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IN THE HIGH COURT OF JUSTICE

No. TLQ18/0774

QUEEN'S BENCH DIVISION

[2019] EWHC 2053 (QB)

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 4 July 2019

Before:

HIS HONOUR JUDGE GORE QC

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

CXB

Claimant

- and -

NORTH WEST ANGLIA NHS FOUNDATION TRUST

Defendant

MR M. MYLONAS QC (instructed by Scrivenger Seabrook Solicitors) appeared on behalf of the Claimant.

MISS C. TOOGOOD (instructed by Kennedys) appeared on behalf of the Defendant.

J U D G M E N T

(Transcript prepared without access to documentation)

JUDGE GORE:

- 1 On 22 November 2008 the claimant and her brother twin were born at Hinchbrook Hospital, for which, and for whose staff, the defendant is responsible.
- 2 By claim form issued on 7 December 2017 the claimant claims damages for the consequences of what is alleged to have been negligence in the management of aspects of her mother's pregnancy and her birth. By order dated 3 July 2018, it was directed by Master Yoxall that liability should be tried as a preliminary issue, and so the trial came to be listed before me. Paragraph 3 of the defence admits that if the claimant's mother had chosen at any stage delivery by way of elective caesarean section her choice would have been agreed (paras. 3(a) and (b)) which would have resulted in delivery that would have avoided whatever was the damaging event (para. 3(c)).
- 3 It is the claimant's case that mother did so elect, and it is the defendant's case that she did not. So it is that Miss Toogood, who appears for the defendant, at para. 2 of her skeleton argument states correctly that, unusually: "the issue between the parties is one of pure fact." That does not make it any less controversial as between the parties.
- 4 Lying at the very centre of this factual issue is a clinical note dated 10 November 2008 on which date there is no dispute that the babies were 36 weeks and 4 days gestation. That note, signed by the senior Registrar (as she then was at the time) records: "Discussed mode of delivery at length. Patient keen for IOL" (Induction of Labour). "IOL booked at term. Above discussed with Mr Forbes. Plan ANC 2/52 . . ." (meaning anti-natal clinic in 2 weeks' time) ". . . to discuss further issues, if any, re mode of delivery." There is no dispute that Mr Forbes was the Consultant in charge of the clinic on that date and was present in clinic at the relevant time, although he never, in fact, saw the claimant's mother.
- 5 The claimant's mother and her husband, who was in attendance, deny that this happened, and give a fundamentally different account of the discussion that occurred with the senior Registrar. Miss Toogood, both in the written submissions contained in her skeleton argument and in her oral submissions, repeats a modern fashion to invite courts, particularly in clinical negligence cases, to prefer the reliability and veracity of assertions contained in clinical notes and records, to contrary factual accounts contained in written witness statements and oral testimony of witnesses who assert the contrary.
- 6 The twin foundation of these submissions is said to be the unreliability or fallibility of witness recollection of events, as compared to the reliability of contemporaneous records made by practitioners in the course of discharging their clear professional duty to inform the care and treatment of the patient moving forward, and not simply provide a historical record of what occurred.
- 7 As is, again, becoming the fashion, these submissions rely on and repeat intrusions into this difficult area by various judges, so as to give the appearance of authoritative statements of principle. So it is that the greater the number of cases and the greater the number of judges who rely on one of the originators of these arguments, the decision of Leggatt J (as he then was) in *Gestamin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560, the more authoritative it appears to become. This approach, in my judgment, is fraught with danger.

The start of the approach is to be found in the observations of Leggatt J where he said this, in his judgment in *Gestamin*:

- "15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie

of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.
21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.
22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as

I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

- 8 With respect to an experienced High Court Judge, whose views are entitled to respect, and from which I, as a judge of co-ordinate jurisdiction, should not lightly depart, these statements, in my judgment, should be treated with caution for a number of reasons. First, if and insofar as it is suggested that these remarks are statements of legal principle that either are, or have become, invested with the status of authority, no authority or legal analysis of them is provided or relied upon either in his judgment, or in the arguments before later judges or, indeed, before me. Secondly, if and insofar as these remarks are based upon the nature of memory, no expert evidence and no relevant professional literature, informed or were evaluated in expressing the remarks recorded. I am far from satisfied that medical or other professionals learned in the understanding of memory would accept without qualification, without question or as trite, all of the observations contained in these remarks. Thirdly, it is relevant to consider the context in which these remarks were made. There was an issue of fact in a commercial case about whether a relevant witness should be regarded as bound by his signed statement of investment objectives at the time that the relevant relationship commenced, as opposed to what he stated subsequently to have been his investment objectives and attitude to risk. As is evident, the trial judge preferred and found as fact the former rather than the latter. That is a very different type of case and issue to that which falls to be decided in the present case. The documents said to be more reliable in that case had been signed by the person who then sought to persuade the court that it did not represent his thinking at the time. Fourthly, the argument is based on a presumption that the writing in question is accurate and reliable. There was no dispute about that in that case, the witness signed what he signed. In this case the accuracy and correctness of the writing relied upon is disputed. Although there is no dispute that what was written was written by its signatory, it is disputed that it records accurately the event it purports to be recording.
- 9 The remarks of Leggatt J were then relied upon twice in separate cases by Mostyn J in *Lachaux v Lachaux* [2017] EWHC 385, paras. 35 to 37, and then *Carmarthenshire County Council v Y* [2017] EWFC 36, para. 17. In the former case there were hotly contested and acrimonious matrimonial proceedings in which the judge made adverse findings as to credibility of the oral evidence of both protagonists, both of whom gave accounts that in some respects were not consistent with the extraneous documentary evidence (see para. 38). In the latter case, the judge had to decide whether to accept the factual account of the complainant of rape and historic sex abuse alleged to have taken place of the order of 20 years before the trial in the circumstance that neither was a witness statement from her filed, nor did she give evidence, nor was she cross-examined (see paras. 6, 29 and 30 to 32). Neither of them are good examples, therefore, of the sort of challenge presented by cases such as that before me in this claim, or claims like it. Moreover, any adoption by Mostyn J of the remarks of Leggatt J must carry the same reservations that I have made concerning the latter, and cannot therefore be said to confer any authoritative status.

- 10 Finally, there are the observations of Stewart J in *Kimathi & Ors v The Foreign & Commonwealth Office* [2018] EWHC 2066 at paras. 95 to 96 referring to the three cases that I have already considered. The issue in that case concerned whether one of a large number of test claimants, seeking to bring proceedings in respect of allegations of physical abuse by colonial authorities during and after the so-called 'Kenyan Emergency' between 1952 and 1962, was barred by the prevailing law of limitation from proceeding with the claim and, if so, whether any discretion under modern or prevailing limitation provisions should be invoked to permit, on grounds of equity, the claim to proceed.
- 11 Conspicuous in that case, as to which there appears to have been no dispute, was that in the particular case of the particular test claimant there was neither witness evidence from either side nor any documentary evidence relating to the events which had occurred over 50 to 60 years earlier, or addressing the circumstances relevant to whether discretion should be exercised. The observations were therefore deployed not to consider the veracity or reliability of the factual assertions being made, but only to the subordinate and unrelated issues of the explanation and reasons for the delay in making the complaint, and the effect that that would have on prejudice and the balancing exercise required of the court in exercising the disapplication discretion. That is a completely different exercise to the forensic consideration of the reliability of factual assertions in evidence. Moreover, in para. 97 of his judgment, Stewart J, recognising that that case was not a commercial case, said that the observations that he had relied upon were "important as a helpful general guide to evaluating oral evidence and the accuracy and reliability of memory", so that his endorsement of the statements is, to a degree, qualified.
- 12 During closing submissions my attention was also drawn to the adoption with approval of paras. 95 to 97 of the judgment of Stewart J in *Kimathi* by John Kimbell QC sitting as a Deputy Judge of the High Court in *Taylor v Chesterfield Royal Hospital NHS Foundation Trust* [2019] EWHC 1048 QB at para. 75, but he did observe that his adoption was without challenge or argument and he accepted simply that it was: "a helpful general guide", no more than that.
- 13 I should not let judicial consideration of this issue pass without making reference to the decision of the Court of Appeal in *Synclair v East Lancashire Hospital NHS Trust* [2015] EWCA (Civ) 1283. Tomlinson LJ, at paras. 10 to 15, addressed the issue concerning the inherent reliability of contemporaneous clinical notes against what was submitted to be the less reliable oral testimony of witnesses. I can deal with the case shortly because it is no more than a decided example of the trial judge being upheld by the Court of Appeal for rejection of reliance on the clinical note in question for forensic reasons fully and properly articulated in his judgment. The case posed and answered the relevant underlying questions which are whether, when the evidence is viewed as a whole, there is material that justifies the conclusion that the clinical record is unreliable or incorrect or whether, when the evidence is viewed as a whole, there is material that justifies the conclusion that the witness evidence to the contrary is unreliable or incorrect. That is the issue which is for the court to decide viewing the documentary and testimonial evidence forensically and not simply by subjective criteria such as demeanour of live witnesses. All that the decided cases to which I have made reference do is to remind judges that care has to be taken in making these assessments, and full and proper reasons have to be given for the conclusions reached, but beyond that I do not find anything in these judgments to be of assistance as a matter of principle in explaining how this task should be undertaken by judges.
- 14 I turn then to the issue which I have to decide. Miss Toogood, in her skeleton argument, concedes that "the evidence of the claimant's mother, her husband and her sisters and her

mother is no doubt honestly given and they believe the truth of their recollections." I agree, there is no evidential basis for suggesting that any of the claimant's witnesses were untruthful or deliberately misleading the court. That does not mean that their evidence should be accepted, even if they express their recollections to be firm and clear. The difficulty is that their evidence is not internally, or externally, consistent and, in some cases, has changed over time, and is not entirely consistent with the content or tone of the records.

- 15 The most significant aspect that, in my judgment, undermines the credibility of the parents' account is that each of them have changed their account of the most important events in what I consider to be two highly material ways. The claimant's mother stated in her witness statement that every time she saw a midwife or doctor she mentioned that she would really like a caesarean section (trial bundle p.84, para. 20). However, examined-in-chief by Mr Mylonas QC for the claimant, she sought to modify or qualify this by saying that her actual and stated preference was always what was safest for the babies. In cross-examination she said that she wanted a caesarean section if either of the children were in anything other than a head down position. Moreover, whereas in her witness statement she had said that her choice has always been to that effect (trial bundle p.82, para. 13), in cross-examination she accepted that she had not made up her mind on mode of delivery until the 36 week scan, which there is no dispute took place on 10 November 2008.
- 16 The same material changes in account emerge from her husband. Whereas in his witness statement (trial bundle p.156, para. 9) he said that they were told at the first scan that the claimant was in a transverse position and that ". . . once his wife knew this it confirmed her initial choice for a caesarean section . . .", in chief, he sought to qualify that by saying that his wife's choice was only if the baby, by which he meant the claimant, remained in what he called a 'non-standard' position. In cross-examination he said that his wife always made it clear that the choice was for a caesarean section if the twins did not lie head down. In his very next answer he somewhat contradicted that by saying that she never stated her preference. That is in marked contra-distinction to what his wife said either in her written witness statement, or in her oral testimony. Although it is only a small point, it is also telling that, in cross-examination, he conceded and accepted that the transverse lie was not communicated and could not have been evident at the time of the first scan, and therefore that his factual assertion to the contrary must be wrong.
- 17 As regards his evidence, the credibility of his oral modification of account is further undermined by his witness statement assertions that his wife's choice was: "confirmed" at the first scan (trial bundle p.156, para.9) that she "became more anxious to press for a caesarean section" at the 28 week scan (trial bundle p.157 para. 10) and that she "remained committed to delivery by caesarean section" at the 32 week scan (trial bundle p.157 para.11).
- 18 There were ample opportunities also for mother's delivery preference to be recorded, and there is no dispute that it has not been recorded in any of the notes and records before the relevant events. Thus, Miss Toogood relies, as her first ground of submission in this regard, on the fact that there is a page in the personal maternity record entitled: "Your preferences for your baby's birth." Under this heading it states that it contains some questions to think about and notes: "It also gives you the chance to write down your preferences. Please tick in any box when you want to talk about a topic with your care provider." One of the boxes is headed "caesarean section" and notes that this may be planned for, i.e. an elective caesarean section or, decided on during labour, an emergency caesarean section. The claimant's mother did not make any notes or comments on this page. I do not regard that single or sole opportunity as sinister because she also does not elect on

the same page to have her husband present at delivery. I accept that she simply did not consider making entries of her own on that page.

- 19 But, following diagnosis of twin pregnancy, the claimant's mother was seen by a Consultant, Dr Sinha. On 2 July 2008 he recorded "I have discussed the risks and implications of twin pregnancy, and also mode of delivery depending on the gestation of twins." If her expressed preference was either as stated in her witness statement or, for that matter, as modified in her oral testimony, I would have expected the clinician to make a note to that effect.
- 20 The claimant's mother states that she raised concerns with Midwife Walker on 11 September 2008, when the claimant was noted to be in a transverse position on the fourth scan. Mrs Walker did not note any concerns and she says, in cross-examination: "And I would have expected that such concerns would be noted if they had been expressed". She also denied that she would have told the claimant's mother that an emergency caesarean section would not happen to her (trial bundle p.186 para. 9) as alleged by the claimant's mother (trial bundle p.83 para. 18). I accept as logical and more probable what Mrs Walker said in cross-examination, namely, that she could not reassure someone that emergency caesarean section would not happen because there is always a risk that it could whether or not the risk was rare. Mrs Walker also states that she would have told her that she would have the choice if she wanted an elective caesarean section if the claimant remained transverse, if mode of delivery was discussed (trial bundle p.186, para. 9). The note on this date is silent regarding mode of delivery, which in my judgment is more consistent with no preference having been expressed by the claimant's mother at that time.
- 21 The claimant's mother was seen again by Dr Sinha on 17 September 2008. The claimant was noted to be in a transverse lie but no preference regarding mode of delivery is noted and, again, the silence of the note regarding the mode of delivery in my judgment is more consistent with no preference having been expressed by the claimant's mother.
- 22 On 23 October 2008 Mrs Walker visited the claimant's mother at her home, according to the note of that attendance: "to discuss mode of delivery and every possible scenario." Mrs Walker states: "If she had expressed any preference I would have written this down, in particular if she had been keen to have a caesarean section I would have documented this." (trial bundle p.187, para. 12). The claimant's mother does not refer to this appointment at all in her witness statement despite having the notes available to her when she completed it. In my judgment, it is undermining the credibility of her general account, whether as originally stated in her witness statement or as modified in her oral testimony, for her to have conceded, as she did in cross-examination, that she did have a recollection of this review and the discussion, including as to mode of delivery, and that all possibilities were discussed but that she did not say at that time that she wanted caesarean section because: "I hadn't made up my mind". It is unsatisfactory, having admitted that there is no reference to any of this in her witness statement, to say that she could not explain why not.
- 23 On 10 November 2008 the appointment with Dr Choudhury, on which the allegations of negligence are based, took place. There is no dispute that the note signed by her, that I have already cited, was entered in the claimant's mother's personal maternity record at the time and handed back to her at the conclusion of the meeting. The note is in stark contrast to the claim of the claimant's parents in both their witness statements and their oral testimony, that they specifically requested a caesarean section and that Dr Choudhury refused, and that they had not been offered a discussion on another day. The crucial point regarding these notes is they were kept by the claimant's mother, and she would have taken them away with her after the appointment. Although it is now maintained that the notes do not provide an accurate

account of the discussion, and that the claimant's mother was "completely stunned" when she first saw the note, and that the note is: "just wrong" (see her witness statement, trial bundle p.88, para. 36). She did not raise any issue with the note at the time. While I accept mother's account that she did not read the notes at the time, the fact that she could have done so at any time makes it difficult to explain why the senior Registrar would make a note that fundamentally misrepresented what occurred.

- 24 On 13 November 2008, three days after the appointment with Dr Choudhury, another midwife, Ms Elliott, visited the claimant's mother at her home. The notes contain no reference to any concern over her appointment with Dr Choudhury, or as regards mode of delivery. Ms Elliott states:

"Had she said anything about wanting a caesarean section, or if I thought that she was unhappy in any way, I would have documented this. I would also have rung into the antenatal office to arrange for her to see Mr Forbes as soon as possible."

(trial bundle p.196, para. 5). The claimant's mother does not comment on this appointment in her witness statement despite having the notes available to her when she completed her witness statement. In cross-examination, the claimant's mother told me that she accepts she probably did not say anything to Ms Elliott, so that absent any foundation for disagreement with the witness statement of Ms Elliott, her statement was agreed and she was not called to give oral evidence. This important assertion on her part is therefore unchallenged. Moreover, it is entirely consistent with what Mrs Walker told me in cross-examination, namely that if the claimant's mother had expressed any concern on these issues she would have documented them and ensured that she was seen by a Consultant to discuss her concerns, precisely the same as is asserted by Ms Elliott.

- 25 On 20 November 2008, 10 days after the appointment with Dr Choudhury, the claimant's mother was seen by Mrs Walker, and this was the ninth time that they had met. The claimant's mother alleges that she told Mrs Walker how unhappy she was that the hospital were not prepared to let her have a caesarean section, but again felt her wishes were ignored. (See her witness statement at trial bundle p.88, para. 37). Mrs Walker states:

"I do not recall, nor have I made any note of any concern raised by her about the appointment with Dr Choudhury 10 days before. If she had said anything, or if I had sensed that she was feeling upset or angry, I would have made a note of this and done something about it. I expect that I would have ensured she got to see Mr Forbes for a second opinion, particularly as he was well-known to be the most willing Consultant at the time to agree to caesarean sections."

That is her witness statement at trial bundle, p.187, para. 15. She maintained this in cross-examination. Mrs Walker also comments generally that:

"If she had said to me at any time during any of our appointments that she really wanted a caesarean section I would've written this down at the very least. If one doctor does not offer this choice, I would have sought a second opinion if the claimant's mother had voiced her concern to me. As midwives, we act as the woman's advocate. With a twin pregnancy it is unlikely that any doctor would not offer an elective caesarean section."

(See her witness statement at trial bundle pp.187 to 188, para.16). She repeated in cross-examination that: "We are advocates for our patients" and that she would have sought by telephone a second opinion, and she would have got the claimant's mother an extra appointment. I found the evidence of Mrs Walker to be compelling and entirely consistent with what I would have expected. That undermines the credibility and reliability of the claimant's mother's assertion that she did report her concerns to Mrs Walker on this occasion.

- 26 When the claimant's mother attended at hospital on 21 November, after her waters broke, there is no note of any request for a caesarean section. When she was moved to the labour ward the following day, on 22 November 2008, the midwife entered: "Twins ? epidural will decide at time" under the heading "Birth Plan", indicating that the plan had been discussed and there was no request for a caesarean section. When she was assessed by the specialist Registrar on admission to the labour ward, she was reviewed to check presentation and it was noted that the first twin was cephalic and the second was breach. The plan was to allow to labour with review in the second stage, and an epidural was discussed. There is no note that a caesarean section was requested.
- 27 There is another aspect to this that causes concern. Reliance has been placed on the evidence of two sisters of the claimant's mother, each of whom provided witness statements and were called to give oral evidence, and also on the witness statement of the claimant's mother's mother, served under a Civil Evidence Act notice, because of the health reasons for her inability to attend. The eldest sister, in her witness statement, asserted that the claimant's mother had been very keen to deliver by caesarean section from about halfway through the pregnancy (witness statement, trial bundle, p.173, para. 13) which is not consistent with the qualification or modification first offered in cross-examination, that this election was only "if there was anything wrong with the twins". In my judgment, it is unsatisfactory for her, when asked about that inconsistency, to simply say that she did not know why such a qualification was not set out in her statement. This time the qualification was not even foreshadowed in chief.
- 28 Similarly, the other sister maintained that the claimant's mother: "was absolutely clear that she wanted no risk to the babies at all." (Witness statement, trial bundle p.167 para. 12) and that she "remained clear that she wanted a caesarean section" (para. 14) and that her advice to her sister concerning the forthcoming 36 week appointment, to discuss mode of delivery, was for "her to calmly tell the doctor that she wanted a caesarean section". (P.168, para. 18) which is not consistent with her assertion in cross-examination that this election was subject to the qualification that it was only if there was a risk to either baby or her suggestion that the decision as to mode of delivery would be made at this appointment. Not only does this inconsistency of account emerge as between written and oral evidence of each sister, but also emerges to undermine the credibility of all of them as witnesses, which is inconsistency between their original or modified accounts, or that of their mother, and the modified oral account of the claimant's mother in her oral testimony.
- 29 The same concern arises in respect of another factual aspect relied upon as important on behalf of the claimant, namely, the demeanour and response of the claimant's mother on 10 November 2008 to the alleged rejection of her election by the senior Registrar. This has been described in graphic terms by the claimant's mother and her husband. It is said that she became distressed, agitated, upset, that she was shaking, that she got quite angry, that she clenched her fists, leant forward in what she now concedes may have appeared to be a threatening way towards the senior Registrar, that her blood was boiling, and that she

became very angry. Her husband says of his wife that she was not concealing her anger from the doctor, that she was becoming distressed, very flushed, clenching her fists and leaning forward to emphasise what she was saying, that she had become distressed, had tears pouring down her cheeks, was very tense and raising her voice so that the atmosphere in the room was incredibly tense and difficult. In a way, that is self-serving and rather like seeking to rely upon previous consistent statements, each of the sisters and the mother of the claimant's mother, referred to telephone conversations with the claimant's mother after this meeting, during which the claimant's mother was really angry, shouting, crying, complaining that her choices had been ignored or overridden.

- 30 As I read and then listened to these accounts, I asked myself – not rhetorically – what I would have expected of the clinician in the face of whom these events or behaviours were occurring. Both midwives in witness statements, and Mrs Walker in her oral testimony, confirmed what I would have expected, namely, that such strongly held wishes, if expressed, would have been noted and recorded in the relevant records, and they were not. Dr Choudhury, in her witness statement (trial bundle p.178, para. 14) admitted that she made no note to the effect that the patient was unhappy or upset in her record, and went on to say that:

"If a patient became upset, my response was to go and see Mr Forbes and ask him to see the patient and talk things over with her."

In cross-examination, when pressed about these matters, she said that if the patient was getting upset there was all the more reason for getting the Consultant. If the patient was upset or unhappy with the plan under discussion, she would have got the Consultant and she would have done so even if she had not been asked by the patient to do so. She asserted that she would not be keen to see a patient upset or unhappy, and that if the consultation was not going right (that was her description) or the patient was not happy, there would be no point in carrying on with it when the Consultant was next door. So it is that she denies the reaction or response asserted by the claimant's mother and her husband.

- 31 The absence of any contemporaneous records supporting the claimant's mother's version of events is sinister for several reasons. First, it is not so much the fact that there is a stark contrast between the parents' account of what transpired between them and the senior Registrar on 10 November 2008, and the senior Registrar's clinical note of that encounter, but it is the contrast between the parents' evidential accounts and all of the notes and records in their totality. Secondly, insofar as either or both parents seek to explain that contrast, the explanation is founded in the modification of the original witness statements during examination-in-chief. It is material to note in this regard that no supplementary witness statements were provided by either of them to foreshadow these important changes and, in my judgment, Miss Toogood is correct to characterise this as not simply clarification but significant change. I would have expected that to be foreshadowed in supplementary witness statements.
- 32 The final and most serious, or sinister, of implications of the inconsistency of account is that for me to accept the account of the claimant's parents, and reject the account of Dr Choudhury, I would have to find that she positively lied in not one but four distinct respects. First, I would have to find that the note asserting that the mother was "keen" for an induction of labour in the face of a strong declaration of preference for a caesarean section was a positive and serious active misrepresentation of the facts. Secondly, I would have to find that she lied to Mr Forbes about what the patient was saying, and actively withheld that the patient was upset because she accepted unchallenged evidence of Mr Forbes, whose

witness statement was agreed, was that: "If a patient became upset I . . ." that is his word "I, would expect to be informed and I . . ." again his word: ". . . would want to see the patient." That is in his witness statement at trial bundle p.183, para. 11, implicitly, therefore, whether or not requested to do so by the senior Registrar, or whether or not requested to do so by the patient. Thirdly, I would have to find that she lied to the claimant's parents about seeing Mr Forbes twice, as they assert she said she did, because they also assert that she left the room twice, as compared to what Mr Forbes said, which was that if a senior Registrar had come to see him twice: "I would have wanted to see the claimant's mother. If I sensed any friction at all between the Registrar and one of my patients I would see the patient personally." That is his witness statement at trial bundle p.183, para. 14. Fourthly, I would have to find that the senior Registrar had lied or, at least, misrepresented the position actively by failing to record either maternal upset or maternal election as to the mode of delivery.

33 The claimant's mother relies on a number of points to support the acceptance of her account. First, focusing in particular on the attendance on 10 November 2008, she says that this was an important meeting in respect of which she and her husband had high expectations, including actually seeing the Consultant, and it being emotional and highly charged which, it is submitted on her behalf, make the event highly memorable, such that their accounts should be accepted and relied upon. Secondly, although Mr Mylonas concedes and accepts that her response to and dissatisfaction with the meeting with the senior Registrar was not the subject of complaint or any attempt to reopen discussion concerning mode of delivery with any of the clinicians after 10 November 2008 before the twins were delivered, save for what is alleged to have been said at the meeting with Mrs Walker on 20 November 2008. That was because both claimant's parents felt that the decision as to mode of delivery was not for the parents to take, but was for the medical professions to take and that they had taken it, and there was nothing that could be done about it.

34 There is to my mind a troubling contrast between, on the one hand, the parental account of the strength of response to the senior Registrar during the meeting of 10 November 2008 and, on the other hand, the suggested meek submission to what they invite the court to find they believed to be a *fait accompli*. Of the single instance of alleged complaint to Mrs Walker on 20 November 2008, I have already indicated the fact, and the reasons for the acceptance of Mrs Walker's account, and why that undermines the credibility of the claimant's mother. But it has the additional consequence that there is no recorded, no accepted evidence of a contemporaneous making of complaint by either of the parents about the events that occurred, at least until the involvement of Mr Majmudar.

35 Thirdly, Mr Mylonas relies on the complaint to Mr Majmudar on 9 April 2009, nearly five months after the claimant's birth, to support the parents' evidence. There is, therefore, he submits, prompt and timely complaint about the events. However, in my judgment, there were many problems with this contribution to the understanding of the events, namely:

(a) the notes of the meeting state that they accept that they had been counselled about the risks and benefits, but felt that their desire of having a caesarean section was undervalued and that Mr Forbes should have seen them personally as the Registrar may not have conveyed their concerns adequately. That is not the same as what is now complained of by the parents to have occurred on this occasion.

(b) The subsequent letter dated 30 April 2009 from Mr Majmudar states that: "She now retrospectively regrets the fact that she did not insist on having a caesarean section." I emphasise the word "not". Again, this is not consistent with what is now

asserted, namely, that their election was not simply overridden but was actively misrepresented.

(c) To the extent that both the note of the meeting and the subsequent letter are open to alternative interpretations, no Civil Evidence Act notice has been served by either party in respect of either of these materials, nor has any attempt apparently been made to consider whether or not the contents of these documents are true, accurate, and complete, and agreed as such, or to obtain a witness statement or procure the attendance of the maker to give oral evidence at trial. Neither document is supported by a signed statement of truth.

(d) One thing that is consistent between the two documents is that Mr Majmudar invited the parents to put their concerns in writing but they did not do so. If they felt as strongly as they do now or allege that they did at the time on the occasion of the meeting with the senior Registrar, this is extremely surprising. It also meant that there was no further investigation of these matters, or any detailed account of their concerns.

(e) Finally, I have to ask myself how probative are complaints made over four months after the relevant events, when I would have expected such serious allegations to have surfaced much sooner. Even at this time they did not surface consistently. So, for example, in May 2009, the claimant's mother attended an appointment with Ruth Dube, a perinatal Community Psychiatric Nurse. Ms Dube recorded that the claimant's mother felt angry and guilty and was asserting that "maybe" – that is her word – she should have been delivered early instead of going near to full term. That is in the section of the medical notes and records numbered GP p.25. That is not consistent with now claiming that an election or desire for a caesarean section was overruled.

36 In December 2009, the claimant's Paediatrician, Dr Raithathar, wrote to Mr Forbes asking for a meeting as the claimant's mother:

". . . acknowledges feeling very angry about the birth when she looks back as her perception is that she wanted a caesarean section all along for both babies. I recognise that this is an incredibly difficult situation now, but her looking back and that is not possible to change a decision that was made at the time."

This use of the word "perception" is different language to the assertion made now, that she specifically requested a caesarean section and her request was refused.

37 Although it is the fact that an appointment with Mr Forbes was arranged for April 2010, but was cancelled, and that the letter of claim was not sent until 15 September 2016, nearly eight years after the claimant's birth, I do not regard either as sinister or undermining the credibility of the parents.

38 The concern raised by Mr Majmudar over four months after the birth, does not explain the complete absence of any reference to the claimant's mother's claimed clear or stated preference for an elective caesarean section in the contemporaneous notes or records.

39 Against all this body of material advanced on behalf of the claimant is the written and oral evidence of Dr Choudhury. She conceded and accepted in both that she had no independent recollection of the meeting on 10 November 2008, and that her account, therefore, is based

entirely on her clinical note, and on what she says was her usual practice – I am not surprised to hear that, it is commonplace. Contrary to the submission of Mr Mylonas that this makes the oral account of the parents based on alleged actual recollection superior in weight or credibility to the evidence of the senior Registrar, I do not regard that state of affairs to be sinister. Next, Mr Mylonas submits that there is an important and sinister contradiction between the discussion as to the mode of delivery being "lengthy" when that was in the face of the assertion that the mother was "keen" for induction of labour. Why was there need for lengthy discussion he asks? She answered in cross-examination by saying that simply because a patient is keen for induction of labour does not make the discussion short. The patient may have lots of questions. The patient may go away and change her mind. In any event, although it was not said or stated in terms during the course of the oral evidence, or in the course of submissions, for consent – for that is what an election would be – to be truly informed the risks and benefits of the various alternative options have to be explained. It has never been suggested by anyone in this case that that did not take place, or that the consent was anything other than informed. There is, therefore, nothing sinister in the discussion having been lengthy, even if the patient was keen. Moreover, the fact that there were, or may have been, other previous discussions as to mode of delivery does not excuse the clinician on this occasion from going through all of the options, and in my judgment, therefore, there is nothing in Mr Mylonas' point that lengthy discussion was unnecessary because of several previous discussions.

- 40 Mr Mylonas, in cross-examination, and in his submissions, was particularly critical of how the notes of that attendance were drafted, and what Dr Choudhury said about that. What he characterised as an account that was gabbled or rushed was, in my judgment, simply a reflection of the witness' understandable nervousness in the face of the allegations that, quite frankly, she was a liar, that were being put. He was particularly critical of the physical structure of the note, which appears on pp.12 and 13 of the personal maternity record and, in effect, is a double page comprising 14 columns. It is evident to me that those making entries into this record remain relatively disciplined only in columns 1 and 3. After that, there are several examples of writers not maintaining column discipline or row discipline. Thus, the note for 17 September 2008 notes that there was a scan on the 11th, in the columns reporting 'lie' and 'relation to brim'. The row relating to the attendance on 25 September 2008 starts and ends on the fifth line, despite the fact that entries relating to the previous attendance are also reported on that line.
- 41 A clinical finding is reported out of place on the second line for the attendance on 6 November 2008. Clinical findings are reported on the line above and below. Dr Choudhury's note for 10 November 2008 starts in a line above the end of the comments for the previous attendance; her entries were very near to the end of the page. While an extra page could, if necessary, be inserted I do not regard it as sinister to have used the space left to complete the note. Only one further attendance was made before delivery and so no extra pages were, in fact, required. Nor do I regard it as sinister that the left-hand portion of the note records a plan to discuss further issues, if any, regarding mode of delivery, while the right-hand portion records a lengthy discussion and a keen election. She told me, and I believe, that mothers do change their mind. A further antenatal clinic visit was planned, and did, in fact, take place. In my judgment, there is nothing sinister in indicating that further discussion might take place. Accordingly, I reject Mr Mylonas' complaints about the reliability of this note.
- 42 I found Dr Choudhury to be an honest, truthful and consistent witness. Her account is consistent with what I would have expected of a clinician. It was consistent as between her written and oral accounts. It was consistent as between the note and her witness

contributions. It was consistent with the understanding conveyed by the Midwives and the Consultant in their written statements, and in the case of Mrs Walker her oral evidence.

- 43 One final aspect reaffirms me in my conclusion. The parents have always maintained that on 10 November 2008, Dr Choudhury, as they put it, offered induction at 42 weeks. That flies in the face of the normal expectation being that twins arrive early, whereas 42 weeks would be late, even for a singleton. Moreover, Dr Choudhury, said in cross-examination, and I accept, that delivery at 42 weeks would have been too late for twins. I therefore reject that there was such an offer.
- 44 I return, therefore, to the questions I posed earlier, namely whether, when the evidence is viewed as a whole, there is material that justifies the conclusion that the clinical record is unreliable or incorrect, or whether, when the evidence is viewed as a whole, there is material that justifies the conclusion that the witness evidence to the contrary is unreliable or incorrect.
- 45 For the detailed reasons that I have now given I find that there is not sufficient material to find that the clinical record is unreliable or incorrect, but there is ample material to justify the conclusion that the contrary witness evidence is unreliable and incorrect. I prefer the evidence of Mrs Walker and Dr Choudhury to the evidence of the claimant's parents, aunts and grandmother. There is no dispute as between the parties that if that was my finding the claimant fails.
- 46 I acknowledge that that finding will be a profound disappointment to the parents. I repeat that I was both impressed by their dignity in giving evidence and that they are to be complimented and applauded for the care that they have lavished on the claimant in the light of her disabilities. The court cannot but have sympathy for the claimant and the life she faces in the future. None of that, I am afraid, can weigh in the scale of the forensic exercise of evaluation of the evidence which is required of me and, therefore, does not affect the conclusions to which I have come.
- 47 I repeat my thanks to both counsel for the quality of their written and oral advocacy in this case.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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