a third party which would mean that it would form part of the overall assessment of the chances of success of the litigation on a percentage basis. The Claimant conceded that some Judges appear to have accepted that a chance of success of 10% or less would not be treated as a loss of substance.

The relevant provisions of the Civil Procedure Rules

26. "*Grounds for summary judgment*

> ***24.2*** *The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if (a) it considers that –*
>
> *(i) that claimant has no real prospect of succeeding on the claim or issue; or*

> *(ii) that defendant has no real prospect of successfully defending the claim or issue; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial.*"

27. "*Power to strike out a statement of case*

> ***3.4***
>
> *(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.*
>
> *(2) The court may strike out a statement of case if it appears to the court –*
>
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*
>
> *(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or*
>
> *(c) that there has been a failure to comply with a rule, practice direction or court order.*"

The application of the test for summary judgment

28. Perhaps the most helpful summary of the correct approach to such applications is that set out by Mr Justice Lewison (as the then was) in *Easyair Ltd v Opal Telcom Ltd* [2009] EWHC 339 (Ch):

> "*The correct approach on applications by defendants is, in my judgment, as follows:*
>
> i*) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that*

> *there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
>
> *vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.*"

29. I was referred to this authority in some detail by counsel for the Claimant and have the guidance clearly in mind. I recognise that I am not conducting the trial of the claim and have no intention of misguidedly conducting a "mini-trial". The issue is whether the Claimant has a real prospect of success against these Defendants. Given the concessions made this comes down to an assessment of whether the Claimant would have had a real prospect of success against SKB in the underlying litigation. If her prospects of success

were, as the Defendants contend, nil or merely fanciful then the application should succeed. If she had any realistic prospect of success then it should be dismissed. Whilst I understand that proceedings have only just been issued, and that disclosure and exchange of evidence has not taken place, I accept the force of the Defendants' submission that the Claimant instructed her solicitors some ten years ago and that the five lever arch files of documents which were filed in relation to this application probably represent all the relevant documents in this case. The narrow issue is whether the Claimant had a real prospect of proving that her epileptic condition was caused by the administration of the MMR vaccine in 1989 in the claim against SKB. The evidence that was, or may have been, available to both parties when the trial may have taken place in 2009 is again, probably contained in the documents filed for this hearing.

The relevant legal principles concerning causation and assessment of loss in professional negligence cases

30. I was addressed at some length about this issue by both Ms Mulcahy QC and Mr Berkley QC. There was considerable unanimity in their approach save for the one issue identified above. They both agreed that the modern history of the court's approach to this issue starts with *Kitchen v Royal Airforce Association* [1958] 1 WLR 563 where Lord Evershed opined as follows:

> "*In my judgment, what the court has to do (assuming that the plaintiff has established negligence) in such a case as the present, is to determine what the plaintiff has by that negligence lost. The question is, has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can."*

31. This suggests a two-stage test, first determining whether the Claimant has lost some right of value and then making an assessment of what the loss of that right is worth. This argument was developed further in *Allied Maples Group Ltd v Simmons & Simmons* [1995] WLR 1602. The following selected passages reflect the conclusions of Lord Justice Stuart-Smith:

> *"In these circumstances, where the plaintiffs' loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.*
>
> *(1) What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists of some act or misfeasance, or an omission or non-feasance……*
>
> *(2) If the defendant's negligence consists of an omission, for example to provide proper equipment, given proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the*

> *hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given? This can only be determined from all the circumstances. The plaintiffs own evidence that he would have acted to obtain the benefit or avoid the risk, while important ,may not be believed by the judge, especially if there is compelling evidence that he would not…. Although the question is a hypothetical one, it is well established that the plaintiff must prove on the balance of probability that he would have taken action to obtain the benefit or avoid the risk….*
>
> *(3) In many cases the plaintiffs loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability, as Mr. Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages? Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr. Jackson's submission is wrong and the second alternative is correct*."

31. This authority also suggests a two-stage test, in the first stage, the issue of causation effectively to be proved by the Claimant is on the balance of probability but in the second stage quantum is proved by the assessment of loss of a chance. So the decision in *Allied Maples* above represented the genesis of the dividing line between those issues which the Claimant must prove, on the balance of probability, and those which may be assessed on the basis of the evaluation of a lost chance. This was confirmed by the Supreme Court in *Perry v Raleys Solicitors* [2019] UKSC 5 in the leading speech given by Lord Briggs:

> "*20. For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation.*"

32. The issue in *Perry* concerned whether, in the Solicitors negligence claim it was appropriate to have a full trial of the issue of causation where it was disputed between the parties. This question in *Perry* was answered in the affirmative. The practical effect of that decision was, according to Lord Briggs:

> "*25. Applied to the present case, the principle that the client must prove on the balance of probabilities that he would have taken any necessary steps required of him to convert the receipt of competent advice into some financial (or financially measurable) advantage to him means that Mr Perry needed to prove that, properly advised by Raleys, he would have made a claim to a Services Award under the Scheme within time. To this the judge added that it would have to have been an honest claim.*"

Ms Mulcahy QC for the First Defendant in this case submits that the phrase "*some financial (or financially measurable) advantage*" means that the Claimant must prove at trial not only that she would have issued proceedings against SKB but also that she would have got to the stage of achieving a judgment or settlement.

33. Whilst I accept that is a legitimate submission based on the wording of that paragraph of the judgment, it is not really consistent, in my assessment, with the analysis which Lord Briggs engages in, later in the judgment, looking at what approach courts have taken in other cases to trying issues of causation compared with assessments of loss of a chance. One such case was *Hanif v Middleweeks* [2000] Lloyds Rep. PN 920 which Lord Briggs summarised as follows:

> "*35. The Court of Appeal, and counsel for Mr Perry in his submissions to this court, placed Hanif v Middleweeks (supra) squarely in the forefront of their criticism of the judge in conducting what they described as a trial within a trial. It was a professional negligence action in which the client was the co-owner of a nightclub which had been destroyed by fire. The insurers had issued proceedings for a declaration of non-liability, on the ground (among others) that the fire had been started deliberately by Mr Hanif's co-owner. Mr Hanif counterclaimed for an indemnity under the insurance policy, but his counterclaim was struck out for want of prosecution because of the negligence of the defendant solicitors. The trial judge had assessed the prospects of Mr Hanif resisting the insurers' allegation of arson by his co-owner at 25% and the Court of Appeal, applying both the Allied Maples and Kitchen cases, held that he had been right to adopt a loss of chance approach, rather than to decide, in a trial within a trial, whether or not the fire had been started deliberately. A submission that, in the light of the 25% finding, the fire probably had been deliberate, so that the claim should have been dismissed as being contrary to public policy was rejected, not least because it had been neither pleaded nor argued in the court below.*
>
> *36. The Hanif case did not, therefore, involve any question about what the client would have done had he obtained competent advice. He had already given instructions for the making of the counterclaim, and it would have gone to trial but for the solicitors' negligence in allowing it to be struck out for want of prosecution. There was, therefore, nothing which Mr Hanif had*

> *to prove, on the balance of probabilities, that he would have done in order to have benefitted from a competent discharge by the solicitors of their duty of care. The questions relevant to the lost counterclaim therefore fell squarely within the category identified in the Allied Maples case as calling for an evaluation of a lost chance, rather than proof upon the balance of probabilities…..*
>
> *37. The case is therefore a conventional example of the correct application of the dividing line established in the Allied Maples case between those matters to be proved by the client on the balance of probabilities, and those to be addressed by reference to the assessment of the value of the lost opportunity. But it does not begin to establish some principle that it is always wrong for the court to try an issue relevant to causation in a professional negligence case, merely because that same issue would have fallen for determination in the trial of the underlying claim, lost due to the solicitors' negligence. The question whether any given issue should or should not be tried in the negligence proceedings depends upon whether it is one upon which the client must prove his case on the balance of probabilities, or only one which should be subjected to the valuation of a lost chance. Treating the question as determined by asking whether the same issue would fall to be tried in the lost claim puts the cart before the horse."*

34. During the hearing I expressed to Ms Mulcahy QC that I felt that this was a significant example of the *Allies Maples* principle in action. At the time when the negligent conduct occurred the Defendant had already issued his counterclaim and so he did not have to prove what he would have done if he had received competent representation. However, at that point in time, he only had a 25% prospect of success because it was likely that the court would find that his partner had actually started the fire. If the Defendants are right in their submissions in this case, I cannot see how it could be argued that Mr Hanif could have converted the receipt of competent advice into some financial or financially measurable advantage if that is taken to mean success at trial or by financial settlement. The Judge actually found that he was likely to lose the trial and it does not seem likely that the insurers would have settled a claim they believed they would win. A more likely interpretation is that the anticipated decision of the court was the action of a third party which in law should be assessed as the loss of a chance, rather than by proof on balance of probability.

35. Lord Briggs then chose a further example in *Sharif v Garrett and Co* [2002] 1 WLR 3118 to illustrate the same point, concluding :

> "*…. But the case is, like the Hanif case, another conventional application of the dividing line established in the Allied Maples case. The client had started his claim and needed to prove nothing about what he would have done, on the balance of probabilities, in order to have benefited from his solicitors' careful conduct of the proceedings.*"

The relevance of the fact that the Claimant could not have pursued her claim without the benefit of legal aid.

36. It is conceded in terms by the Claimant that she could not have pursued her claim against SKB without the benefit of legal aid. This is not surprising as product liability claims are habitually very expensive to run and pharmaceutical companies have deep pockets and are prepared to aggressively defend their reputations. This issue provides the Defendants with the high water mark in relation to their legal submissions in the form of a decision by Mr Justice Neuberger (as the then was) in *Harrison v Bloom Camillin* [2000] Lloyd's Rep. PN 89. This was factually a very complicated case with a myriad of issues, one of which was that the Claimants needed legal aid in order to pursue the claim against the original defendants. When Neuberger J dealt with the first part of the two-stage *Allied Maples* test he expressed it in the following way:

> "*As I see it, one must initially ask whether the claimant would, in fact, have proceeded with the action, had he not been deprived of the right to bring it. After all, one is concerned with the loss which the claimant has suffered and, for reasons I have given, this cannot, at least normally involve a market value exercise: generally it is only the claimant who could have brought the action, and, without his having done so, there would be no opportunity to recover damages. In my judgment, therefore, unless the point is conceded by the defendant in a particular case (and in most cases I suspect that it will be), the first question to be considered is whether the claimant would have actually have pursued the action to the point where he would, subject to the courts assessment of the prospects, have recovered something. Applying normal principles, it is for the claimant to satisfy the court that he would have pursued the action to that extent ,albeit only on the balance of probabilities. If the claimant fails at that point, that is the end of the matter. If he succeeds, it is necessary to turn to the second question, namely what would have happened if the Claimant pursued the action."*

37. The Defendants say that in the current claim the Claimant cannot show that, on the balance of probabilities she would have reached the stage where she could have said to have "*recovered something",* because she could not have satisfied the Legal Services Commission that she had at least a 50% chance of success and they would then have withdrawn funding, bringing the claim to a halt. The Claimant's counsel points out that this comment is *obiter* in so far as the core of the judgment is concerned and is not consistent with other decisions which draw the distinction first set out in *Allied Maples.*

38. A different approach was taken by Mr Justice Thomas (as he then was) in *Casey v Hugh James Jones and Jenkins* [1999] Lloyds LR 115. The claimant had a rather dubious claim against British Railways Board. The Legal Services Commission asked the claimant's solicitors to show cause why legal aid should not be discharged. It was alleged that they failed to do so and then did not advise the claimant to appeal against the decision to discharge his legal aid certificate. The Judge considered in turn what the claimant's chances of success were: in asking the Legal Services Commission to reconsider their decision; in an appeal against the refusal of legal aid; and in ultimate success at trial. He assessed each of these prospects on the basis of the loss of a chance,

reminding himself that chance in each case must be a real and substantial one as opposed to a speculative one. He found that there was no substantial chance that the claimant would succeed on any of the three hypothetical issues. Importantly however, he did not find that the claimant had to prove on balance of probability that he would have recovered something (as Mr Justice Neuberger had done in *Harrison).*

39. Ms Mulcahy QC sought to distinguish this case on the basis that the obtaining and maintenance of legal aid was actually what the case was about. This is only partially correct as the Judge also had to consider whether the underlying litigation would succeed. It was decided roughly contemporaneously with *Harrison* and in neither trial was the other case referred to. I agreed with counsel for both sides that the two cases cannot be successfully reconciled on principle.

40. Overall on this point of principle I prefer the submissions of the Claimant. The principle first set out in *Allied Maples* is easy to explain and straightforward to apply. If the issue is what the Claimant would have done if she had obtained competent advice, that is a causation issue which the Claimant has to prove on balance of probability. If the issue is what some third party would have done, like a contracting party, a court, a claims handling company or the Legal Services Commission this should be part of the overall broad brush assessment of the loss of chance. I believe that the Supreme Court have made this clear in *Perry* where the Claimant only had to prove that he would have made an honest services claim because he met the factual matrix for doing so. He did not have to prove in addition that he had reached the stage where he would have recovered something in addition.

41. This does not mean that the fact that the Claimant had, and required, legal aid to continue with the claim is irrelevant. I accept that the Claimant could not have continued the litigation without legal aid and I also accept that SKB had made it clear that they would not be negotiating any settlements. The fact that there is no evidence of a successful claim in the MMR litigation tends to support this. I am also aware that the Legal Services Commission did not normally continue to support claims where they concluded that the prospects of success were less than 50%. This would be the case both under the original system and under the later costs / benefit assessment. I think it is fair to conclude that if at any time the Claimant's solicitors conceded, or the Legal Services Commission found, that the prospects of success were less than 50% they would have discharged the legal aid certificate leaving the Claimant practically unable to pursue her claim. This is obviously something that is relevant to the broad brush assessment of the Claimant's prospects of success in the underlying litigation, which is in turn relevant to her prospects of success in this claim.

The *Mount v Barker Austin* principles

42. The Claimant relies on the rebuttable presumptions set out by Lord Justice Simon Brown in *Mount v Barker Austin (a firm)* [1998] PNLR 493 where he said:

> "*(1)The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim … he has lost something of value i.e. that his claim … had a real and substantial rather than merely a negligible prospect of success. (I say 'negligible' rather than 'speculative' -- the word used in a somewhat different context in* Allied Maples Group Ltd v Simmons & Simmons *[1995]*

> *1 WLR 1602 -- lest 'speculative' may be thought to include considerations of uncertainty of outcome, considerations which in my judgment ought not to weigh against the plaintiff in the present context, that of struck-out litigation.)*
>
> *(2) The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position ....*
>
> *(3) If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim ... than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. It is quite likely that the delay will have caused such difficulty ....*
>
> *(4) If and when the court decides that the plaintiff's chances in the original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure. To my mind it is rather at this stage than the earlier stage that the principle established in* Armory v Delamirie *(1722) 1 Stra 505 comes into play.*"

43. This was developed further by Lord Justice Simon Brown in *Sharif v Garrett and Co* [2001] EWCA CIV 1269:

> "*38 In stating the principles generally applicable to this class of case, I indicated in Mount v Barker Austin [1998] PNLR 493, 510 a two-stage approach. First, the court has to decide whether the claimant has lost something of value or whether on the contrary his prospects of success in the original action were negligible. Secondly, assuming the claimant surmounts this initial hurdle, the court must then 'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out'.*
>
> *"39 With regard to the first stage, the evidential burden rests on the negligent solicitors: they, after all, in the great majority of these cases will have been charging the claimant for their services and failing to advise him that in reality his claim was worthless so that he would be better off simply discontinuing it. The claimant, therefore, should be given the benefit of any*

> *doubts as to whether or not his original claim was doomed to inevitable failure. With regard to the second stage, the Armory v Delamirie (1722) 1Str 505 principle comes into play in the sense that the court will tend to assess the claimant's prospects generously given that it was the defendant's negligence which has lost him the chance of succeeding in full or fuller measure.*"

I must have the principles in mind when dealing with the current application but it will be necessary to examine whether the Claimant was given consistent bullish promises of success as she alleges or more mixed messaging as the Defendants contend.

After-coming evidence

44. Both sides accept that damages ought to be assessed as at the date that the original action would have come on for trial, in this case in 2009. The issue between them is whether the court on a professional negligence action is limited to the evidence which was actually available at the notional trial date, or whether in certain circumstances later evidence can be permitted. The editors of Jackson and Powell on Professional Liability clearly accept that it is possible for after-coming evidence to be admissible. In dealing with a decision of the Australian High Court *Johnson v Perez* (1988) 166 CLR 351 the editors state as follows:

> "*Evidence of what happened later may, in certain cases, assist in determining what a Judge at the notional trial date would have done, and what evidence might have been brought then; see Johnson v Perez. For instance, if there were no medical reports prepared at the notional trial date, later medical reports may assist in determining what reports would have said then. The longer the time has passed from the notional trial date, the less material the report will be.*"

45. In this application the Defendants say that the expert evidence from Dr Jarosz and Professor Walker is intended to replicate the expert evidence which SKB would have obtained and deployed in the original proceedings. The Claimant submits that after-coming evidence should only be admitted where it is evidence of a fact that is not now disputed.

46. I do not agree with the Claimant's summary of the law in this respect. It is clear from the authorities that after-coming evidence can be admitted in certain circumstances. In *Dudarec v Andrews and Others* [2006] EWCA Civ 256 the Claimant had made a personal injury claim and a key issue in the litigation was whether the claimant's decision not to have an operation to cure a traumatic false aneurysm of the left carotid artery constituted a failure to mitigate his loss. The action was struck out due to the negligence of the Defendants in 1996. In 2004 medical evidence was obtained which indicated that the Claimant did not in fact have a false aneurysm as had been previously thought. As Lady Justice Smith said :

> "*If the trial judge is presented with important new evidence that would or might not have been available to the judge at the notional trial, then I would respectfully agree with the views expressed in Charles, namely that, unless the evidence relates to*

> *some entirely new matter which could not possibly have been known about at the date of the notional trial, the facts as they have since turned out should be taken into account by the trial judge.*"

As a consequence of this she decided:

> "*In the present case, it seems to me that the agreed medical evidence of Professor Greenhalgh and Mr Marcuson could have been available at the notional trial in 1996. Therefore, the trial judge in the present action should have taken it into account and acted upon it. Even if there was doubt in the judge's mind about whether it would in fact have been available in 1996, he should have taken it into account and given it full effect.*"

47. The evidence referred to in the preceding paragraph was not evidence which had been obtained in the original litigation but evidence obtained after the notional trial date from experts instructed in the professional negligence litigation. But the court found that it was evidence which could have been available at the time of the original trial. As Lord Justice Waller found:

> "*48. My conclusion is as follows. The scan and opinion produced in 2004 and the fact that it would have probably been available at the date of notional trial, has had a material influence on the question whether the appellant stood a good or a bad chance of convincing a trial judge in 1996 that he was acting reasonably. On behalf of the appellant Mr Boyd would wish that evidence to be put in for that purpose – indeed in his skeleton argument before us he suggested it would be "absurd" not to take it into account.*"

48. In *Charles v Hugh James Jones and Jenkins (a firm)* [2000] 1 WLR 1278 a similar view was taken regarding the deterioration of the claimant's medical condition after the date of the notional trial. In *Whitehead v Searle* [2008] EWCA Civ 285 the fact that the mother committed suicide after the notional trial date was admitted as evidence in the professional negligence proceedings as there would be a windfall to the claimant's estate if her death was ignored.

49. In the current application to assess the Claimant's prospect of success solely on the basis of the expert evidence disclosed by her is both unfair and unrealistic. This was group litigation where every other member of the group has either discontinued or otherwise failed. SKB intended to defend the litigation robustly and it is inconceivable that they would not have deployed expert evidence to support the contention, expressed in their defence, that the Claimant's admitted disability was not caused by the MMR vaccine. The evidence of Dr Jarosz and Professor Walker is exactly the type of evidence they would have deployed and which the Claimant would have had to have overcome in order to succeed. This is the type of evidence which could and would have been available to the trial judge by the notional trial date and in my judgment is both relevant and admissible in these proceedings.

What was the Claimant told about the prospects of success in her case?

50. This issue is relevant when considering the evidential burden which is set out by Lord Justice Simon Brown in *Mount v Barker Austin* in paragraph 42 above. The Claimant was part of a group of other claimants who were all intending to make a claim against the manufacturers of the MMR vaccine and the First Defendant was one of a number of counsel who advised the group from time to time. On 8th April 1999 a written advice on the current state of the litigation was provided by Jeremy Stuart-Smith QC which was approved by the First Defendant. It contained the following statement which, given that proceedings had been issued for most of the claimants at this point, I find rather extraordinary:

> "*The first and most important feature of the case (to which I will return in greater detail later) is that we do not yet know what our case will be on causation. I cannot overemphasise the fact that to embark on the litigation in this state would be catastrophic. Nothing gives a Defendant greater encouragement or greater scope for inflicting on Plaintiffs in such a case as this than for the Plaintiffs to be uncertain about a central issue such as causation. In particular, it is crucial that the Plaintiffs must decide what is likely to be their best case on the biological mechanism (or mechanisms) of injury.*"

51. Mr Stuart-Smith advised that the claimants needed to demonstrate four things to bring the Defendant to the negotiating table:

    a) A clear temporal connection between administration of the vaccine and the event which caused damage;

    b) A coherent case on biological plausibility;

    c) Epidemiological evidence which is at least neutral or positive for the claimants;

    d) Evidence that the Defendants' research and monitoring was inadequate.

52. It is clear at least to me now, with the benefit of hindsight, that the Claimant's advisors did not really have evidence on any of these issues at the time that proceedings were issued, in a misguided attempt to protect the Claimant's position on limitation.

53. By 2003 the funding position had become somewhat perilous with the Legal Services Commission withdrawing support from the MMR cases on the basis they had no reasonable prospects of success. The MMR group solicitors appealed but the appeal was dismissed despite the advice of eminent Queen's Counsel including the First Defendant that the claims did have good prospects. This decision was challenged by judicial review which was refused by Mr Justice Davis. On 7th July 2004 Mrs Coote's then solicitors Alexander Harris advised her to discontinue Rachael's claim and accept the Defendant's offer not to claim costs against her.

54. On 15th February 2006 Alexander Harris reported again with the result of a two-day conference with medical experts. These had included Dr Green, a paediatric neurologist. The experts were assessing whether claimants' cases had a greater than 51% chance of success on causation. They found that Rachael's case did not, in the main because she recovered quickly from the febrile convulsion in March 1989 and had no further fits until November 1989.

55. A further conference took place with four experts to screen 35 cases where it was alleged that epilepsy had been caused by the MMR vaccine. The experts were unable to find a causal connection in any of the cases, including Rachael's. The main reason was the absence of any evidence of encephalitis (which it was accepted can cause epilepsy) as opposed to febrile fits which cannot. The definition of encephalitis used in the screening process is taken from an Australian paper by D'Souza[4] which appears in the trial bundle. Mr Redfern QC for the Claimant sought to impugn the quality of the review as the study concerned the Jeryll-Lynn strain of mumps virus rather than the Urabe strain which was administered to the Claimant. Whilst this is an accurate distinction, I find that it does not impact in any way on the quality of the definition of encephalitis which was used in the screening process. A full explanation was given to Mrs Coote why, in the expert's view, it was unlikely that Rachael's epilepsy had been caused by the MMR vaccine. As a result of this process legal aid was again discharged.

56. The Claimant returned to consult the Second Defendants in 2006 in an effort to appeal against the refusal of legal aid. Mr Todd, the solicitor concerned, thought that there was only a 33% chance of achieving this. He included the following rather pessimistic statement:

> "*This is a very very difficult and demanding case and your money is very much at risk. Basically you are spending money on an outside chance that this case might get anywhere. I am sorry to be apparently so negative but I need to be clear about the situation before you agree to part with any money*".

57. Somewhat surprisingly, the Legal Services Commission did agree to fund Rachael's case together with another case for a William Deville at least until receipt of a defence from the Defendant. William Deville's case however failed because genetic testing showed that the opinion of Professor Kinsbourne was no longer sustainable in his case. The defence when served contained a robust defence to Rachael's claim on the merits and also on limitation given that the batch of Pluserix vaccine had been despatched from the factory on 13th December 1988 which meant that the claim was statute barred.

58. Mr Todd reported in writing to Mrs Coote on 7th January 2008 containing the following, rather confusing advice:

> "*As I explained to you in our conversation, I have unfortunately come to the view that the prospects of success in Rachael's claim have now reduced somewhat. Even before now, the chances of success were assessed as only being at best borderline. No vaccine claim has ever succeeded against a manufacturer in this*

[4] Adverse Events following Immunisation Associated with the 1998 Australian Measles Control Campaign – D`Sousa et al CDI vol 24 no 2 17.2.00

> *country. It has taken a lot of effort to get this far. However the matters raised in the defence and in particular the new information regarding the date of supply of the vaccine means unfortunately the prospects of success have slipped below 50%. I am under a professional duty to report this to the Legal Services Commission and they are bound to discharge Rachael's Legal Aid Certificate……*
>
> *It is my professional duty to advise you that you may wish to consider whether to seek independent legal advice regarding the limitation point.*"

59. Mr Redfern QC was very critical about the terms of this letter and I see the force of the points he was making. The paragraph about seeking independent advice could certainly have been better expressed. I also accept that once the limitation point was raised the prospects of success by then were nil. The moot point is what the prospects of success were without the limitation point and the answer would appear to be "*at best borderline*" in Mr Todd's assessment.

60. Mr Redfern QC relied on what he described as the "bullish assessments" of success in Rachael's case but there are few examples of these. Certainly in an individual case plan prepared by the Second Defendant in March 1999 it was stated:

> "*Our researches have indicated that there is a strong likelihood that the MMR vaccine is responsible for the injuries suffered by the hundreds of children we represent.*"

To use a modern idiom- this statement did not "age well" given that none of the two thousand or so claimants in the MMR group actually succeeded in obtaining any compensation.

61. More significantly, in the submissions made to the Legal Services Commission against the discharge of Rachael's Legal Aid Certificate in October 2007 the Second Defendant referred to the advice of Nigel Godsmark QC and Adam Korn concluding that Rachael's prospects of success were 60%. It is only fair to point out that the same barristers assessed William Deville's chances of success at 60% only to find that genetic evidence showed that there was no plausible connection between his epilepsy and the MMR vaccine.

62. I can conclude this section by finding that the Claimant was not given consistent positive assessments of her prospects of success. The messages were mixed. Whilst she was never told that her claim was bound to fail it was obvious from much of the material which was provided that this was a challenging case and the most significant challenge was the need to prove that Rachael's epilepsy was caused by the MMR vaccine and not by any other process. The fact that her public funding was withdrawn on more than one occasion showed that there were conflicting views about whether she had a case with a real prospect of success.

Was Dr Kinsbourne discredited in the American litigation?

63. This is a factual dispute between the parties on this application. The Defendants submit that he was discredited whilst the Claimant contends that alternative evidence was preferred causing no lasting damage to his reputation. The decision of Special Master Hastings runs to some 182 pages and concerned a claim by the Cedillo family that their daughter Michelle suffered from autism and chronic gastrointestinal symptoms which were allegedly caused by the MMR virus. Special Master Hastings found that they were not, preferring the evidence of other experts to that of Dr Kinsbourne. Dr Kinsbourne had opined that Michelle's autism resulted in substantial part, from the presence of measles virus in Michelle's brain. Special Master Hastings dealt with this issue in the following way:

> "*Of course it is not impossible that persisting measles virus in a human brain might in some individuals have a result different from SSPE*[5] *or MIBE*[6]*. But Dr. Kinsbourne has supplied no* evidence *for such a possibility, beyond his own unsubstantiated speculation on this point, concerning what effect a persisting measles virus* might *cause in a human brain, I find the evidence to weigh heavily in the Respondent's favour. On this point, I have on one side the testimony of Drs. Griffin and Ward, with vast experience studying the measles virus, plus the similar testimony of Drs. Wiznitzer and Rust; on the other side is the testimony of Dr. Kinsbourne, who has no special expertise concerning the measles virus.*"

This last sentence is particularly troubling as Dr Kinsbourne appears to be of the opinion in Rachael's case that the measles virus is at least partly responsible for her initial febrile convulsions and subsequent epilepsy.

64. This was summarised by Master Hastings in his decision as "*although he was an unquestionably qualified witness, his testimony was unpersuasive. His opinion lacked reliable evidential support.*"

65. In a similar case involving a child named Colten Snyder, Special Master Vowell recorded as follows:

> "*Dr. Kinsbourne may have relied on the appearance of symptoms of MIBE (months after vaccination) and SSPE (years after vaccination) for the lack of any firm outer limit. If he were reasoning by analogy to these conditions, it would not matter when the symptoms manifested. This is yet another example of Dr. Kinsbourne 'cherry-picking' data that supports his hypothesis, but blithely ignoring facts that contradict it.*"

[5] Subacute sclerosing panencephalitis
[6] Measles inclusion body encephalitis

These are serious criticisms of Dr Kinsbourne's methodology and do not amount to simply the tribunal preferring the expert called by the other party. I therefore accept the thrust of the Defendants submissions that Dr Kinsbourne's professional reputation was adversely affected by his participation in this litigation.

The expert evidence relied on by both parties

66. I would not normally conduct a detailed analysis of the expert evidence relied on by both parties in a summary judgment application for obvious reasons but in this application the Defendants contend that the Claimant has no real prospects of success, in particular on the issue of causation. Some analysis of the parties' respective evidence is therefore required.

67. The Claimant relies on the expert evidence of Dr Marcel Kinsbourne who has provided one report dated 10th July 2007. He relates in his report the medical history. Rachael was born on 31st July 1987 and had a relatively uneventful birth and infancy. She received the MMR vaccination on 22nd February 1989 which was the Pluserix brand including the Urabe strain of the mumps virus. She experienced some swelling and a raised temperature and was unwell thereafter. On the third of March 1989 whilst sat on her mother's lap her head fell to one side and she began to shake all over. She stopped breathing and turned a dusky colour. Her mother could not feel a pulse. An ambulance was called and by the time it arrived she had recommenced breathing and her pulse was discerned. She was taken to Bolton General Hospital where the next day she had a measles-like rash. A clinical note states "*all problems likely to relate to MMR*". She was discharged home on 8th March 1989 apyrexic and otherwise well.

68. She suffered from mumps on 25th May 1989 despite the vaccination on 22nd February 1989 and her next seizure was on 8th November 1989 when she fell and frothed at the mouth and her fists clenched. She was again transported to hospital with a high temperature. She recovered and was discharged the same day. By January 1990 she was having daily drop attacks which increased in frequency and by July 1990 she had developed nocturnal seizures. She was diagnosed with primary generalised epilepsy – myoclonic with astatic akinetic seizures. Dr Kinsbourne recorded that an EEG scan was normal whereas a CT scan showed mild non-specific ventricular enlargement.

69. Dr Kinsbourne opined that Rachael's intractable seizure disorder began nine days after she received her MMR vaccination. Seizure onset in the second week after MMR vaccination is a well-recognised adverse reaction to the vaccination. Specifically, this is the time when the viremia of the measles vaccine virus is at its height, and indeed a measles like rash became apparent on the day following the onset seizure.

70. He found that nothing about Rachael's early development that indicated a risk factor for the development of epilepsy and she had no neurological illnesses pre- vaccination. Her family history was negative for epilepsy and mental retardation. Therefore, he found that the medical records offered no viable causation for Rachael's seizure onset alternative to the MMR vaccination that preceded it. He then relates the results of at least five studies which relate to the connection between the measles vaccine and seizures. He reasoned that Rachael's seizure and residual seizure disorder were caused by the MMR vaccine which could have been due to the mumps component or to a combination of the measles and mumps components of the vaccine.

71. Dr Kinsbourne said that Rachael's onset seizure was association with anoxia, as respiratory movements temporarily ceased. After she regained consciousness, she stopped speaking, and she was very slow to regain just a few words. The anoxia that the seizure caused is the most likely explanation for the setback in the rate of Rachael's mental development. Whatever caused the onset seizure set in motion and ongoing process of persistent severe seizures. It has long been known that severed seizures are associated with brain damage and cell loss in children.

72. The following passage represents a summary of his overall opinion:

> "*C. Opinion*
>
> *(1) Measles vaccine virus and mumps vaccine virus (Urabe strain) are biologically plausible causes of seizures.*
>
> *(2) The seizure onset occurred within a medically reasonable temporal interval after the MMR vaccination.*
>
> *(3) The onset seizure was associated with anoxia.*
>
> *(4) There is no evidence of any alternative cause of her epilepsy in the medical records.*
>
> *(5)1ntractablc seizure disorders are apt to cause incremental brain damage and corresponding neurodevelopmental impairment.*
>
> *It is therefore my opinion. on the balance of probabilities. that the MMR vaccination caused Rachael Coote's intractable mixed epilepsy. and that Rachael 's learning difficulties are sequelae of her vaccine-related epilepsy.*"

73. The Defendants rely on the expert evidence of Dr Jozef Jarosz who is a consultant diagnostic radiologist. His report is dated 27th July 2019. He was asked to review an MRI Scan which was performed on Rachael on 25th September 2003. He also reviewed a CT scan performed on 29th March 2004. These two scans would have been available for Dr Kinsbourne to review but he has not mentioned them in his report.

74. His first finding is that he can see no evidence of ischaemic or hypoxic brain damage or evidence of any other damage to the brain or any other significant intracranial abnormality. There is a nodule in the wall of the body of the left lateral ventricle which is subependymal nodular heterotopion. This represents a malformation of cortical development, which is where some neurons remain in an abnormal location rather than migrating to the cortex at the surface of the brain itself. This diagnosis is associated with epilepsy.

75. There is a possible differential diagnosis of a subependymal tuber as part of tuberous sclerosis, which is a developmental condition and also associated with epilepsy. The absence of calcification on the CT scans suggests that this differential diagnosis can be eliminated.

76. There may be a further apparent nodule in the wall of the atrium of the left lateral ventricle which may represent a further subependymal heterotopion but this would not affect his view that it shows a malformation of the brain.

77. Professor Matthew Walker is a consultant neurologist with a specialist interest in the treatment of epilepsy. He has prepared a written report dated 10th November 2019. He has reviewed all of the medical records together with the reports of Dr Kinsbourne and Dr Jarosz.

78. His opinion is that Rachael had a febrile seizure on 3rd March 1989. Febrile seizures are common occurring in 3-8% of the population. The risk of epilepsy after a febrile seizure is only increased by 1% unless the seizure is complex which Rachael's was not. There is no evidence that febrile seizures are associated with intellectual disability.

79. Febrile seizures have been associated with the MMR vaccination with the risk of febrile seizures increasing 2.75 fold in the two weeks following vaccination. The study which confirmed this found no increased risk of epilepsy however.

80. The Urabe strain of the mumps vaccine virus was withdrawn from use in the MMR vaccination because of concerns of aseptic meningitis (not because of the potential to cause convulsive disorders). The aseptic meningitis occurred 15-35 days after vaccination and usually resolved without consequence. As Rachael's first convulsion occurred nine days after vaccination this makes it unlikely that the Urabe mumps strain was involved and more likely the measles element was involved. He confirmed that there was no evidence that Rachael had ever suffered from meningitis and the timing of the convulsion means it is more likely to be due to the measles component in any event.

81. He opines that the most likely cause of Rachael's epilepsy is Dravet Syndrome. This is an epilepsy syndrome in which children are prone to febrile seizures and then later develop epilepsy and have learning difficulties and problems with balance as Rachael has. The seizures are not causative but part of the condition. Children with Dravet Syndrome usually develop normally and then have a first convulsion, often related to fever or vaccination in the first year of life (but sometimes during the second year). Some patients may have a family history of epilepsy but often a family history is absent. Marked developmental delay and ataxia often occur particularly evident in the second year. Whilst vaccination may trigger the first febrile seizure predisposed children would have developed the condition in any event and it has no impact on prognosis.

82. An alternative explanation is suggested by the MRI scan which demonstrates subependymal heterotopia. There is a very high incidence of epilepsy with this condition (> 80%) and refractory epilepsy is often a consequence. Febrile seizures are common with these patients and symptoms can cover a broad spectrum including learning difficulties. Subependymal heterotopia occur before birth and therefore cannot be caused by the MMR vaccination. These diagnoses are not mutually exclusive according to Professor Walker.

83. There are various aspects of Dr Kinsbourne's report that Professor Walker disagrees with. Dr Kinsbourne concludes that Rachael's intractable seizure disorder began nine days after she received the MMR vaccination. Professor Walker points out that febrile seizures are usually benign events which rarely result in epilepsy. Spontaneous seizures

in Rachael's case did not begin until over 10 months later. Dr Kinsbourne points out that seizure onset in the second week after MMR vaccination is a well-recognised adverse event. Professor Walker points out that febrile seizures are a well-recognised consequence of MMR vaccinations but the risk of later onset epilepsy is very small and no different from those who have febrile seizures unconnected with vaccinations.

84. Dr Kinsbourne relies on the fact that Rachael was well before her vaccination and that there is no family history of epilepsy or mental retardation. Professor Walker points out that in Dravet Syndrome patients there are frequently no symptoms at all for the first year of life and no related family history due to de novo gene mutations which are not found in the parents.

85. Dr Kinsbourne opines that the medical records offer no viable causation for Rachael's seizure onset alternative to the MMR vaccination that preceded it. Professor Walker points to the MRI findings which show a brain abnormality in the form of subependymal nodular heterotopia which can only occur before birth and cannot be caused by vaccinations. In addition, Dr Kinsbourne's assertion ignores what Professor Walker describes as a "seminal paper" the results of which have been reproduced by other groups which show that encephalopathies that begin after vaccination are not secondary to the vaccination[7]. It also ignores the Dravet Syndrome diagnosis.

86. Dr Kinsbourne thinks that Rachael's seizure disorder was caused by the MMR vaccination which could have been due to the mumps component or a combination of the mumps and measles component. Professor Walker points out that there is no evidence to support this proposition. A large UK study looked at precisely this issue and found no increase in the incidence of febrile seizures 6-11 days after vaccination with MMR containing the Urabe strain of the mumps vaccine compared with the later Jeryll-Lynn strain[8]. Whilst there is a slight increase of risk of febrile seizures 15-35 days after vaccination with the Urabe strain this is not relevant to Rachael's case because she had a seizure after nine days.

87. Dr Kinsbourne says that Rachael suffered anoxia[9] at the time of her first seizure as respiratory movements temporarily ceased. He says this anoxia is the most likely explanation for the set back in the rate of her mental development. Professor Walker confirms that febrile convulsions are often associated with hypoventilation (reduced breathing) and children often become dusky or blue. Rachael's MRI scan is not however consistent with prolonged anoxia as it does not show any brain damage from anoxia.

88. Professor Walker also disagrees with Dr Kinsbourne's conclusion that whatever caused the initial seizure set into motion an ongoing process of persistent severe seizures. He says that more recent studies have found conclusively that this is not the case. The fever is the trigger for the first seizure but the subsequent course is independent from whatever the trigger was. This led to the authors of the study[10] to continue to

[7] Berkovic et al De Novo mutations of the sodium channel gene SCN1A in alleged vaccine encephalopathy ; a retrospective study. Lancet Neurol. 2006 June 488-92
[8] Miller et al : Risks of convulsion and aseptic meningitis following MMR vaccination in the UK Am J Epidemiol. 2007 Mar 15 704-709
[9] An absence of oxygen
[10] McIntosh et al : Effects of vaccination on onset and outcome of Dravet syndrome: a retrospective study. Lancet Neurol. 2010 June 592-598

recommend immunisation as there is no rational basis for a fear of causing Dravet syndrome or injury to the brain.

89. The contention that "*it has long been known that severe seizures are associated with brain damage and cell loss in children*" is also controversial and Professor Walker would say, in fact misrepresents the literature. In fact developing brains (in the young) are less vulnerable to the damaging effects of seizures. There is little evidence that brief convulsions (less than thirty minutes duration) cause any damage and certainly do not cause the substantial damage that results in an epileptic encephalopathy. The first seizure lasted "*a few minutes*" and the second seizure ten minutes. There is no evidence according to Professor Walker that seizures of this nature result in any clinically significant neuronal damage.

90. Overall Professor Walker concludes that Rachael's first febrile seizure was caused by the measles component of the MMR vaccine. The fact that she had a second seizure in November 1989 indicates she had a predisposition to febrile seizures independently of the vaccination. There is no evidence that MMR vaccination increases the risk of subsequent epilepsy beyond that which is associated with a febrile seizure (a 1% increase). Rachael's subsequent development delay and uncontrolled seizures are indicative and typical of a genetically-determined epilepsy. There is no evidence that a vaccination-induced febrile seizure would have any impact on the course or prognosis of the epilepsy.

91. The MRI scan and report of Dr Jarosz support the diagnosis of a malformation of cortical development which can only have occurred prior to birth and thus unrelated to the vaccine.

92. There is no evidence that the Urabe strain contributed to the causation of the initial febrile seizure. That carried a risk of aseptic meningitis which did not eventuate in this case. The type of short-lived febrile seizures which Rachael had do not result in hypoxic[11] brain damage and there is no evidence from the MRI scan that she sustained any significant hypoxic damage to the brain. His view is that Rachael's epilepsy and learning disability were definitely not caused by her MMR vaccination unusually asserting that there is "*no chance*" that there is a causal link.

My assessment of whether the Claimant has a real prospect of success in this claim

93. I am acutely conscious that this is an application for summary judgment and not a trial. I have heard no evidence and will be making no findings of fact. My task is to look at the evidence in the round, including evidence which might in the future be available to the Claimant and decide whether her chances of success in this litigation are real, in that they are more than fanciful. The Defendants jointly submit that the Claimant has no real prospects of success in this litigation because she cannot prove that she has lost anything of value as a consequence of her losing the ability to pursue her claim against SKB due to the Defendants' alleged negligence. This inevitably changes the focus of the enquiry to what the Claimant's prospects of success were in the underlying litigation against SKB, if she had been able to issue her claim within the ten year limitation

[11] A condition caused by having low oxygen levels in the tissues

period. This again is not a "trial within a trial" but a broad assessment of what her prospects of success were in the original litigation on the basis of the evidence which she could rely on compared with the evidence which SKB would have been likely to have put before a court.

94. I have set out earlier in this judgment the appropriate legal test for dealing with professional negligence claims against legal advisers where the chance to pursue the claim to its conclusion was lost. First, the Claimant must prove what she would have done if she had received the benefit of competent advice. This must be proved on the balance of probabilities. In this case the allegedly negligent advice happened before the expiry of the limitation period in late 1998. At this point the Claimant had not issued proceedings. She did in fact instruct her solicitors to issue proceedings in January 1999 which is obviously something I can take into account when deciding whether she had a real prospect of proving this aspect of her claim. In my view the Claimant (through her litigation friend), would have no difficulty in proving in this litigation that she would have instructed her solicitors to issue proceedings in time if she had received competent advice about the expiry of the limitation period. The fact that she did in fact do so in the mistaken belief that the proceedings were issued in time is strong evidence to support this. A review of the documentation shows that Mrs Ann Coote has been determined throughout to do everything she can to pursue her daughter's claim and it is fair to say that she has left no stone unturned in her efforts to prove that her daughter's disability was caused by the MMR vaccine. I am satisfied that she would have instructed her solicitors to issue proceedings and do everything necessary thereafter to pursue the claim to its conclusion. On my assessment of the law set out above this is all she would have to prove so far as causation is concerned on the balance of probability. All the other issues relate to what third parties may have done and these would be assessed by this court on the basis of the loss of a chance.

95. The real issue in this application is what the Claimant's prospects of success were in the underlying litigation. Has she lost something of value in the sense of a claim which had a real and substantial prospect of success? Mr Berkley QC appeared to concede that a judicial rule of thumb appears to have arisen that prospects of success of 10% or less are treated as negligible or at least insufficiently substantial to sound in damages. This is based on the judgments in ***Thomas and Thomas v Albutt*** [2015] EWHC 2187 (Ch) and ***Kingsley Napley LLP v Harris*** [2021] EWHC 901 (QB). I agree with his submission and, although the aetiology of this principle is unclear, it appears to have found some judicial favour.

96. The context in which this claim was being made is important. At one point in time there were approximately two thousand claimants in the MMR Litigation Group who were seeking to make claims against the various manufacturers. The Defendants claim that not one of these claims succeeded at trial and none received a voluntary settlement. One of the main reasons for the collapse of this group litigation was the discrediting of the methodology of the research done by Dr Andrew Wakefield into the connection between the MMR vaccine and autism. By early 2007 no supportive expert evidence had been found to justify the causal link between the MMR vaccine and epilepsy; in fact the reverse was true. Dr Andrew Green and the four consultants who took part in the screening process were all unable to support a causal link generally or in the Claimant's case more specifically. This changed later in 2007 when Dr Kinsbourne reported that there was a causal link in Rachael's case. The Claimant's prospects of

success in the original litigation therefore hinge on the chances of a court accepting the expert evidence of Dr Kinsbourne.

97. In order to pursue the claim to trial the Claimant would have had to convince the Legal Services Commission that it had good prospects of success (usually at least 50%). The views of the Legal Services Commission about Dr Kinsbourne's evidence were expressed in submissions it made to the Funding Review Committee on 2nd May 2007 as follows:

> *"However I would suggest it remains highly questionable that this line of reasoning will be accepted, given that Dr. Kinsbourne appears to be the first expert in a long line prepared to report favourably for the claimants , and given that to date, medical opinion (including eminent and respected experts) has weighed very heavily on the side of stating that it was not possible to say that on the balance of probabilities MMR was the cause of the damage. There are a large number of potential causes of this injury and I do not consider it to be a straightforward step to show that one should reasonably exclude the host of common, albeit in these cases unproven causes"*

It is fair to record that the Funding Review Committee did extend legal aid until the receipt of the Defence but I suspect the views expressed above might well have resurfaced once expert evidence was served by SKB as it inevitably would have been.

98. The relevance of the fact that the Claimant was publicly funded is that she would not have been able to continue to pursue the claim against SKB unless she could continue to convince the Legal Services Commission that her prospects of success were at least 50%.

99. It is important to record what the Claimant's medical records show. Rachael was first admitted on 3rd March 1989 with what was thought to be a febrile convulsion which "*lasted a few minutes*". It was thought likely to be related to the MMR vaccination nine days previously. Her next febrile convulsion was on 8th November 1989 and "*lasted ten minutes*". She started to have drop attacks in 1990 and by August 1990 her diagnosis was " *primary generalised epilepsy – myoclonic*". She had both an EEG and CT around this time which were inconclusive but it is important to record that there was no history of meningitis or encephalopathy. This diagnosis from Dr Richard Newton, Consultant Paediatric Neurologist, was repeated over the years as her treating physician. He was asked by Mrs Ann Coote whether Rachael's disability was caused by the MMR vaccine and he said he felt that this was unlikely.

100. This is not a promising beginning to start from. The complete absence of supporting epidemiological evidence is another significant obstacle. It is clear from reading the early opinions of the barristers instructed that they all considered that supporting epidemiological evidence would be essential to succeeding with the claim against the manufacturers of the vaccine. If researches revealed a number of children who had suffered epilepsy symptoms after being vaccinated, the manufacturers would no doubt claim these were random childhood illnesses and so epidemiological evidence would be necessary to show clusters of cases which could logically be linked to the vaccine. It would also help negate any development risks defence. Counsel for the Claimant in

this hearing appeared to place the blame for this absence with the Second Defendant but there is an evidential burden now on the Claimant to show that this evidence could have been available at the trial against SKB which is something the Claimant is now not able to do, the Defendants would say because no such epidemiological evidence exists which is supportive.

101. The real issue however is what are the prospects that the court in 2009 would have accepted the evidence of Dr Kinsbourne on the likely medical causation of the Claimant's disability. Having examined all the evidence very carefully I have concluded that the chances are nil or virtually nil. He reaches a number of conclusions which are logically unsupportable. I find myself agreeing with my American colleagues that his opinions lack evidential support and that he has a tendency to cherry-pick data which suit his opinion whilst discarding it if it does not. It does not help his credibility that he also reported in the case of Mr Deville opining that there was a causal link between his epilepsy and the vaccine only to be proved wrong when genetic testing proved to the contrary.

102. It is clear that his conclusion that the initial febrile convulsion on 3rd March 1989 may have been caused by the MMR vaccination is logical and supportable. It is likely that it was the measles component which was responsible as the seizure occurred nine days after vaccination. Dr Kinsbourne's conclusion that the mumps component could also have been involved is unlikely to be correct (see paragraph 82 above). His suggestion that the flawed Urabe strain of the mumps component may have been responsible was clearly incorrect as the known complication was aseptic meningitis. Rachael did not have meningitis at any point in time.

103. Whilst it is likely that there was some anoxia, or more probably hypoxia, during Rachael's first fit, Dr Kinsbourne does not appear to have considered how long this deprivation of oxygen lasted. The fact that it was of relatively short duration and that Rachael appears to have made a full recovery within a few days militates against a finding of hypoxic induced brain damage. The fact that the MRI scan in 2003 and CT scan in 2004 show no evidence of brain damage due to hypoxia reinforces the fact that it is unlikely that there was any lasting damage due to this febrile convulsion. As Professor Walker records febrile convulsions are relatively common and usually have a benign outcome.

104. The argument that there is no evidence of an alternative cause to her epilepsy in her medical records is valueless when one considers that epilepsy is often an idiopathic condition[12]. The argument is also inaccurate in fact in that an examination of the 2003 MRI scan would have revealed a clear alternative explanation as found by Dr Jarosz and interpreted by Professor Walker. It is both their views that this sort of brain malformation shown on the scan can only have happened prior to birth. Professor Walker explains that a child with Dravet Syndrome does not normally have any symptoms until the first one or two years of life have passed. The failure of Dr Kinsbourne to examine and reflect on the MRI scan of 2003 is fatal to his credibility as a witness.

105. Counsel for the Claimant both emphasised that disputes in expert evidence can only normally be resolved at trial with full cross-examination of all witnesses. Whilst I

[12] A condition which arises spontaneously or for which the cause is unknown.

accept this is generally correct I know that Dr Kinsbourne is now 91 years old and will not have been in clinical practice for about 32 years. It is not fair or realistic to expect him to give evidence to a court about issues this complex in a couple of years' time. I am satisfied in any event from my examination of the material that his position is untenable for the reasons advanced by Professor Walker and summarised earlier in this judgment.

106. Counsel also cautioned me about making a premature decision when other evidence may become available to the Claimant before trial. I accept the fact that the Claimant's solicitors have however said, in terms, that they have no intention of obtaining any more expert evidence as it is not required and that a previous stated intention to obtain a report from a paediatric neurologist did not produce a disclosable report. The expert evidence available to me on this application appears therefore to be what would be available at the trial of this claim. It is unlikely that lay witness evidence will have any impact on the core issue of medical causation of the Claimant's disability.

107. I have taken into account the principles set out in ***Mount v Barker Austin*** set out above together with the ***Armory v Delamirie*** *(1722)* principle. This is not a case however where the solicitors have blithely carried on with the claim without advising their client of the hopelessness of the position. I have found that the messaging throughout was mixed and the Claimant was advised that there were difficulties in proving that there was clear link between the MMR vaccine and epilepsy. She was actually advised to discontinue the proceedings after the screening meeting with the experts because this link could not be proved. Whilst the Claimant persevered thereafter and was given some hope by the evidence of Dr Kinsbourne this was a developing picture which would only have got worse once SKB served their expert evidence. Although I have tried to be as generous as I can be in my assessment of the prospects of success I cannot ignore the fact that Dr Kinsbourne's evidence would not have stood up to any significant scrutiny.

108. Similarly, although I accept that at some point in time leading and junior counsel advised that the Claimant had a 60% chance of success I do not know what material was before them when they made this assessment. I can only assume that once SKB served their expert evidence this assessment would have been reviewed and substantially reduced.

109. The likelihood is that once SKB had served their expert evidence those advising the Claimant would have been obliged to report to the Legal Services Commission that the chances of success were now significantly less than 50%. This would have resulted in the discharge of the legal aid certificate and the Claimant would have been compelled to discontinue the claim as she had no way of funding such expensive and perilous litigation privately.

110. My own view remains, however, that on an objective assessment of the expert evidence the Claimant had no real prospect of success against SKB for the reasons outlined above. She therefore has no real prospects of success in this litigation because the loss of a chance on my assessment is less than 10% by some distance.

111. I therefore intend to grant the Defendants' applications for summary judgment against the Claimant on the grounds that the Claimant's claim has no real prospects of success. I do not need to deal with the alternative ground based on CPR 3.4. I can say however that I agree with the Second Defendant that the Claimant's case on causation has not

been adequately pleaded. I would not however have struck out the claim but would have ordered the Claimant to amend her case to properly plead causation as this would have been a more proportionate response than striking the claim out, notwithstanding the long delay in correcting this error and the many opportunities the Claimant's solicitors have had to deal with it.