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## Shoshana Mitchell Think Before You Act: Admissions Of Liability 📅

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## THINK BEFORE YOU ACT: ADMISSIONS OF LIABILITY

This article summarises and discusses the decision of Master Sullivan in [Somoye v North West Anglia NHS Foundation Trust \[2023\]](#) [EWHC 191 \(KB\)](#).

Defendants in personal injury and clinical negligence claims have long been encouraged to make early admissions of liability. Such admissions narrow issues, reduce time and save costs. However, the recent decision in [Somoye v North West Anglia NHS Foundation Trust \[2023\] EWHC 191 \(KB\)](#) reminds defendants that they should *not* make admissions of liability lightly.

### BRIEF SUMMARY OF FACTS

This clinical negligence claim arose from the death of Dr Somoye ("S"). The following chronology depicts the key events leading to her death:

| Date             | Event  |
|------------------|--|
| 28 February 2018 | S underwent a myomectomy at the Defendant's hospital.                        |
| 3 March 2018     | S was discharged from the Defendant's hospital.                              |
|                  | Having suffered a seizure at home, S returned to the Defendant's hospital.   |
|                  | S was once again discharged from the Defendant's hospital on the same day.   |
| 7 March 2018     | S returned to the Defendant's hospital with severe abdominal pain at 0415.   |
|                  | An abdominal x-ray raised concerns for small bowel obstruction or ileus.     |
|                  | In the afternoon, S vomited faeces, collapsed and suffered a cardiac arrest. |
|                  | Following unsuccessful resuscitation, S was pronounced dead at 1452.         |

### THE INQUEST

A post mortem examination was undertaken by Dr Wright and a Consultant Colorectal Surgeon, Professor Winslet, was instructed by the Coroner for the Inquest to produce an expert report.

Professor Winslet's first report dated 17 December 2018 considered that there were two possible causes of death:

1. S aspirated causing a cardiac arrest with some natural autolytic changes being present during the post mortem; or
2. Alternatively, S had developed a rare bowel abnormality, necrotising enterocolitis, which could not have been diagnosed pre-mortem.

In his first report, Professor Winslet considered that if the Court found that the post mortem appearance of the bowel was natural autolysis, then on balance the cause of death was aspiration by pneumonia which could have been avoided.

Dr Wright commented on the report of Professor Winslet and considered that the cardiac arrest was most likely due to hyperkalaemia. Professor Winslet revised his opinion to conclude that if the Court found in favour of Dr Wright's view then on the balance of probability the cardiac arrest would have occurred in any event.

At the inquest, the Coroner found that it was not possible to conclude, on the balance of probabilities, whether aspiration led to cardiac arrest or whether the cardiac arrest caused the aspiration.

### THE ADMISSION

The Defendant made two admissions both prior to the inquest. On 24 March 2020, the Defendant made a pre-action admission of liability, which was predominantly based upon the first written opinion of Professor Winslet. The Defendant then reiterated this admission in a letter dated 20 April 2021.

### THE DECISION

On 13 July 2022, the Defendant made an application to withdraw

the admission. The Defendant served two expert reports from consultants in support of their application. In applying the factors in Practice Direction 14 paragraph 7.2, Master Sullivan considered:

1. The grounds upon which the applicant seeks to withdraw the admission, including whether or not new evidence has come to light which was not available at the time the admission was made

- 1.1. Professor Winslet in his first report had identified two possible causes of death;
- 1.2. Therefore, the issue of whether the cause of death was something other than a cardiac arrest arising from aspiration was identified as early as 2018;
- 1.3. Whilst there was a change in the opinion of Professor Winslet, this was not a new theory or new evidence and was a clear possibility at the time of the admission; and
- 1.4. The evidence of the two consultants was not new evidence for the purpose of this factor given it was made in support of the Defendant's Application.

2. The conduct of the parties, including any conduct which led the party making the admission to do so

- 2.1. The Defendant's conduct could be criticised as defendants are expected to take independent legal and medical advice at an early stage before making an admission;
- 2.2. Despite Professor Winslet changing his opinion in September 2021, the Defendant did not notify the Claimant that it was investigating causation until March 2022; and
- 2.3. Given there was no express reference to an application to resile from the admission until July 2022, there was a significant delay on the part of the Defendant.

3. The prejudice that may be caused to any person if the admission is withdrawn

- 3.1. Prejudice would be caused to the Claimant as witness evidence would likely be relevant and the delay in obtaining that evidence could undermine the cogency of such evidence; and
- 3.2. The Claimant had spent money investigating quantum that would probably not have been incurred if liability was in issue until after that issue had been resolved.

4. The prejudice that may be caused to any person if the admission is refused

- 4.1. There would be prejudice given the Defendant would not be able to dispute liability, but this was mitigated by the fact that the Defendant would still be able to challenge the extent of losses.

5. The stage in the proceedings at which the application to withdraw is made, in particular in relation to the date of a fixed period for trial

- 5.1. Whilst the application was made at the first opportunity, this was of limited weight given the time between the accident and the admission.

6. The prospects of success, if the admission is withdrawn, of the claim or part of the claim in relation to which the admission was made

- 6.1. Whilst the Defendant had a real prospect of success in respect of causation on 7 March 2018, there was no evidence detailing the earlier substandard treatment on 3 March 2018.

7. The interests of the administration of justice

- 7.1. The Defendant's submissions focused on it not being in the interests of the administration of justice to allow a trial to proceed on an artificial basis, specifically that S's death was caused by the Defendant's negligence;
- 7.2. The Claimant's submissions concentrated on the wider impact, namely that claimants would be unable to rely upon pre-inquest admissions in case there were tactical decisions to admit pre-inquest and then withdraw later; and
- 7.3. The issue between the administration of justice were connected with the issues identified at the conduct stage.

Master Sullivan confirmed that the above factors were not listed in a hierarchical order. Permission to resile from the admission was not granted; despite a realistic defence, this was outweighed by conduct and prejudice issues.

## WAY FORWARD

I consider that there are three main takeaways from this decision:

1. Whilst early admissions should continue to be encouraged, caution must be taken before admitting liability;
2. In determining whether or not to make an admission, parties should consider the totality of the evidence and how it could mature; and
3. Parties wishing and/or intending to resile from admissions should act promptly.

*Shoshana Mitchell*

23 March 2023