Neutral Citation Number: [2020] EWHC 91 (QB)

Case No: D13LV404
Appeal Ref: 77/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Manchester Civil Justice Centre
1 Bridge Street West, Manchester, M60 9DJ

Date: 27/01/2020

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

Morrison	**Claimant**
- and -	
Liverpool Women's NHS Foundation Trust	**Defendant**

- -
- -

Ms Elizabeth Francis (instructed by **Slater & Gordon (UK) Ltd**) for the **Claimant**
Mr Charles Feeny (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing date: 16 January 2020

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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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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. This appeal concerns the birth of a baby which went wrong. Fortunately, the baby was uninjured but his mother, the claimant, suffered a serious injury to her womb and had to undergo a hysterectomy. She brought a claim alleging negligence on the part of those responsible for her care at the defendant's hospital but liability was denied on the issues both of breach of duty and causation.

2. The trial came before Mr Recorder McLoughlin in June 2019. He handed down his reserved judgment on 6 September 2019. He found for the claimant and awarded damages against the defendant. The defendant now appeals against his decision to this court.

3. With one exception, to which I will turn in due course, neither party takes issue with the Recorder's detailed and careful findings of primary fact. Accordingly, the story can be told concisely.

BACKGROUND

4. At the relevant time, the claimant was expecting her fourth child. She had a history of undergoing two previous caesarean sections and had also sustained a tear to her womb. As a result, her pregnancy was categorised as "high risk" and a plan for her treatment was drawn up which included "elective CS…emergency CS during labour"

5. On 2 December 2014, her waters broke and she was admitted to the defendant's hospital. It was decided that the way forward, unless the claimant were to go into labour sooner, would involve her undergoing an elective caesarean section on the morning of 11 December. If she were to go into labour earlier, however, the section was to be carried out as an emergency.

6. And so it was that she was discharged from hospital on 9 December with instructions to return two days later at 7:00 am.

7. However, nature took its course and the planned timing of the elective caesarean was overtaken by events. At about 2:30 am on 11 December, the claimant duly presented herself to the hospital about four and a half hours before her appointed hour. By then, she was in the latent stage of labour. This is the label given to the period during which contractions are occurring but the cervix has not yet dilated by more than 4 cm. Once this level of dilatation has been achieved, the labour is no longer regarded as being latent but established.

8. Following her second admission, the claimant was assessed by the defendant's clinicians on four occasions: 2:40 am, 4:10 am, 5:35 am and 7:05 am. It was upon the last occasion that the decision was made to proceed to a caesarean section. The claimant gave birth to a baby boy at 8:36 am. However, she was subsequently found to have sustained damage to the posterior wall of her uterus which was not susceptible of repair. In consequence, a hysterectomy was performed.

9. At trial, the central issue relating to breach of duty was as to whether a decision should have been made at 4:10 am to proceed to a caesarean section. It was agreed that such a decision was not mandated at 2:40 am, so soon after the claimant's arrival. At 5:35 am, on the other hand, preparations were already afoot to deal with another emergency caesarean and no criticism was made about the decision to prioritise the progress of that procedure.

10. The claimant's expert, Mr Waterstone, concluded that no reasonable body of medical opinion could support the decision not to proceed to a caesarean section following the appraisal at 4:10 am. Mr Irons, on behalf of the defendant, concluded that a caesarean section was not mandated at this time. Each gave evidence in support of his respective opinion in their written reports and orally at trial.

11. It was further argued on behalf of the defendant on the issue of causation that the claimant was unable to prove on a balance of probabilities that the tear to her uterus occurred after the time at which the caesarean section would have been performed even had there been a decision to proceed with it at 4:10 am.

THE GROUNDS OF APPEAL

The First Ground of Appeal

12. The first ground of appeal is that the structure of the Recorder's judgment was so deficient and his reasons for reaching his conclusion so inadequate that his findings should not be allowed to stand. In this context, the defendant relies on the observations of the Court of Appeal in ***Simetra Global Assets Ltd and Another v Ikon Finance Ltd and 11 Others*** [2019] EWCA Civ 1413. However, merely because a judgment could have been better expressed or more logically structured does not automatically render it susceptible to appeal. Of course, circumstances may arise in which the reasoning in a judgment is so inadequate or incomplete that it cannot be allowed to stand. Nevertheless, in cases where the judgment, although, in parts, infelicitously expressed, can still be reasonably understood despite its presentational imperfections then the appellate court will not interfere. Care should be taken not to collaborate in the triumph of form over substance. In this case, the Recorder set out the evidence and arguments before him both accurately and in detail. Thereafter, he gave his reasons for reaching the conclusions at which he arrived. I am satisfied in the circumstances of this case that the broader allegations of structural and analytical imperfections are not of sufficient merit upon which to found a freestanding ground of appeal. Instead, this Court ought to concentrate on the substantive complaints relating to the judge's process of reasoning.

The Second Ground of Appeal

13. One such complaint raised in the second Ground of Appeal relies upon the fact that the Recorder made no direct reference to the well-known ***Bolam/Bolitho*** test for breach of duty in the context of claims in professional negligence. I am readily persuaded that it would have been preferable for an express reference to have been made to this test within the context of the Recorder's reasoning. Nevertheless, I am not satisfied that it would be fair to conclude that he did not, in fact, apply this test. It is to be noted that he made repeated reference, at earlier stages in the judgment, to the basis upon which the claimant's case on breach of duty was advanced. At paragraph 47, for example, he

records the opinion of Mr Waterstone, the claimant's expert, to have been that: "No reasonably competent obstetrician would have failed to make the decision to deliver by 4:10…" Later, he summarised the position of Mr Irons, the defendant's expert, at paragraph 83 to the effect that: "He felt that a reasonable body of opinion would have gone ahead with a CS at 4:00 am and alternatively a reasonable body would have left it." Having preferred the evidence of the claimant's expert over that of the defendant, I am satisfied that, by necessary implication, he was applying the same test which the claimant's expert had set for himself and which was, in law, the appropriate one.

14. A further criticism is directed towards the fact that Mr Waterstone was unable to point to literature or guidance directly in support of his conclusions. The closest he came was his reference to the Green-top Guideline published by the Royal College of Obstetricians and Gynaecologists which provides that planned VBAC [Vaginal Birth After Caesarean] is contraindicated in women with previous uterine rupture or classical caesarean scar. This guidance is, however, of limited use. A vaginal birth was never part of the plan for the claimant and, indeed, it was foreseen that it should be avoided, if necessary, by carrying out an emergency caesarean. It gives no direct assistance on the issue as to the anticipatory timing of any caesarean before vaginal birth might otherwise take place. On the other hand, Mr Irons, on behalf of the defendant was also unable to identify any significant guidance or literature in unequivocal support of his approach.

15. Undoubtedly, in very many cases where disputes arise between experts in the context of claims in respect of clinical negligence, there exists a substantial body of literature and guidance from which each side seeks to draw comfort in order to support its respective position. It would be unduly mechanistic, however, to conclude that the absence of such material is, of itself, an insurmountable barrier to a finding of breach of duty. The complexities of clinical practice are bound to give rise to an almost limitless number of permutations of circumstances not all of which could be expected to be directly covered in guidance or literature. As it was, Mr Waterstone relied upon a combination of a logical assessment of the situation which presented itself at 4:10 am backed up with his many years of clinical experience in this area. Doubtless, the claimant's hand would have been strengthened further if Mr Waterstone had been able to draw upon more helpful guidance or literature but, on the facts of this case, the absence of such material fell far short of being automatically fatal to the survival of his conclusions. Again, the sustainability of the claimant's case must hinge upon a more focussed analysis of the evidence and of the Recorder's reasoning. This Ground of Appeal must, therefore, also fail.

The Third Ground of Appeal

16. The third Ground of Appeal relates to two distinct bases upon which the Recorder was said to be in error. I will deal with each in turn.

17. Firstly, it was contended that the reference to "emergency CS during labour" in the plan must be taken to be a reference to established labour. The claimant was not in established labour at 4:10 am and so the need for an emergency caesarean had not yet been triggered.

18. A closer examination of the evidence, however, undermines this assertion. The author of the plan, Mr Williams, was not called to give evidence as to what he intended to

mean by "labour". Mr Waterstone certainly did not accept that "labour" meant "established labour". The claimant was in the latent stage of labour at 4:10 am and, on his interpretation, the aim of the plan was not to defer the need to carry out a caesarean section until she had reached the established stage. Of particular significance is the fact that both experts agreed that the risk of a uterine rupture relates to the strength of uterine contractions and not (at least directly) to the extent of dilatation of the cervix. In this context, the concept of established labour is of limited value as a trigger for emergency caesarean intervention.

19. Accordingly, I am satisfied that it was open to the Recorder on the evidence before him to conclude that a clinical judgment fell to be made upon each review and that the stage of established labour did not represent a threshold which, all other things being equal, had to be crossed before a finding of breach of duty could be entertained.

20. Secondly, it is contended that the Recorder fell into error by criticising Mr Irons' reliance upon the balancing act involved in having to accord appropriate priority to other demands likely to occupy the time of clinicians in this busy hospital. It is alleged that he thereby applied a standard of care which wrongly excluded from consideration issues of what was practicable and which led, in effect, to an unfairly favourable adjudication upon the claimant's position in a vacuum of context.

21. If this had indeed been the approach of the Recorder, I would have had no hesitation in concluding that it was indeed flawed. However, taken as a whole, the judgment did not seek to impose such a test. At paragraph 113, the Recorder observed: "…Mr Waterstone approached the matter from **an objective, practical perspective**..." [Emphasis added].

22. He went on to conclude that: "…on occasion, Mr Irons when being asked questions moved from the specifics of this set of circumstances to general observations about the difficulties in running a labour ward, midwifery unit and delivery suite under the NHS."

23. It would have been helpful if the Recorder had been more explicit in defining the distinction which he drew between the approach of the experts and the reasons behind his preference of Mr Waterstone's evidence. However, it remains possible to infer with the necessary degree of confidence that he had concluded that Mr Waterstone had taken into account the practicalities relating to the claimant's case bearing in mind the actual evidence as to the other priorities facing those working on the ward that night whereas Mr Irons, in contrast, had placed too great an emphasis on general assumptions about what competing demands might commonly arise but which were divorced from the evidence of what was actually happening at the hospital over the relevant period.

24. Of course, in the clinical context a balance has to be struck between the needs of any given patient and any other competing professional demands placed upon the clinicians involved. Sometimes, the seriousness and urgency of a patient's presentation and the absence of any conflicting factors will mandate a swift and decisive response. On other occasions, it is equally obvious that the needs of the patient must be deprioritised to allow the clinicians to attend other demands on their time of as a matter of priority. This is reflected in the defendant's Emergency Caesarean Section Guideline which recognises that the degree of promptness with which an emergency caesarean ought to be carried out on any given patient must take into account circumstances in which other pregnancies might be thereby be exposed to undue risk.

25. There may be cases in which the risk to the patient is sufficiently low as to justify a postponement of treatment simply to allow clinicians to deal with the inevitable day to day running of a labour ward. However, where the risk is significant and increasing a closer consideration of the competing considerations will be called for.

26. In this case, the records revealed no competing emergency coinciding with the claimant's review at 4:10 am. The first emergency of the day resulted in a theatre being occupied from 5:53 am. This was the event which it was agreed justified the decision not to take immediate action following the review of the claimant's condition of 5:35 am. In his report of 18 November 2018, Mr Irons had commented that:

> "If the court accepts the registrar was busy as the records suggest and certainly was in theatre at times, I assume performing other deliveries then is entirely appropriate and reasonable for the registrar to prioritise the workload…"

27. However, the records contradicted the suggestion that there were any such deliveries and Mr Irons was driven to speculation under cross-examination on what competing priorities there may have been. He was obliged to retreat into suggesting:

> "The doc (sic.) was at that stage, if they had nothing else to do whatever, if they're sitting – trust me it doesn't happen very often, playing Scrabble or drinking coffee, and there was no other woman in labour, and nothing else going on. I think they should have got on with it."

28. In the event, the defendant called no evidence to support the suggestion that there were, in fact, any significantly competing priorities. Dr Saleemi, who was the Senior Registrar, provided a witness statement dated 22 October 2018 in which she made no reference to any such factors. Other members of the on call team that night including the senior House Officer, Dr Clarke, and the Specialist registrar, Dr Harris, did not provide witness statements or give evidence at trial.

29. In these circumstances, the Recorder was entitled to conclude that the edifice of Mr Irons' analysis had been significantly undermined by the shakiness of the foundations upon which it had been erected. His assessment that Mr Irons had over-stated the importance of unspecified and unproved competing factors was open to him on the evidence as a justification for preferring the approach of Mr Waterstone and does not validate the defendant's criticism that he applied the wrong legal test.

30. The Recorder made the following undisputed findings of primary fact at paragraph 120 of his judgment:

> ".. the claimant was in the latent phase of labour and suffering with contractions from at least 2:32 am and these were increasing in intensity and by 4:10 am the defendant was aware that the frequency of the contractions has increased, the claimant was more bothered by them and the claimant's own description was being in severe pain."

31. And at paragraph 121:

> "She was in any event having to undergo a CS come what may."

32. Against this background, the Recorder was fully entitled to find that the failure to act at 4:10 am amounted to a breach of duty. As Mr Irons on behalf of the defendant had been forced to concede, in the absence of competing priorities (of which it transpired there was no evidence): "they should have got on with it".

The Fourth Ground of Appeal

33. The fourth and final Ground of Appeal concerning breach of duty related to the Recorder's finding that:

> "… Dr Saleemi was not fully appraised of the total clinical picture regarding the claimant from her colleagues until 5:35 am…"

34. The direct relevance of this finding is elusive. Although Dr Saleemi was in overall charge, she did not participate in the assessment of the claimant at the crucial time of 4:10 am. The records reveal, and the Recorder found as a fact, that this review was carried out by Dr Clarke who discussed the matter with Dr Harris.

35. In her witness statement, Dr Saleemi accepted that as a result of the passage of time she was unable to recall the events directly and was reliant upon the medical records. Furthermore, she expressed no opinion in her statement upon the correctness of the decision taken at 4:10 am save to the extent that the absence of any adverse comment might perhaps be taken to imply approbation.

36. During cross-examination, Dr Saleemi was asked about her knowledge of the fact that Mr Williams had recorded "emergency section during labour due to risk of uterine rupture". Unsurprisingly, she was unable to recall when she learnt of the history but it is equally clear that she did not regard the issue as being relevant as is apparent from the following exchange:

> "Q. So Dr Clarke did not make you aware of that entry?
>
> A. I wouldn't need to know that because, of course, if we were seeing signs of labour, which we were, we would do a delivery before her planned caesarean."

37. During re-examination, Dr Saleemi was asked directly about the situation at 4:10 am:

> "Q. And would you consider that that presentation would indicate an immediate need to go to caesarean section?
>
> A. Not unless there was foetal distress, which there wasn't, and if there's any other sign of concerns, whish there wasn't."

38. Counsel for the defendant later deployed this answer in cross examination of Mr Waterstone:

> "Q. Where would you define the difference, though, between you and Mr Irons and Dr Saleemi?
>
> A. Well I think that with Dr Saleemi, what she was demonstrating is that she wasn't aware necessarily that Ms M had previously ruptured until 5.35 because that's – she wasn't given that information and therefore she couldn't make that decision.
>
> Q. Right.
>
> A. But equally, she didn't make the decision at 4.10. Dr Harris did."

39. It is clear from this exchange that counsel for the defendant and Mr Waterstone were at cross purposes. Counsel was relying on Dr Saleemi's evidence in re-examination as being an opinion purporting to justifying the 4:10 am decision (made in full, albeit retrospective, knowledge of the claimant's history) to which some weight should be attached. In contrast, Mr Waterstone interpreted the question as an invitation to consider the evidence relating to her actual state of mind at the time.

40. The defendant contends that Mr Waterstone was being opportunistic because he had expressed the opinion that Dr Saleemi was a very competent clinician and had deployed the evidence relating to her knowledge of the claimant's history as a means to reconcile his positive assessment of her general abilities with what might otherwise be a serious criticism of her judgment on the shift in question.

41. I do not accept that the defendant's contention is legitimate. I note the following:

    (i) Dr Saleemi's state of knowledge during the shift was not relevant to her retrospective approbation of the decision of Dr Harris at 4:10 am during her re-examination. Accordingly, Mr Waterstone's answer was clearly not directed to the question put to him and arose, I find, as a genuine misunderstanding as to the purpose of the question;

    (ii) As Mr Waterstone went on to observe, it was not Dr Saleemi who made the decision at 4:10 am it was Dr Harris and so Dr Saleemi's state of knowledge at the time was not of direct relevance;

    (iii) The issue of Dr Saleemi's state of knowledge was not referred to in her witness statement and was first brought into focus during the course of her re-examination and Mr Waterstone's interpretation of her responses was a genuine one.

42. Nevertheless, probably as a result of the confusion which I have identified, the time at which Dr Saleemi became aware of the claimant's medical history and Mr Waterstone's conclusions on the point were thereafter to assume a disproportionate significance in the case.

43. In the event, the Recorder found as a fact that Dr Clarke was unaware of the full clinical picture until she made a note of it at 5:30 am whereupon this information was passed to Dr Saleemi.

44. Again, the defendant makes several criticisms of this finding.

45. Firstly, it is contended that such a finding fell outside the scope of the claimant's pleaded case. I disagree. The pleaded particulars of negligence include an allegation that the clinicians involved "failed, on 11 December 2014, to pay adequate heed to the claimant's past obstetric history of 2 pervious caesarean sections and a posterior uterine wall rupture…" Any issue as to whether such a failure was due to ignorance or ill-judgment or both was a matter falling outside the direct knowledge of the claimant. Dr Saleemi in evidence was understandably vague saying she could not remember when she became aware of the claimant's history.

46. Secondly, it is contended that Dr Saleemi's opinion with the benefit of hindsight on the correctness or otherwise of the decision at 4:10 am was a matter which should have been specifically referred to and dealt with by the Recorder and that this he failed to do. In the circumstances of this case, again, I disagree. I observe:

    (i) Dr Saleemi was not an expert in the case and thus not subject to any or all of the salutary discipline imposed by the CPR 35 regime;

    (ii) Her opinion was not heralded by any direct reference to it in her witness statement;

    (iii) She and/or her colleagues were facing allegations of negligence which were bound to impact on her objectivity;

    (iv) She had no direct recollection of events and was reliant upon the medical notes. Accordingly, she had no significant evidential advantage over the highly qualified independent experts in the case.

    (v) Her view coincided with (and added nothing of significance to) that of Dr Irons that an emergency caesarean was not mandated until the claimant had reached (or was at least close to) established labour. This position was at odds with that of Mr Waterstone. The judge having, as I find, legitimately preferred the evidence of Mr Waterstone must inevitably have concluded that Dr Saleemi's approach was also wrong for reasons which required no further articulation because she had not provided any sufficient additional analysis which fell to be given separate consideration.

47. Of course, cases will arise in which experienced clinicians will volunteer opinions despite the fact that they are not experts in the case within the parameters of CPR 35. Such opinions will be accorded a weight which depends upon the individual circumstances of the case. Nevertheless, on the very particular facts of this case, the value of Dr Saleemi's view, notwithstanding her undoubted skill and experience, was so diluted by the factors which I have listed that it did not mandate separate treatment in the judgment.

48. Thirdly, the defendant complains that the Recorder's approach to the issue of Dr Saleemi's knowledge is "impossible to understand". In his judgment, he found at paragraph 119 "…on the balance of probabilities that Dr Clarke was unaware of the full clinical picture until her recorded entry and that she was not passing on the full clinical picture to Dr Saleemi who was the ultimate decision maker on site."

49. Unhappily, the Recorder later rather muddied the waters when giving his written reasons for refusing permission to appeal in which he categorised the breakdown of communication as "a finding of fact on the balance of probabilities" which "does not constitute a formal breach of duty…" He went on to observe that "…it was not necessarily Dr Saleemi who was responsible for this breakdown in communication and did (sic.) not undermine her competency as an obstetrician."

50. In the circumstances of this case, it is difficult to see how a breakdown in communication could not have constituted a breach of duty where a clinician required to make an important decision in the context of a high risk pregnancy, would thereby be inadequately informed of a material consideration.

51. Ultimately, however, I am not satisfied that the Recorder's apparent confusion was such as to render his decision on the issue of breach of duty so flawed as to be susceptible to appeal. Stepping back from the detail, once the Recorder had concluded that no reasonable clinician with adequate knowledge of the relevant medical history would have contemplated delaying the emergency section beyond 4:10 am then breach of duty was established. It did not matter whether the explanation lay with (i) a breakdown in communication or (ii) a bad but well informed decision or (iii) both. Whatever the explanation, it must follow that one or more persons for whose actions the defendant was vicariously responsible were in breach of duty.

CAUSATION

52. If the decision to perform an emergency caesarean had been made at 4:10 am then the claimant would have given birth by about 5:35 am, if not sooner. In the event, the baby was delivered three hours later. The issue is therefore whether the Recorder was entitled to find that the rupture to the claimant's uterus is more likely than not to have occurred during that later period.

53. The Recorder correctly observed that both Mr Waterstone and Mr Irons were of the view that it was highly unlikely that contractions would continue following a rupture of the uterus. Indeed, Mr Irons accepted in cross examination that in accordance with general teaching: "…whenever you get a uterine rupture or significant tear the uterine contractions usually reduce or stop". The Recorder noted that the records revealed that at 7:00 am the contractions were increasing in intensity and thus concluded, on a balance of probabilities, that the rupture probably occurred after that time. In fact, the records reveal that contractions were still occurring at 7:45 am which was ten minutes before the claimant arrived in theatre.

54. The defendant argues that this was a silent tear which could have occurred at any time and the fact that the contractions were continuing until shortly before delivery leads convincingly to the inference that they were continuing despite the tear.

55. I am satisfied that the Recorder was entitled to find that the tear occurred after 5:35 am. The more frequent and stronger the contractions the greater was the risk of a tear and the lower the chance that a tear had already taken place. Throughout the period from 5.35, the contractions were happening at a rate of five every ten minutes. At 6:00 am they were noted to be "getting very strong now". By 7:10 am, the intensity was noted to be increasing. This combination of factors, although not putting the issue of causation beyond doubt, was sufficient to justify the Recorder's conclusion on causation.

CONCLUSION

56. It follows from my findings that this appeal must be dismissed.