Neutral Citation Number: [2021] EWHC 3234 (QB)

Case No: QB-2019-001503

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2021

Before:

HHJ Coe QC
(sitting as a Judge of the High Court)

- -

Between:

Evie Toombes **(a protected party who sues by her mother and litigation friend, Caroline Toombes)**	**Claimant**
- and -	
Dr Philip Mitchell (sued in his own right and as a partner in, and on behalf of all of the partners in the Hawthorn Medical Practice)	**Defendant**

- -
- -

Miss S Rodway QC (instructed by **Moore Barlow LLP**) for the **Claimant**
Mr M de Navarro QC (instructed by **Clyde and Co**) for the **Defendant**

Hearing dates: 22nd and 23rd November 2021

- -

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.

.....

HHJ COE QC

HHJ Coe QC:

The Claim

1. The claimant's claim is for damages arising out of the alleged clinical negligence of the defendant, Dr Philip Mitchell, who was one of the general practitioners at a group practice at which her mother was a patient.

2. The claimant, Evie Toombes, was born on 19 November 2001. She is now 20. As set out in the report of Mr Bone, consultant neurologist, dated 2 February 2019, she was diagnosed, following investigation by MRI, with a lipomyelomeningocele ("LMM"), which is a form of neural tube defect. She underwent spinal cord untethering on 4 March 2003, aged 16 months. She suffers from weakness and impaired mobility so that she is an occasional wheelchair/Zimmer frame user. She has a neuropathic bladder and has in the past had both indwelling and suprapubic catheters occasionally. She requires intermittent self-catheterisation. She has had frequent urinary tract infections. She suffers from bowel incontinence and constipation. She has a consequent gastrointestinal disorder including gastroparesis which causes vomiting and nausea. She is fed via a nasogastric tube.

3. It is apparent from a brief consideration of her web page and Twitter account to which I have been referred that Evie Toombes, is a remarkable young woman. Despite her significant disabilities, the consequent restrictions on her being able to leave home and the planning and preparation which goes into any activity, she has achieved and continues to achieve great deal. She is a para-horse rider, a campaigner for hidden disabilities and together with her mother, the author of a book.

4. It is alleged on behalf of the claimant that at a pre-conception consultation as long ago as 27 February 2001, the advice given to Caroline Toombes, the claimant's mother, by the defendant, Dr Mitchell, was negligent in relation to taking folic acid supplements and that, had she been properly advised, Mrs Toombes who says that she was not pregnant at the date of the consultation would have delayed conception. In those circumstances, it is said that the claimant would not have been born, but a genetically different sibling, conceived later, would have been born without the neural tube or any other defect.

5. This claim is pursued by the claimant in her own right as opposed to an action for wrongful birth brought by her parents. The pleaded case is that the provision of the correct advice to Mrs Toombes would have resulted in a delay in conception of the claimant. By his original defence, the defendant contended that the pleaded claim showed no cause of action in law because, in arguing that she should not have been born, the claimant was, in fact, putting forward a "wrongful life" claim. Although a later conception would have been of a genetically different individual, the court has found at an earlier hearing that on the balance of probabilities, a later conception would have been of a normal healthy individual, and that the law provides that the claimant is entitled to pursue her claim for damages for being born in her injured state. In her judgment ([2020] EWHC 3506 (QB), dated 21 December 2020 at p.90 in the bundle), Lambert, J. found that the requisite elements in Section 1 of the Congenital Disabilities (Civil Liability) Act 1976 were established and that the claimant had a lawful claim for damages for personal injury arising from her disability, if

she could establish the basis for that claim.

6. Although the defence raises issues of causation on the premise that preconception intake of folic acid does not necessarily prevent neural tube defects, it is now settled (as a result of the court's finding at the trial of the preliminary issue) that later conception would probably have been normal. The defendant admits the duty to provide the appropriate information to Mrs Toombes but asserts, relying on Dr Mitchell's standard practice, that Mrs Toombes did take folic acid "as advised by Dr Mitchell". It is denied that Mrs Toombes only started to take folic acid when advised to do so by Midwife Flatters. Thus, the substance of the defence now is that the defendant relies on what would have been his standard practice, that that standard practice was in accordance the recommended guidance and that he advised Mrs Toombes correctly.

This hearing

7. In consequence, the matters I have to decide are essentially factual and have been carefully and clearly set out by leading counsel on behalf of both claimant and defendant. I am concerned only with the liability issues, that is, breach of duty and causation.

8. The issues which I have to decide therefore are: what advice was Mrs Toombes given by Dr Mitchell at the consultation (this issue includes making a finding about whether or not Mrs Toombes was taking folic acid before the booking-in appointment with the midwife); whether or not that advice was negligent; whether or not Mrs Toombes was or may have been pregnant by the time of the consultation on 27 February 2001; and finally, I have to decide, if she did not receive the correct advice, what Mrs Toombes would have done had she received the correct advice, that is, would she have delayed conception?

9. In deciding these matters, I of course remind myself that the claimant brings the claim and the burden is on her to prove, on the balance of probabilities, the matters on which she relies.

Background

10. By way of brief background, Mrs Toombes sets out in her statement that she and her husband started their relationship in 1994 and got married in November 2000. In early 2001, they began to discuss starting a family and having initially thought they would wait until later in that year (confirmed in the GP notes p.147), while attending a Valentine's Day dance on 17 February 2001, they discussed trying for a family. Mrs Toombes had been taking the oral contraceptive pill ("the pill") for several years. Her last menstrual period began on 13 February 2001 and in the normal way she would have started the next packet of contraceptive pills on 18 February 2001 but she did not do so. She made an appointment to see her general practitioner, the defendant, Dr Mitchell on 27 February 2001 for pre-conception counselling.

11. It is the claimant's case that Mr and Mrs Toombes decided to refrain from any sexual intercourse until after the doctor's appointment. Mrs Toombes says that having lost both of

her parents when she was young it was a dream of hers to have her own family, and this first pregnancy was a much wanted one. She wanted to ask the doctor if there was anything which she should or should not be doing to assist conception and also when it would be safe to try for a family after having taken the pill for several years. It was her understanding that it was best to leave a gap between stopping the pill and trying for a family. She also asked about folic acid. It is her case that the defendant reassured her that having taken the pill did not put her at risk and that if she was eating a healthy diet, including cereals and bread (which were an important part of her diet at the time) it was not necessary to take supplements of folic acid. She remembers the defendant telling her to go home and have "lots of sex", which she found somewhat blunt. She and Mr Toombes restarted sexual intercourse after the consultation, and she became pregnant almost immediately.

12. There is no doubt about the fact that the period which began on 13 February, some 14 days before the consultation would have been the last menstrual period for Mrs Toombes, before the claimant was born. The estimated date of delivery ("EDD") for the claimant was calculated as 20 November 2001 which is 40 weeks after the first day of that last menstrual period. The scan dates were consistent with that EDD, and indeed the claimant was born on 19 November 2001.

13. There was no indication that the claimant might have a neural tube defect before her birth because the particular form of spina bifida which she has was occult (that is, closed).

14. It is the defendant's case that Mrs Toombes was probably already pregnant on 27 February 2001 or at least that she cannot establish on a balance of probabilities that she was not given the timing, and that even if she did not know that she was pregnant, the sexual intercourse resulting in conception had already taken place. It is further argued that the advice given by Dr Mitchell was not negligent, but was given in accordance with the recommended guidance at the time. Although Dr Mitchell has no direct recollection of the consultation, he sets out what would be his usual practice at the time and that usual practice, say the defendant was not negligent.

Evidence

15. I heard oral evidence on behalf of the claimant from her mother, Caroline Toombes, whose statement is at p.110 in the bundle, from her father, Russell Toombes, whose statement is at p. 115 in the bundle and from Dr Mitchell, whose statement is at p.118. Given that this matter now turns on factual issues I heard no expert evidence and there is none in the bundle except for the condition and prognosis report on the claimant from Mr Bone.

16. The bundle contains the relevant extracts from Mrs Toombes' medical records.

17. In her statement, Mrs Toombes sets out the matters I have referred to above. She said that she felt somewhat "out of date" for raising the subject of folic acid with Dr Mitchell and was left with the impression that it was not something that you had to take if you were maintaining a healthy, balanced diet. At paragraph 11, she says that if the defendant had advised her that she should supplement her diet with folic acid tablets, she would have

done so immediately and she and her husband would have either refrained from all sexual intercourse, or from unprotected sexual intercourse until she had completed an appropriate programme of pre-conception folic acid. The very reason that she made the pre-conception consultation appointment was in order to find out everything that she was recommended to do to ensure a healthy baby. She said that she stopped drinking alcohol and cut down her caffeine intake. Although she did not want to go on a pre-booked skiing holiday because she had discovered that she was pregnant (confirmed on 15 March 2001 p.148), she did go, but did not drink alcohol or ski. She saw a midwife on 25 March 2001 and was advised to take folic acid supplements and did so immediately that was recommended. This coincided with her sister-in-law who was also pregnant, telling her that she had been advised to take folic acid.

18. In her oral evidence she confirmed that she took the last pill on 11 February 2001 two days before her period started. She had asked the defendant about folic acid because she recalled seeing something somewhere about folic acid and pregnancy and had a vague recollection that it was important in pregnancy, but did not know why. She said she had not seen the recommended guidance from the British National Formulary or the Practical General Practice textbook (referred to in the pleadings and the pre-action correspondence) before she saw Dr Mitchell in February 2001. She confirmed that she did not know why folic acid was important at that stage. At the consultation she remembered being told about not smoking or drinking but did not recall being asked or told about not using recreational drugs, or about maintaining a healthy diet and exercising. She says that Dr Mitchell did not tell her about the risks of spina bifida and neural tube defects from folic acid deficiency. She confirmed that the defendant told her that folic acid was not necessary and he did not tell her that the relevant guidance recommended folic acid supplementation of 400 µg daily for women preparing for pregnancy and during the first trimester.

19. Mrs Toombes says that she could have become pregnant at any time after the consultation with the defendant on 27 February but could not have been pregnant before because between her last menstrual period and the consultation, she and Mr Toombes had had no sexual intercourse. She was absolutely adamant on this point. She said it was not possible because there had been no sexual intercourse. When asked about the use of the phrase “unprotected sexual intercourse” in some of the correspondence and pleadings, Mrs Toombes again was clear that she and her husband have never used a condom or other barrier form of contraception and that if she was not taking the pill, the only form of "unprotected" sex would be no sex, and that that was the choice: either sex if she was taking the pill or no sex.

20. Thus, Mrs Toombes was clear that following on from the defendant's advice that there was no reason for a gap between ceasing the pill and trying to become pregnant, she and her husband were having unprotected sex in the hope of a pregnancy. By reference to her last menstrual period, the positive pregnancy test on 15 March, the estimated date of delivery and the ultrasound scan test, Mrs Toombes accepted that she could have been pregnant any time from 27 February onwards, but not before.

21. Mrs Toombes told me that, on the advice of the first midwife she saw, Midwife Flatters, on

25 March 2001, she began taking folic acid. She did so immediately, having bought the folic acid tablets over the counter. She confirmed that she was not taking folic acid prior to that booking-in appointment. She repeated that the advice of the midwife coincided with information she received from her sister-in-law who was also pregnant at the time and had been advised to take folic acid.

22. Mrs Toombes' records make it clear that following genetic counselling before becoming pregnant for the second time she took the larger dose of folic acid, pre-pregnancy (from April 2003 to her positive pregnancy test in July 2003) and for the 12 weeks of the first trimester. The records also show that she was concerned that the claimant's neural tube defect should have been picked up antenatally, but it seems she accepted the advice that this would not have been likely given the occult nature of the defect.

23. At p.162 in the medical records is an entry for 17 April 2003 which indicates that Mrs Toombes was reporting she was "upset as was adv[ised] if had good diet prev[iously] would not need folic acid supplements".

24. She told me that when the claimant was about a year old, she was in W.H. Smith's looking at a book and saw that folic acid is recommended to be taken pre-conception as well as in the first 12 weeks of pregnancy. She was so shocked to come across that recommendation that she should have taken folic acid before conceiving that she told me that she telephoned her husband straightaway. It is her understanding that folic acid should be built up before pregnancy and that the phrases "before conception" are used in both the British National Formulary and the Practical General Practice publications. She told me that because of the advice that she could try and get pregnant straightaway, she did not have a chance to take folic acid pre-conceptually and that had she been told of the recommendation in the terms of the guidance she would have waited and become pregnant at a later date.

25. Mrs Toombes was cross-examined at some length about apparent inconsistencies in the pre-action correspondence and the pleadings as well as the significant delay in bringing the claim on behalf of the claimant. In response to these challenges, she made it clear first of all, that she could not have been pregnant before the consultation with the defendant because she and her husband refrained from all sexual intercourse. She confirmed that she and her husband had never used condoms or barrier methods. She acknowledged that the case had evolved in terms of the way in which it was presented, but that the facts upon which it is based remain the same and true. She referred to her preoccupation with caring for the claimant, particularly at the time that she started school and the time involved in that care as being the reason for her not pursuing litigation more quickly.

26. She told me she would have taken folic acid supplement and would have followed advice to wait if that advice had been given and tried for pregnancy at a later date.

27. I heard from Mr Toombes. His witness statement is dated 28 September 2021. He confirmed that he and his wife have only ever had sex (when not trying to get pregnant) if Mrs Toombes was taking the pill. He said that they have never used barrier methods (condoms or gels).

28. In his statement he confirmed that his wife's concern was about having taken the pill for five years and whether there should be a gap before they tried for a baby and that they refrained from sexual intercourse completely until after the advice from the defendant on 27 February 2001.

29. I heard from the defendant, Dr Philip Mitchell. In his witness statement, he says that he has a "very vague" recollection of Mrs Toombes, although he cannot recall the details of the consultation given the passage of time. He says that his statement is based on his usual practice at the time of the index events assisted by reviewing the contemporaneous medical records. In his oral evidence he said that he had no specific recollection of the consultation and the details put to him about Mrs Toombes did not "ring any bells".

30. He said that this consultation would fall within an unusual category because most patients do not ask for preconception advice and he told me that it was not common for him to be consulted in that way.

31. He said that, like any consultation, he would start by asking open questions such as how the patient was and what he could do for them today. He agrees that as is apparent from his note, Mrs Toombes came for pre-conception advice because she was planning to become pregnant. His note reads "Preconception counselling. adv. Folate if desired discussed".

32. Dr Mitchell explained that "pre-conception counselling" would mean that he would give a patient general advice such as to stop smoking, drinking and taking recreational drugs, to eat healthily and to exercise. He says that since his note records "Folate if desired", it is likely that the discussion around folate would have been the focus of the consultation. In his statement, he says that at that time his usual advice to patients was to tell them that the "relevant guidance recommends folic acid supplementation of 400 µg daily for women preparing for pregnancy and during the first trimester."

33. In his statement, he also explains that sometimes a patient will ask whether or not supplementation is necessary and, in those circumstances, he would explain that spina bifida and neural tube defects can be associated with poor folic acid levels and correcting that deficiency has been shown to prevent such abnormalities. However, he would go on to say that if the patient had very good folic acid intake from their normal diet, then the benefit of taking additional supplementation would be less important. He adds "but the dietary intake of folic acid would have to be very good in order to avoid the need for 400 µg of folic acid supplementation daily".

34. He goes on to say that he therefore tended to leave it for the patient to decide whether they would take folic acid supplementation. From his notes, he says, "I suspect that Mrs Toombes may have wished to discuss natural alternatives to folate supplementation during the consultation."

35. At paragraph 12 of his statement, he says that he did not advise his patients to delay attempting to conceive, but rather to start taking folic acid and to continue taking it until

after the first 12 weeks of pregnancy.

36. He states that there is no reason why he would not have adopted his usual practice at the consultation with Mrs Toombes. It is his assumption that he advised and discussed with her whether or not there would be sufficient folate in her natural diet because his note reads "Folate, if desired," rather than simply advising her to take folate. He confirms that he would not have advised her to delay attempting to conceive. Such advice would not be in accordance with the applicable guidance at the time.

37. In cross examination, Dr Mitchell agreed that it was apparent from the nature of the consultation that Mrs Toombes wanted to know what was best to do prior to conception. He says that if he had been made aware of the possibility that she was pregnant, he would have made a note of it. He does not recall her asking a specific question about the pill, but he agrees that he was not saying that she did not, it is just that he does not recall it. His own contemporaneous note is the only assistance he has in recalling the consultation. His usual practice before a consultation would be to look at the patient's last notes to familiarise himself with the patient and he agreed that it is therefore likely that he would have read the previous note, which indicated that Mrs Toombes was thinking about getting pregnant in the next six months or so.

38. He told me that on reflection he considers that his note of the consultation is inadequate. He agreed that it does not identify that the advice that he gave was in accordance with his usual standard practice and that he has made assumptions based on his usual practice. He agrees that none of the detail of the relevant guidance as to dosage or timing of taking folic acid is in the note, nor is there any reference to discussion about spina bifida or neural tube defects. He agreed that it would be important to give a patient all relevant advice to help her make an informed decision. It is his view that "Folate if desired," is not inconsistent with him giving the usual standard advice in accordance with the recommended guidance because it would be his practice to allow women to make the decision for themselves, having been informed in accordance with the recommended guidance.

39. He confirmed that the dietary intake of folic acid would have to be very good for the supplements not to be necessary, and that it would be his usual practice to enquire as to the details of a patient's diet. He agreed that if he did so, that should be in the note, too. He also agreed that there is no adverse effect from taking a higher dose of folic acid (indeed significantly higher doses are prescribed for people who have had a previous child born with such a defect or a history of it in the family) and so he agreed there would be no harm in taking the supplement, even if diet was good. Dr Mitchell agreed that folic acid supplements would be easier to take, that is, in pill form, rather than by food supplementation.

40. He agreed that without being told the dose recommended, the reason for taking folic acid and the timing of taking it, the patient would not have been able to make an informed decision.

41. He agreed that the literature already referred to (the British National Formulary and the

Practical General Practice publication), makes it clear that folic acid should be begun “before conception" and when "preparing for pregnancy". Nonetheless, he stated that there is no timeframe referred to in any of the recommendations and repeated that he does not advise his patients to delay attempting to conceive, but he did say that he agreed that the correct advice to have given would have been exactly as set out in the recommendations which refer to “before conception” and “preparing for pregnancy”. He said he would not use the exact wording in the guidance and would rarely give instructions in terms such as "preparing for pregnancy". So, it was his view that starting supplementation could begin "at any point before conception". He says that “before conception” does not give a timeframe but agreed that one has to start before the other.

42. In re-examination, he said that if Mrs Toombes had obtained folic acid that same day and got pregnant that same day, it would not have been against his advice.

43. Dr Mitchell told me that he left the practice at the end of August or the end of September 2002, so was still in practice when the claimant was born, but he was not sure that he knew of her medical problems before he left the practice.

The witnesses

44. Clearly, given this is a factual dispute, my findings will depend upon my assessment of the witnesses. The thrust of much of the argument on behalf the defendant is that a critical examination of the reliability and credibility of Mrs Toombes’ evidence (and that of Mr Toombes, albeit to a more limited extent,) in light of the documents in the case and the passage of time (more than 20 years) shows that Mrs Toombes’ evidence is materially inaccurate, unreliable and possibly, untruthful. It is suggested that her account has changed and “improved” over the years and that there are multiple and late changes in her account (and a very late addition from Mr Toombes in the form of his witness statement) which it is suggested on behalf of the defendant have only emerged to try and "make good holes in the earlier case". I am invited to reject Mrs Toombes’ evidence (and that of Mr Toombes) because it has changed over time and "her current account is wholly incompatible with the earlier account in the letter of claim”.

45. The points relied upon by the defendant in this respect fall into 3 main categories. Firstly, in respect of the issue as to whether or not the claimant can prove that Mrs Toombes was not already pregnant at the date of the consultation, reference is made to the letter of claim (in October 2006) which sets out that Mrs Toombes "conceived at about the same time as when she saw Dr Mitchell". In March 2011 on behalf of the claimant it was set out. "we can say with reasonable certainty that the claimant's mother was not pregnant by the time of the consultation". It is also argued on behalf of the defendant that there is a material difference between the particulars of claim, contending that Mrs Toombes had not had "unprotected sexual intercourse" between stopping the pill and seeing Dr Mitchell and Mr and Mrs Toombes in their witness statements signed on 28 September 2021, saying that during that period, they had refrained completely from sexual intercourse.

46. Secondly, the defendant places reliance on the delay in putting forward the claimant's claim as currently formulated. After the letter of response in May 2007, there was a gap of

some four years before the claim was pursued again and it was not until May 2014 that it was contended that with proper advice, there would have been a later conception. This is said to have been a change made in response to the defendant's case that taking folic acid during the first weeks of pregnancy would not have made any difference to the outcome. The defendant relies on the fact that this latter argument has not been pursued.

47. Thirdly, the defendant seeks to undermine Mrs Toombes' account by saying that the booking-in form with the midwife states (p.219) "Current Medication-Folic acid" contradicting Mrs Toombes' evidence that it was only after seeing the midwife that she began to take folic acid.

48. However, I found Mr and Mrs Toombes to be entirely honest and straightforward witnesses. I considered that Mrs Toombes in particular was very careful and measured in her evidence. Her approach and that of her husband to planning to start a family was equally careful and considered, and that is reflected in the fact that she sought pre-conception counselling. As Dr Mitchell agreed, that of itself is not common.

49. It was apparent when she gave her evidence and was subject to robust cross-examination, including as to her veracity that Mrs Toombes found some of the questioning difficult to deal with and there were some lengthy pauses whilst she either thought about her answer or was unable to answer. However, I find that this was a reflection of her wish to give accurate answers having first understood the question properly. I further find that this was a reflection of her temperament, which I assessed from her demeanour in the witness box to be that of a very careful and thoughtful witness. I found her to be reliable and credible.

50. Mr Toombes was direct, frank and precise in his evidence and I accept what he told me.

51. In his closing submissions, leading counsel for the defendant went as far as to say that when Mrs Toombes was asked to see her G.P. notes that was "presumably to check if what [Mr and Mrs Toombes] were now saying fits with those notes". There was nothing in Mrs Toombes's evidence or the way in which she gave it which caused me to believe that she was being untruthful in that sense, or seeking to fabricate a case.

52. I accept that Dr Mitchell has no actual recollection of the consultation and is entirely reliant on what he says his usual practice would have been and his note. I find that he did not have even the very vague recollection of Mrs Toombes referred to in his statement. He acknowledged that his note is inadequate. I formed the view that he was attempting to reconstruct a conversation/consultation on the basis of that inadequate note which required him to speculate or make assumptions about what was said. I find therefore that his evidence was not as reliable as it would have been if the note had been as complete as it should have been.

Findings

(i) Attack on the credibility of Mrs Toombes in reliance on a "changing case"

53. Mrs Toombes' evidence is that she sought preconception counselling and was told it was

not necessary to take folic acid. It is her evidence that she did not take folic acid until after she saw the midwife. The claimant was born with a neural tube defect. That defect was not picked up antenatally. It is her evidence that had she been advised to take folic acid pre-conceptually and during the first 12 weeks of pregnancy, she would have done so. The pre-action correspondence merely reflects, as I find, the way in which an investigation/enquiry was ongoing to see whether or not there was a claim in negligence which could, on these facts, properly be pursued. That it was first framed as a failure to recommend folic acid, which led to a claimant being born with a neural tube defect was a proper line of enquiry in my view. I do not know what advice may have been received in terms of causation, but on the same factual matrix, the claim as currently formulated has, inevitably, through the filter of legal representation, put different and/or greater emphasis on aspects of the evidence. I find, as Mrs Toombe said, that the facts as she gives them in her account have not changed in any real or important sense. How the claimant's cause of action is formulated on those facts may, however, have crystallised.

54. Thus, whilst I accept that when they initially sought legal advice, Mr and Mrs Toombes (and/or their legal advisors) were concerned that the lack of folic acid was responsible for the claimant's neural tube defect, it seems to me that would be a reasonable line of enquiry to pursue and a not unreasonable assumption about the cause of the claimant's problems. Mrs Toombes clearly did have that concern.

55. Whether or not the claimant is in fact of the opinion that her LMM was not preventable by folic acid, it was apparent to me that Mrs Toombes was not really willing to concede that point, but she also clearly struggled with the idea of disagreeing with her daughter. In any event I heard no expert evidence on the point. The particulars of claim specifically plead at paragraph 4 that there are studies which cast doubt on the relationship between occult spinal defects and open neural tube defects. The reliance by the claimant is on the advice that should have been given to her mother in respect of folic acid. As pleaded at paragraphs 6 and 7, it is the claimant's case that had Mrs Toombes been so advised she would have followed that advice and would have refrained from attempting to conceive immediately. This has always been the pleaded case and was in the draft particulars of claim sent on 16th May 2018.

56. It also seems that initially Mrs Toombes was concerned that the claimant's neural tube defect had not been identified antenatally. Again, I find this was not an unreasonable concern, nor would it have been unreasonable to make enquiries about that. It seems that Mrs Toombes was told that such an occult defect would not be picked up antenatally and she has not pursued that further and seems to have been satisfied with the explanation. That does not seem to me to undermine her credibility in any way.

57. I accept that the claimant's case has evolved. Leading counsel for the claimant accepted that, too. For the reasons I have set out I consider this to be entirely explicable and understandable. In the circumstances, despite the heavy reliance by the defendant on the letter of claim and the "change of case" alleged it does not seem to me that there is anything other than an entirely explicable course of events here in investigating whether or not there was a case to pursue. It is right, of course, to say that the case has evolved, and in

particular required the resolution of the difficult preliminary issue point. It has been decided, however, that the claimant has a cause of action. I do not find that there were any significant inconsistencies in the way in which the case has been put on behalf of the claimant.

(ii) What advice should Mrs Toombes have been given and what advice did Dr Mitchell give her?

58. It does not seem to be in dispute, but I make the finding, that Dr Mitchell should have given Mrs Toombes advice about folic acid in accordance with the guidance in the British National Formulary and the Practical General Practice publication, that is, "Women who are planning a pregnancy should be advised to take folic acid as a medicinal or food supplement at a dose of 400 µg daily before conception and during the first 12 weeks of pregnancy," and “it is recommended that all women take 400 µg of folic acid from before conception until the end of the 12th week".

59. In particular, Mrs Toombes should have been told that the recommendation is to take folic acid daily, "before conception". In the defence, it is pleaded that Dr Mitchell’s standard practice was to indicate that the current guidance was to recommend folic acid supplementation for women "preparing for pregnancy". I find it difficult to reconcile that standard practice with paragraph 12 of his witness statement in which for the first time, he says that he did not advise his patients to delay attempting to conceive. In any event, Mrs Toombes should have been advised that folic acid should be taken prior to conception.

60. I find that Mrs Toombes’ recollection of the consultation is accurate in relation to its important aspects. I accept that that she has a clear recollection of the consultation on 27 February 2001. I find that Mrs Toombes’ primary concern was whether or not there should be a gap in time from finishing taking the pill before trying to conceive. I find that she also wanted to know if there was anything else that she should or should not do.

61. I find that Dr Mitchell’s note is completely inadequate. As I have found, Mrs Toombes’ main concern was with regard to stopping the pill and that is not referred to in the note at all. I find that Dr Mitchell's assumption that "Folate if desired," means that he gave his usual standard advice, but that Mrs Toombes raised an issue as to whether or not the supplement was necessary and he explored details of her diet, informed her of the risks and then left it to her to choose, is nothing but speculation after the event. The note gives the impression without more discussion that Mrs Toombes was told that she should take folic acid if she wanted to. I accept Mrs Toombes’ evidence that she came away from the consultation under the impression that if she had a healthy diet, folic acid supplements were not necessary. In the circumstances, I prefer the evidence of Mrs Toombes and find that she was not told about the recommended dose or the reason why folic acid supplementation was recommended or that it should be taken before conception and for the first 12 weeks of pregnancy.

62. I accept that it was probably Mrs Toombes who raised the issue of folic acid first. I find that on the balance of probabilities on this occasion Dr Mitchell responded to her query

rather than raising it himself.

63. I find that Dr Mitchell told her that if her diet was good enough, folic acid was not necessary. I find that that is the more likely meaning of his note, “Folate if desired". I reject Dr Mitchell's interpretation that this record reflects a concern by Mrs Toombes about taking supplements, perhaps preferring a natural source of folic acid and being asked about her diet which would have to be "very good" to avoid the necessity for folic acid supplements. Taking a folic acid supplement as I find is the easiest way to take it. Moreover, there are no adverse effects to taking too much even if a woman’s diet is rich in folate. There is no evidence that Mrs Toombes was averse to the idea of taking a tablet. As I have already indicated, had she been correctly advised, Mrs Toombes would have begun to take folic acid at the recommended dose. I find that in cross examination, Dr Mitchell did seem at one point to support the view that a healthy diet negated the need for folic acid supplements and again that may better reflect the accurate interpretation of the entry, “Folate, if desired". In any event, I prefer Mrs Toombes’ account.

64. I find that she was not told about the reason for taking folic acid supplements (neural tube defects and spina bifida) because I accept her evidence that it was not until the claimant was about a year old when she was in WH Smith's that she made the connection. She had heard about the importance of folic acid and pregnancy, but did not know the reason. She was not told the reason by Dr Mitchell at the consultation, therefore.

65. The medical record entries at pp.162 and 160 in my view, give strong support for Mrs Toombes’ evidence about the consultation being accurate. On 17 April 2003, she was reporting that she had been advised that if she had a good diet, she would not need folic acid supplements. That is exactly what she is saying now. That was repeated in December 2003 when she said that she felt that she had had inappropriate advice about the folic acid in the preconception period. Any lack of particularity in the words, “inappropriate advice” does not, in my view, weaken the point that this was what Mrs Toombes was saying from an early stage.

66. Mrs Toombes’ concern about the lack of folic acid supplementation preconception and/or in the early stages of pregnancy was also set out in the letter of claim and I find that that only supports the claimant's case that her mother was not advised appropriately by the defendant.

(iii) When did Mrs Toombes start taking folic acid supplements?

67. I find that Mrs Toombes did not start to take folic acid supplements until after she saw Midwife Flatters following the booking in on 25 March 2001 (p.187). I accept her evidence on this. The coincidental information about her sister-in-law being advised seems to me to have the ring of truth about it. It is also supported, as I find by the evidence in Mrs Toombes’ medical records (pp.162 and 160) where at an early stage, she was reporting inappropriate advice about folic acid in preconception and being upset specifically about being advised that she would not need folic acid supplements if she had a good diet. The document at p.219, which reads "Current medication Folic acid" is, as I find clearly a

document which was being updated. There are entries on it for dates between 30 March 2001 and 29 October 2001, and I find on the balance of probabilities that either the "Folic acid" entry was an updated entry, like many of the others following the initial booking in on 25 of March 2001 (p.187), or follows on from the advice which was given about folic acid and which is recorded and signed by Midwife Flatters, (p.220), because Mrs Toombes indicated that she would start taking folic acid immediately. I find that that is what Mrs Toombes did. It is apparent that these pages form part of a booklet which is an ongoing record throughout the course of the pregnancy and I accept Mrs Toombes' evidence on this point.

68. My finding that she did not take folic acid until she saw Midwife Flatters supports my finding about the consultation with Dr Mitchell. Had Dr Mitchell fully informed Mrs Toombes in accordance with what he says is his usual practice about folic acid supplements, I find that she would have taken them. She did not and I find that is because she was told they were not necessary.

(iv) Has the claimant proved that it is more likely than not that Mrs Toombes was neither pregnant nor had the sexual intercourse leading to the claimant's conception taken place before the consultation with Dr Mitchell?

69. It is Mrs Toombes' evidence on behalf of the claimant that she could not have been pregnant at the date of the consultation. The defendant says she cannot prove this on a balance of probabilities. For the reasons set out above, I do not accept the submission on behalf the defendant that she must have been pregnant sooner by reference to the EDD, the last menstrual period or the ultrasound scan. I make this finding, if necessary, by taking judicial notice of the fact that the EDD is calculated as 40 weeks from the first day of the last menstrual period. In any event that fact is clear from the records which show the 40-week calculation from 13.2 2001 – 20.11.2001. It was suggested and put to Mrs Toombes that, knowing that she could not have been pregnant earlier than 27 February 2001, she should have pointed this out to the midwife. I find that is a completely unrealistic submission. In any event, had she said that (which is entirely hypothetical because she would not have considered the possibility), the calculation would still have been 40 weeks from the first day of last menstrual period whether she conceived as early as 13 February or as late as 14th March.

70. Given her careful approach to conception and the concerns which Mrs Toombes had about the pill and given the fact that she had made the appointment with Dr Mitchell, I am satisfied on the balance of probabilities that Mr and Mrs Toombes' evidence is right when they say that they did not have sexual intercourse at all until after this consultation. I accept the defendant's point that, given the EDD is calculated at 40 weeks from the date of the last menstrual period, it would have been possible for Mrs Toombes to have been pregnant on 27 February, but I am satisfied that her evidence and that of her husband is clear and accurate. In the circumstances I find that she was not pregnant at the time of the consultation although is likely to have been very soon thereafter. following the advice from the defendant.

(v) What on the balance of probabilities would Mrs Toombes have done if she had received the appropriate advice?

71. I find that, given the careful consideration which was being given towards conception, Mrs Toombes would have followed any advice she had been given. She did follow the advice to stop drinking (including on a skiing holiday.) She took extra care on that holiday, by not skiing. She was obviously vigilant in attending antenatal appointments. As soon as Midwife Flatters advised her to take folic acid, I find that she immediately bought the recommended dose over the counter and began taking it. Before trying for their second child Mr and Mrs Toombes were very careful to explore the chances of there being some genetic reason for the claimant's neural tube defect and then Mrs Toombes took the recommended higher dose of folic acid over a period of about 3 months and had a folic acid level test before becoming pregnant.

72. As I have said, I find her to be a very careful person who was very concerned about doing the right thing. I find that if she had been advised that the recommendation was for 400 µg of folic acid supplement before conception and for the first 12 weeks of pregnancy and that that was to avoid neural tube defects and/or spina bifida, she would have followed that advice carefully. I find that she would have followed the advice even without full explanation of the reasons for taking folic acid.

73. If she had been told of those things I find that she would have had no reason not to follow that advice. There is no evidence that Mrs Toombes was averse to taking tablets and taking folic acid in tablet form is, as was agreed, the easiest way to take it and to ensure the correct quantity recommended. There is no adverse effect of taking more folate even if one's diet is rich in folate.

74. I find that had Dr Mitchell advised Mrs Toombes in the terms set out in the British National Formulary and the Practical General Practice, namely that folic action should be taken before conception and/or when preparing for pregnancy as well as during the first 12 weeks, she would have waited to conceive until she had established a pattern of taking the folic acid supplements. I find that it would have been about a month or so before she attempted to start a family on the basis of her evidence, which I accept. Whether or not Dr Mitchell did or did not advise delay, it seems to me that Mrs Toombes, given her own concerns to do the best she could and given the fact that she had delayed, as I have found, attempting to start a family until her preconception counselling appointment, would, on a balance of probabilities, hearing that folic acid supplementation should be taken before conception have delayed trying to conceive.

75. It does seem that in the limited literature I have seen there is no specific recommendation as to the period of time "before conception" during which folic acid should be taken. That literature does make it clear, however, that the supplements should be taken before conception and for the first 12 weeks of pregnancy. Dr Mitchell agreed with that, but his evidence is that taking folic acid literally the same day as one begins trying to conceive (even though one might be successful on that first day) would be enough. I was not told the

basis for that assertion. The letter of response from the Medical and Dental Defence Union of Scotland sent on behalf of the defendant dated 1 May 2007 states (p.12).

> "The neural tube closes between 21-28 days post conception. Folic acid levels take three weeks to reach stable levels in the mother. It is clear that the effect of maternal levels of folic acid on the fetus is both dose related and affected by the woman's pre-supplementation folate status although the general consensus is that supplementation needs to be started before pregnancy".

76. I know that Mrs Toombes took folic acid supplements for 3 months before conceiving her second child.

77. In the absence of expert evidence in relation to when a woman should start taking folic acid, I am left with the evidence of Dr Mitchell, the details set out by his defence union in the letter of response and the (albeit dissimilar circumstance) of Mrs Toombes taking folic acid for three months before attempting to conceive her second child. However, my finding is essentially a factual one; what would this person, Mrs Toombes, have done? Mrs Toombes was actively seeking advice about what she should do to ensure healthy pregnancy and baby. Had she been given the correct advice by Dr Mitchell I find that she would have made her own decision based on that advice and established her folic acid supplementation regime before becoming pregnant. That is what she told me she would have done. This accords with the approach identified by Dr Mitchell; give the patient the information and leave it up to her to decide what to do. On balance, I think it would have been a delay of about a month, that is probably after her next monthly cycle. In any event, on Mrs Toombes' evidence, which I accept, it would certainly have been weeks rather than days.

78. By the particulars of claim, Mrs Toombes asserts: that she would have delayed conception, that she would have refrained from unprotected sexual intercourse until she had taken folic acid for at least some weeks; that she would not have attempted to conceive until she was taking the prescribed dose of folic acid, that she would have delayed attempting to conceive for at least one month; and (from her witness statement and oral evidence) that she would have waited until she had completed an appropriate programme of pre-conception folic acid. I accept her assertions.

79. Mr and Mrs Toombes had been in a relationship for some time and married for some time and had discussed when to start a family. I accept Mrs Toombes' evidence that starting a family was very important to her. I accept her evidence she wanted to get it right. It is apparent that she and her husband had discussed this before (hence the earlier entry in the records). It is apparent that they then had a discussion about starting a family earlier. Mrs Toombes' reaction to that discussion was to get an appointment for preconception counselling. That is not a common situation and I have found that they did not have unprotected sex before that appointment. I accept the evidence from Mr and Mrs Toombes that they waited until after the consultation with Dr Mitchell. I accept therefore that they would have waited longer had they been given the appropriate advice.

Conclusion

80. In the circumstances I find that Mrs Toombes was not pregnant at the time of the consultation with Dr Mitchell. She was not advised in accordance with the guidance to take folic acid prior to conception and for the first 12 weeks of pregnancy. She was not advised about the relationship between folic acid supplementation and the prevention of spina bifida/neural tube defects. Had she been provided with the correct recommended advice she would have delayed attempts to conceive. In the circumstances, there would have been a later conception which would have resulted in a normal healthy child.

81. I therefore find that the claimant's claim succeeds on liability.