Neutral Citation Number: [2021] EWHC 3228 (QB)

Case No: QB-2019-003519

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2021

Before :

MR JUSTICE COTTER

- -

Between :

HTR (acting by his Mother and Next Friend LJR)	**Claimant**
- and –	
Nottingham University Hospitals NHS Trust	**Defendant**

- -
- -

Howard Elgot (instructed by **Hudgell Solicitors**) for the **Claimant**
Dominic Nolan QC (instructed by **Browne Jacobson LLP**) for the **Defendant**

Hearing dates: 5th, 6th & 7th October 2021

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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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MR JUSTICE COTTER

Mr Justice Cotter:

Introduction

1. This is the judgment upon the issue of breach of duty in a clinical negligence claim.

2. By proceedings issued on 4th October 2019, the Claimant, who proceeds by his mother and litigation friend, LJR, seeks damages for alleged medical negligence during an appointment at an antenatal clinic at Nottingham University Hospital on 6th October 2004. The Claimant was subsequently born by emergency Caesarean section four days later on 10th October 2004, having suffered permanent damage from chronic partial hypoxia which has resulted in asymmetric quadriplegic cerebral palsy.

Summary of Claimant's case

3. LJR was referred to the ante-natal clinic by her community midwife, Ms Lincoln-Davis, who was concerned that the Claimant was in a breech position.

4. LJR' case is that:

    a. she was seen by Dr Salman, then a Senior House Officer, at the clinic on Wednesday, 6th October 2004. LJR was accompanied by her mother and was not seen until late afternoon (more than two hours after her appointment time); and
    b. she made a clear report to Dr Salman that in the period before the appointment she had experienced reduced fetal movement, sufficient to be a cause of concern to her; and
    c. an ultrasound scan was undertaken by Dr Salman, who appeared to satisfy herself that the Claimant was not in breech position, that everything was in order, that the Claimant's head was down and he was ready to be born, and that this would explain the lack of movements; and
    d. by ignoring LJR' report of reduced fetal movement as a potential matter of concern requiring further investigation, Dr Salman acted negligently.

5. It is not in issue between the parties that if LJR had raised a concern as to reduced fetal movement, then Dr Salman was negligent in failed to act upon it.

Summary of Defendant's case

6. It is the Defendant's case that:

   a. LJR did not raise a concern as to reduced fetal movement with Dr Salman on Wednesday 6th October;
   b. the note made by Dr Salman, who did not undertake the ultrasound, but saw LJR after it had taken place, records active fetal movement;
   c. any concern which LJR raised regarding reduced fetal movement would have been recorded and investigated; and
   d. after the Claimant was admitted on Sunday 10th October 2004, no medical record sets out any reference to LJR having experienced or been concerned about reduced fetal movements as at 6th October, but only on subsequent days.

7. Dr Salman has no independent recollection of meeting LJR on 6th October 2004. As no claim was intimated until eight years after the events in question (by correspondence in 2012) and the trial was taking place on the 17th anniversary of the clinic appointment, this was unsurprising. In those circumstances, it was the Defendant's case that the court should place considerable reliance on the contemporaneous medical records, as opposed to LJR' recollection of events such a long time ago.

Applications

8. Unfortunately, the first day of the trial was largely filled by discussion in relation to an application for relief for sanctions by the defendant in relation to two supplementary statements of Dr Salman dated 2nd September 2021 and 27th September 2021. This application, having been made on Friday 1st October 2021, notwithstanding the anticipated commencement of trial on Monday 4th October 2021, led to dispute between the parties as to matters including: whether the material covered in the supplementary statements elaborated upon or contradicted the evidence in Dr Salman's original statement; the need for expert handwriting evidence, and as a consequence an adjournment of the trial date; and the practical approach to any likely examination and cross-examination of Dr Salman in the event that certain paragraphs were not admitted.

9. Ultimately, these matters were resolved by a concession by Mr Nolan QC for the Defendant that only paragraphs 1 – 15 and 31 – 38 (each inclusive) of Dr Salman's first supplementary statement dated 2nd September 2021, and the entirety of Dr Salman's second supplementary statement dated 27th September 2021, should be admitted. It was also agreed that the Claimant had permission to rely upon an additional statement from Mr Jeremy Brocklesby, Consultant Obstetrician, commenting upon matters set out in the second supplementary witness statement of Dr Salman.

10. These discussions brought to the fore a particular difficulty affecting the determination of the factual issues in dispute. The reproductions in the trial bundle of

the key contemporaneous documents, and specifically the medical record relating to LJR' appointment on 6th October 2004, were very difficult to read and degraded in quality, owing to the age of those documents, their initial production on microfiche, and deterioration in legibility arising from their subsequent scanning and photocopying.

Issues

11. The issues for determination were wholly factual. It is also common ground between the parties that a maternal report at an antenatal clinic of reduced fetal movement is a matter requiring immediate further investigation. It is common ground between the parties that fetal movement was discussed between LJR and Dr Salman at the clinic appointment on 6th October 2004. The central issue for determination was *what* LJR said to Dr Salman about fetal movement on that date.

12. A subsidiary issue is whether Dr Salman was the person who carried out the ultrasound scan on LJR on 6th October 2004, which scan undoubtedly took place (and established that the baby was not in a breech position). It is the Defendant's case[1] that Dr Salman did not carry out ultrasound scans at antenatal appointments, but rather that such scans were undertaken by either a sonographer or a senior doctor. LJR is adamant that Dr Salman undertook the ultrasound. The importance of this factual dispute is that its determination may inform the accuracy of recollection of the key witnesses and/or their credibility.

Outline facts

13. LJR had previously given birth to a daughter by normal vaginal delivery on 20th July 1999 at 40 weeks gestation. The Claimant's estimated date for delivery was 30th October 2004. LJR was referred to the maternity unit by Ms Lincoln-Davis, a community midwife, following an appointment on 30th September 2004 due to a concern that the Claimant was in a breech position. There is no suggestion of reduced fetal movements at this time.

14. LJR was understandably concerned that the Claimant was in breech, and went along to the ante-natal appointment on 6th October 2004 with her mother, Judith Smith (who had travelled approximately 120 miles to accompany her to the appointment, as her husband, was working away on that day).

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[1] Defence paragraph 8

6th October 2004 (Wednesday)

15. It is not in dispute that the clinic would have been busy. It is also not in dispute that an ultrasound was performed, and that LJR was seen by Dr Salman. The record of the appointment, in so far as it can be read, has entries on the left- and right-hand pages of a booklet which (as was the practice) was retained by LJR for production at her next appointment.

16. The left-hand page of the booklet has the following columns:

Date Time	Urine		Weight	B.P.	Hb	Maturity Assessed By				Present-ation	Relation to Brim	Fetal Heart	Oedema
	Protein	Sugar				Weeks of Amen-orrhoea	U/S	Uterine Size	Fundal Height				

17. On the left-hand page of the Claimant's booklet, in the 'Presentation' column, there is an entry reading "*Ceph*", and there is a tick in the column for fetal heart. There was a dispute between the parties as to who made these entries.

18. On the right hand side there is an entry completed and signed by Dr Salman:

> *Well. Worried if baby breech. Confirmed cephalic*
> *by USS. Declines having FBC. See @ 41/40*
> *Active FMs.*

Events subsequent to the appointment

19. On Friday 8th October 2004, LJR was shopping in Newark for a friend's 30th birthday. She was standing outside the Thorntons shop when she felt very sharp fetal movements such that she had to put her hand on a nearby post/bollard. Her evidence is that she was worried that she was going into labour.

20. During the evening of Sunday 10th October 2004, LJR took a bath. She noticed that the warm water of the bath had not produced any fetal movement, and this worried her. She was so obviously worried that her husband insisted that she attend at the hospital to have matters checked out.

21. LJR was admitted at 21.40pm on 10th October 2004. The note in the hospital records, which note is likely to have been made a by a midwife, is rendered as follows:

Admitted for [?] [?] [?] No fetal
movement since Thursday URINE NAD.

BP Lk 10[?] pres ceph 3/5 palp*
No [label?] [?] [?]
CCG [suspected?] left on D/ informed

10/10/04 22.[?]
SHO
37/40 [?] [?] [?]
No FM 2/7 [?]/bleeding/SRM

…

The note, like almost all of the relevant hospital records in this matter was handwritten, and was produced at trial in a form which, as noted above, was in poor quality due to age and photocopying/reproduction. It contains a significant number of words which cannot be read. In this judgment, '[?]' is used to represent a word in a hospital record which cannot be read.

22. At 22.20pm, LJR was seen by a Senior House Officer ('SHO'), Dr Bennett. She made the following entry:

10/10/04
Informed me abt pt
G2P2 37/40 – uneventful pregnancy
[h/o] of no fetal movement x 2DS…

The balance of the note is of limited legibility, but it appears to relate to CTG results and other test results.

23. Dr Bennett discussed matters with a registrar Dr Than-Than Yin who reviewed the CTG

24. At 23.00pm, Dr Gandhi wrote a note as follows:

P… self ref for↓[2] *no FM for 3-4 days*

She considered that the CTG was suspicious and the clinical position was discussed with the on call consultant who recommended a caesarean section. LJR was prepared for theatre, the CTG was discontinued and the Claimant was born at 23.43

[2] The arrow to indicate reduction was crossed out

25. On the 11th October at 02.00am, SHO Dr Hurley made an entry:

> *Mother. Clinical worker. G2 P2.*
>
> *37/40*
>
> *<u>Antenatal</u>: G2P2. Presenting well.*
> *Scans - Ⓝ*
> *No fetal movements for last 4/7*
> *Admitted for monitoring – pathological CTG*
> *→ Emergency CS*

26. On 12th October 2004 Dr Budge made the following entry:

> *Parents seen in quiet room. Critical Care SN Donna Morgan (seen at cotside yesterday)*
>
> *Since admission clinical condition discussed.*
>
> *Mother gives a history of reduced fetal movements for possibly 2 days prior to delivery.*
>
> *Seen on Wed 6.10.04 and scan reported Ⓝ movements and "heart beat", then felt good movements Friday 8.10.04 [?] fewer and non on bathing on Sunday 10.10.04 evening ∴ presented for assessment → stat LSCS.*
>
> *Subsequently, Harry has behaved as a baby with mild-moderate HIE although this am he has had a witnessed seizure …*

27. There are other entries in the notes subsequent to the Claimant's birth which Mr Elgot pointed out referred to reduced fetal movement for four days before birth (13th, 14th, 15th, 16th October and the transfer note of 17th October). However, when compiling these records the clinician may have just repeated an earlier record as this element of the history was then of very limited importance. I consider them of no assistance with the main factual issues.

The Law

28. The law is not is in dispute and, as set out above, it is conceded that if LJR raised a concern about reduced fetal movement, then given that no further steps were taken to investigate the Claimant's health, there was a breach of duty

Expert Evidence

29. The following expert evidence was adduced;

    a. reports prepared by:
        i. Dr Gayatri Vadlamani, a consultant neurologist; and
        ii. Dr Jeremy Brockelsby, a consultant in obstetrics and feto-maternal medicine,

       on behalf of the Claimant; and
    b. a report prepared by Dr Michael Maresh, a consultant obstetrician, on behalf of the Defendant.

    Dr Vadlamani's evidence relates to the Claimant's condition and prognosis. It does not bear on the factual issues in dispute in the present case.

30. There were two reports, one from each of Dr Brocklesbury (dated 9th June 2021) and from Dr Maresh (dated June 2021), which considered LJR's medical records and the subsidiary issue above (i.e.who is likely to have undertaken the ultrasound scan at the clinic appointment on 6th October 2004). There was also an additional report from Dr Brocklesbury dated 1st October 2021, responding to a supplementary statement prepared by Dr Salman and relating to the qualifications and stage of medical training at which obstetric practitioners are likely to be able to undertake a presentation scan.

31. None of the experts was required for cross-examination.

32. There was a lot of common ground between the experts and the following aspects of their evidence are of significance

    a. Dr Brocklesbury considers it likely that the scan was undertaken by "*one of the medical staff within the clinic, as there is no documentary evidence to suggest that it was undertaken by a sonographer".* If the scan had been undertaken by a sonographer, he would have expected a request form to be available and the scan logged in the medical records, and a formal report contained in the hospital records and the hand-held notes. This evidence is in

line with the evidence given by the Defendant's witnesses; Dr Kean and Ms Sampson

b. Each of the doctors considers it at least possible that a person with Dr Salman's level of training in October 2004 would have been able to undertake a presentation scan;
c. It was Dr Maresh's opinion that

> *"Green top Guidelines were introduced in the 1990s…. to assist with areas of uncertainty about what was best practice…the first Green-Top Guideline on reduced fetal movements was number 57 published in 2011……*
>
> *Since the guideline was published in 2011 there certainly has been more of an emphasis on always following the guideline and in practice this has resulted in a significant number of women saying fetal movements are reduced at around term and requesting induction of labour. While fetal movements are always asked about and certainly were in 2004, it is possible that not quite so much emphasis was placed on the significance of minor degrees of reduced fetal movements. I am not aware of any evidence to indicate that the grade of obstetrician relates to the likelihood of a single reduction of fetal movements being overlooked."*

Lay witness evidence

33. Oral evidence was given by LJR, Mrs Smith and LJR's husband for the Claimant, and from Dr Salman, Dr Gandhi, Professor (formerly Dr) Budge, Dr Bennett and Dr Yin for the Defendant.

LJR

34. LJR gave oral evidence and confirmed the content of her witness statement dated 13th January 2021 which also annexed a copy of LJR's witness statement dated 1st October 2012. This was produced at the time at which proceedings were first intimated in correspondence with the Defendant, but prior to the receipt of medical records from the Defendant identifying Dr Salman as the doctor with whom LJR had spoken on 6th October 2004.

35. LJR gave evidence consistent with her 2021 statement and, importantly, also with her earlier statement made in 2012. She stated that on Tuesday 5th October 2004 there had not been much movement, and that on Wednesday 6th October 2004, when she got up, she said to her husband that she would mention it at the clinic.

36. In her statement she set out a clear recollection of the appointment, which took place on her wedding anniversary. The clinic was chaotic and running late. She was not seen by either a midwife or a sonographer; only by Dr Salman, who she subsequently

recognised at a meeting after the Claimant's birth. She informed Dr Salman about her concern about reduced fetal movement

37. She remembered Dr Salman carrying out the ultrasound to confirm cephalic presentation and the heart beat, and the reassurance given by Dr Salman that the reduced movement was explained by the Claimant's head being down and that he was ready to be born. She stated during re-examination that there was not a lot of movement on Thursday and that she was relieved by a big movement on Friday whilst shopping in Newark. She also remembered the visit of Dr Salman following the Claimant's birth and her comment that she had told LJR to monitor matters.

Mrs Smith

38. Mrs Smith accompanied her daughter (one of her three children) to the appointment on 6th October 2004. She lives 120 miles away, but had travelled down to give support to LJR, as LJR's husband was away and given that there was a worrying concern about the Claimant being in a breech position. She remembered Dr Salman giving reassurance to LJR.

39. During the entirely proper and courteous cross-examination, I could detect that Mrs Smith was a little confused. She appeared to agree with the proposition that Dr Salman had asked whether the baby was moving OK and that LJR had said yes. However I am not sure, having observed the exchange from close hand, that too much reliance can be placed on the answer, which is contrary to what she had set out in her witness statement that;

> *"Lisa also mentioned that she was a little concerned that she had felt very little movement from her baby in recent times. The lady said something to the effect of "let's have a look". This consisted of a very brief ultrasound check in a cubicle. We were told by the lady that the baby's head was down and ready to be born. Lisa again asked regarding the lack of movement and we were again reassured"*

40. Mrs Smith stated that she clearly remembered Dr Salman leaving the clinic room for approximately five minutes, bringing in a machine on wheels and pulling a curtain around LJR. Mrs Smith sat at the desk, but could hear what was said behind the curtain. As with her daughter, she was adamant that it was Dr Salman who had carried out the scan.

Mr R

41. Mr R stated that his wife LJR had mentioned that she had experienced reduced movement and told him that she was going to ask about it at her appointment on 6tH October 2004.

42. He gave evidence of his memory of having been relieved, when, during a telephone conversation with LJR after the clinic visit, he was told that the Claimant was not in a breech position. He also recalled a light-hearted interchange that they were not going to have an anniversary baby. This evidence was consistent with LJR's evidence.

43. He remembered persuading his wife to go to hospital on Sunday 10th October 2004, instead of leaving matters until the next day, as he could see the concern on her face when getting out of the bath. He vividly remembered the birth and that after being told that the Claimant would possibly be brain damaged he "was in a bit of a mess" and so he could remember the conversation with Dr Budge.

44. When considering the evidence of these three witnesses I have carefully borne in mind both the very long passage of time since 2004 and also that, wholly understandably, the events are likely to have been discussed at length within the family. Although I have no doubt that each of these witnesses was trying their best to give an accurate recollection there was clearly considerable scope for recollection to have been influenced by the memories or suggestions of another.

Dr Salman

45. Dr Salman has provided three written statements in these proceedings: one primary statement dated 21st December 2020, and two supplementary statements dated 9th September 2021 and 27th September 2021.She was first contacted about the claim in 2018—some thirteen to fourteen years after the events in question. Quite understandably, she has no independent recollection of seeing LJR during what was (as she described it) a routine clinic assessment in October 2004.

46. Dr Salman qualified as a doctor in Baghdad in 1990. After working as an SHO in obstetrics and gynaecology at George Eliot Hospital in Nuneaton from December 1999 to August 2000, and as an SHO in obstetrics and gynaecology at Royal Derby Hospital from August 2000 to December 2001, she began working in Nottingham as an SHO in colorectal oncology and genitourinary medicine. She returned to obstetrics and gynaecology as an SHO in August 2002. Notwithstanding maternity leave, this

meant that as at October 2004, she was on her fifth rotation. In cross-examination, Dr Salman agreed that this was "as senior as it gets as an SHO".

47. For completeness, Dr Salman subsequently qualified as a specialist registrar (in August 2005) and then consultant in obstetrics and gynaecology and has been practicing as a consultant for over 10 years.

48. On 6th October 2004 Dr Salman had been put on the hospital rota as an acting registrar in the Gynaecology department. Her evidence was that, at the time, she was attempting to get the national training number necessary for her to progress to a registrar position. The decision in relation to this was made by senior doctors. It seems likely that the ante-natal clinic was running late on 6th October 2004, as it often did, and that Dr Salman agreed to help out after completing the shift set out on the rota. At the time she was likely to be anxious to impress the senior doctors and as a result to show flexibility and willingness.

49. Dr Salman says it was her invariable practice to ask about fetal movement. There is "*no way*" that she would have recorded "Active FMs", being the critical component of the record of the clinic visit, had there been the slightest concern about fetal movement expressed by the expectant mother. She stated that a mother reporting reduced fetal movements was, and is, a 'red flag'. She stated that she would not have said that reduced movements were 'because the baby was about to be born', being the version of the conversation advanced by LJR, as this would not be a tenable explanation or analysis for reduced fetal movements.

50. Dr Salman's evidence was that she was certain that she did not perform the ultrasound scan as she had not been trained. She believed that in all probability the scan would have been performed by a sonographer. She also did not think that there was a portable ultrasound machine available in the antenatal clinic at the time. She stated that she had completed the three sentence entry in the medical notes (with her signature against it) and that someone else had written the other notes which gave her the information she needed.

51. During cross-examination, Dr Salman was taken to the following extract within her second supplementary witness statement, dated 27th September 2021.

> *"to be absolutely clear, whatever the state of my training in October 2004, I was never trained to perform ultrasound scans, I never scanned, I still don't scan"*

52. When cross-examined she stated that she was referring to "formal" training and that she received informal "hands on" training towards the end of her second year, in December 2004. This was whilst working on the labour ward, and involved use of the portable scanner to confirm presentation. She also stated that once trained she had done such scans infrequently over two to three years.

53. It is very difficult to understand how Dr Salman came to prepare and verify a statement, the sole purpose of which was to address one issue (being a Part 18 request; "Has Dr Salman ever carried out ultrasound scans? If so, during which period of her career") which was so fundamentally incorrect a fortiori when expressly setting out that she was making matters "absolutely clear". I do not accept Mr Elgot's submission that as she was less than careful in her evidence, it could be assumed that she was less than careful as a doctor. However, I received no satisfactory explanation for this very seriously misleading assertion which provoked an expression of some incredulity from Dr Brocklesbury in his responsive statement dated 1 October 2021. It resulted in the balance of her evidence, when not corroborated by records or other witnesses, having to be treated with considerable caution—an example being her oral evidence that she never used a portable scanning machine during an ante-natal clinic, but only ever on the labour ward. I do not think that she can remember her work so well as to be able to make such a statement with the certainty with which she made it and, after considering all the other evidence, I do not accept it as correct.

54. There were other areas of concern within Dr Salman's evidence. She stated in relation to LJR's scan that:

> *"I think she would have been seen by a sonographer who would have carried out the ultrasound scan to check the baby's presentation*."

When asked about doctors undertaking presentation scans in the ante-natal clinic, Dr Salman stated,

> *"I've never seen it and no-one has told me that they did this".*

55. However, Dr Harper, who was a registrar at the time, set out a very different picture in her witness statement:

> *"In 2004 it was quite common for us to undertake our own ultrasound scans to identify the presentation of the baby using a spare machine in one of our assessment rooms."*

56. Mr Fay, the consultant , also set out in his witness statement that it was quite common practice for competent senior trainees to be asked by trainees to perform a simple

ultrasound scan on women seen by them in the antenatal clinic, to confirm the presenting part of the fetus when a breech presentation.

57. In my view this evidence, from two sources with contemporaneous knowledge, wholly undermines Dr Salman's confident assertion that she had *"never seen it*", where 'it' refers to the practice of doctors undertaking presentation scans. I think it highly likely that she had seen it.

58. Dr Salman says that she took the issue of fetal movement very seriously and she stated that it was not enough to see fetal movement on a scan if there was a report of reduced movement, but that such a report had to be escalated. However, I think it likely that her recollection has been affected by years of subsequent clinical experience, and she has, unintentionally, conflated current practice (which, as set out above, has changed in terms of emphasis since the publishing of a Green Top guide on reduced fetal movements in 2011) with the practice in 2004.

Dr Gandhi, Professor Budge, Dr Bennett and Dr Yin

59. Oral evidence was also heard from four of the doctors who saw LJR between 10th and 12th October 2004: Dr Hina Gandhi, Professor Helen Budge, Dr Joanne Bennett and Dr Than-Than Yin.

60. Dr Gandhi was a senior registrar as at October 2004. She was asked to review LJR's Cardiotocography('CTG') scan following her admission on 10th October 2004. She attended on LJR at 23.00 and made an entry in the medical records.

61. Dr Gandhi pointed out that in the records, she wrote "reduced fetal movements for 3-4 days" and then crossed it out and wrote "No fetal movements". Mr Elgot suggested that it was unlikely that LJR stated that there had been no fetal movements. However Dr Gandhi stated that she would accurately record what a woman said in these circumstances and that the crossing out would reflect her editing of the records to reflect what the patient had told her. Given that I am quite satisfied that LJR had a severe kick on the Friday and also given the content of initial entry (which was then crossed out), I think it likely that there must have been some misunderstanding between Doctor and patient. I can go no further to explain this curious entry.

62. In October 2004, Professor Budge was a neonatal consultant, and, after his very difficult birth, the Claimant was her patient. The hospital notes record that she discussed the Claimant's case with Mr and Mrs LJR on 12th October 2004, although Professor Budge now has no memory of the meeting. She stated that she would have

asked about fetal movements, as the Claimant had suffered a fit. Her evidence was that ascertaining the exact number of days of reduced movement was not her primary interest at that time, but rather the quality of the movement. She stated that she would have asked, as was her practice, an open (as opposed to a leading question) of LJR in order to elicit discussion of fetal movements. The significance of the record justifies repetition

> *Mother gives a history of reduced fetal movements for possibly 2 days prior to delivery.*
>
> *Seen on Wed 6.10.04 and scan reported Ⓟ movements and "heart beat", then felt good movements Friday 8.10.04 [?] fewer and non on bathing on Sunday 10.10.04 evening ∴ presented for assessment → stat LSCS.*

63. In cross examination LJR accepted that this was a conversation which took place after time for reflection and recollection and that, conscious of the importance of the question about fetal movement in the time prior to delivery to Prof Budge's decisions about treatment, she would have made every effort to give an accurate answer to any question posed of her.

64. Mr Nolan QC placed significant reliance upon this record as accurately recording what LJR said less than a week after the relevant clinic visit; this being, he submitted, inconsistent with her recollection about a concern about reduced fetal movement on the Wednesday. LJR accepted that she did not say anything to Dr Budge to suggest that she had experienced reduced fetal movement at or before the clinic visit of 6 October and her explanation was that she was re-assured on the Wednesday. As for the two day timeframe she had felt significant movement on the Friday; this being two days before she as admitted.

65. Dr Bennett was a senior SHO who was asked to see LJR on 10th October 2004, and also made an entry in the medical notes. She gave evidence and pointed out that although the midwife had seen LJR and made an entry, she (Dr Bennett) would not have relied on that information, and would have asked LJR for a relevant history. Her evidence was that the change in her notes from the report of no fetal movement since the Thursday 6th October, to no fetal movement for 2 days, proved that this was the case.

66. Dr Yin was the final witness as to fact. She was a registrar working on 10th October and made a record in the notes, after having been asked to review LJR by Dr Bennett.

She saw her at 20.20 and had already been told of the history of no fetal movements for two days, but would have checked that this was correct with LJR.

Other witness statements

67. There were also statements from witnesses who Mr Elgot did not wish to cross-examine.

68. In October 2004, Miss Sarah Harper was a first year registrar (now a consultant). The rota for the week commencing 4 October 2004 shows that on 6 October 2004, she was scheduled to work in the antenatal clinic. She has no recollection of LJR. She doubts that she undertook the ultrasound as she would have made an entry in the notes and would have completed the assessment herself, rather than handing the case over to Dr Salman.

69. Dr Toby Fay was a consultant at the time. He set out in his first witness statement, dated 6th January 2021 that at the relevant time, it was quite common practice for consultants or competent senior trainees to be asked by trainees to perform a simple ultrasound scan on women seen by them in the antenatal clinic to confirm the presenting part of the fetus when a breech presentation had been previously suspected by the woman's Community Midwife. The antenatal visit would then be completed by the trainee when the fetal presenting part was confirmed as cephalic. His evidence was that in this case, Dr Salman was competent to review, discharge and re-refer the woman back to her Community Midwife for ongoing antenatal care. Mr Fay also stated that there was a spare ultrasound scan machine permanently in one of the antenatal clinic's assessment rooms for uncomplicated scans.

70. A statement was also received from Dr Lucy Kean, who was also a consultant obstetrician at the time. and provided an overview of maternity services in 2004. Dr Kean's evidence was that the mother kept the hard copy of the set of notes referred to as "the hand-held notes". She would take these along to relevant appointments with the midwife or the clinic. Alongside these hard copy records, the hospital computer system retained records. She states that the ante-natal service was exceptionally busy in 2004 and it was not unusual for patients to complain about long waits. A senior midwife managed the clinic. She set out that she has discussed matters with colleagues who believed that there was access to an ultra sound machine in the clinic. She thought it highly unlikely that an SHO would undertake an ultrasound, as training was not routine.

71. There was a statement from Ms Lincoln-Davis, the community midwife who saw LJR in the antenatal clinic on 30th September. She referred LJR on for an appointment as she was concerned that the Claimant was in a breech position.

72. There was a statement from Ms Sampson, who was a sonographer in 2004. She set out that an SHO would not be trained to undertake an ultrasound. She said that there was not a portable machine on the antenatal clinic in 2004, but there was an old sonography machine in one of the clinic rooms which could be used by Doctors "*to quickly check a baby's presentation".* She pointed out that there were no records of a scan of LJR being performed by a sonographer.

Findings of fact

General observations

73. I start with some general observations about the accuracy of recollection and medical records.

74. As noted by Stewart J in *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) and by Warby J (as he then was) in *Dutta v General Medical Council* [2020] EWHC 1974 (Admin), there has been a considerable body of authority in recent years setting out the key principles in relation to the judicial determination of facts and the approach to witness evidence. These cases include *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) (Leggatt J, as he then was); *Lachaux v Lachaux* [2017] EWHC 385 (Fam), [2017] 4 WLR 57 (Mostyn J); and *Carmarthenshire County Council v Y* [2017] EWFC 36, [2017] 4 WLR 136 (Mostyn J).

75. In *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), Leggatt J made the following observations:

> "16. While everybody knows that memory is fallible, I do not believe that the legal system sufficiently absorbs the lessons of a century of psychological research into the nature of memory and the unreliability of eye witness 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 peoples' memories are unreliable and believe our memories to be more faithful then they are. Two common (and related) errors are supposed: (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 over (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 'flash bulb' memories, that is memories of experiencing or

learning of a particularly shocking or traumatic event. (The very description 'flash bulb' 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 have not happened, 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 suggestion about an event in circumstances where his or her memory of it is already weak due to the passage of time".

76. At [19] – [22], Leggatt J went on consider the relationship between these characteristics of memory and the civil litigation process—including the "considerable interference with memory" introduced by the procedure of preparing for trial, and the potential biases and influences exerted through the process of preparing witness statements and giving evidence. In those circumstances, he suggested at [22] that:

> "… 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*." [Emphasis added.]

77. While *Gestmin* was a commercial case (and notwithstanding that Leggatt J's observations explicitly referred to that context), the '*Gestmin* approach' (as it has become known) has broader utility. In *Carmarthenshire County Council v Y* [2017] EWFC 36, Mostyn J noted at [17] in reference to paragraph 22 of *Gestmin* that:

> "In my opinion this approach *applies equally to all fact-finding exercises*, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context."

78. Mostyn J observed that while "the general rule is that oral evidence given under cross-examination is the gold standard" (at [7]), noting (as summarised by Stewart J in *Kimathi*, above, at [96]) that it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness, "[i]t should not be thought however that oral evidence under cross-examination is the be all and end all of forensic proof" (at [17]).

79. Turning to medical records in *Synclair v East Lancashire Hospitals NHS Trust* [2015] EWCA Civ 1283, Tomlinson LJ made the following observation:

> "[12] … [I]t is too obvious to need stating that simply because a document is apparently contemporary does not absolve the court of deciding whether it is a

> reliable record and what weight can be given to it. Some documents are by their nature likely to be reliable, and medical records ordinarily fall into that category. Other documents may be less obviously reliable, as when written by a person with imperfect understanding of the issues under discussion, or with an axe to grind."

80. In those circumstances, Tomlinson LJ "commend[ed] the approach of His Honour Judge Collender QC, sitting as a judge of the High Court, in *EW v Johnson* [2015] EWHC 276 (QB) where he said, at paragraph 71 of his judgment":

> "I turn to the evidence of Dr Johnson. He did not purport to have a clear recollection of the consultation but depended heavily upon his clinical note of the consultation, and his standard practice. As a contemporaneous record that Dr Johnson was duty bound to make, that record is obviously worthy of careful consideration. However, that record must be judged alongside the other evidence in the action. The circumstances in which it was created do not of themselves prevent it being established by other evidence that that record is in fact inaccurate."

81. Tomlinson LJ noted at [15] that while there was general force in the submissions made by Counsel that clinical notes are inherently likely to be reliable,

> "here [those submissions] are less persuasive because there is so much uncertainty concerning the circumstances in which the critical note was made".

82. Similarly, in *HXC v Hind & Craze* [2020] EWHC (QB) (5th October 2020), faced with a dispute about the accuracy of medical records, I stated at [137] that:

> "In my judgment a court can and often will taking a starting point, *but no more than a starting point*, that a contemporaneous entry made by a medical professional is likely to be a correct and accurate record of what was said and done at a consultation/examination." [Emphasis added]

83. As for the approach to evaluation of the evidence of a witness I set out my view in *Pomphrey v Secretary of State for Health & North Bristol NHS Trust* [2019] EWHC QBD [2019] Med LR Plus 25:

> [31] I start with some very general and basic propositions. When evaluating the evidence of a witness whose testimony has been challenged it should be broken down into its component parts. If one element is incorrect it may, but does not necessarily mean, that the rest of the evidence is unreliable. There are a number of reasons why an incorrect element has crept in. Apart from the obvious loss of recollection due to the passage of time, there may be a process of conscious or subconscious reconstruction or exposure to the recollection of another which has corrupted or created the recollection of an event or part of an event.
>
> [32] The court must also have regard to the fact that there can be bias, conscious or subconscious within the recollection process. When asked to recall an event that took place some time ago within the context of criticism people often take an initial stance that they cannot have been at fault; all the more so if the act in question was in terms of their ordinary lives; unmemorable. There is a tendency to

fall back on usual practice with the tell-tale statement being "I would have" rather than "I remember that I did".

[33] To approach the exercise of fact finding in a complex case (when faced with stark conflicts in witness evidence) as necessarily requiring all the pieces of the jigsaw to be fitted together is often both flawed and an exercise in the impossible. This is because individual pieces of the jigsaw may be wrong, distorted to a greater or lesser degree or absent. Indeed, it is not possible to make findings if the state of the evidence or other matters mean that it is not proper to do so (see generally *Rhesa Shipping Co SA v Edmunds (The Popi (M)* [1985] 1 W.L.R. 948). However, often a sufficient number of pieces may be fitted together to allow the full picture to be seen.

84. The hearing in this case took place seventeen years to the day after the events in issue. LJR first prepared a statement eight years after the meeting with Dr Salman. I have no doubt she has discussed what took place with her mother and husband, both of whom gave evidence, on many occasions. As for Dr Salman she was first asked to cast her mind back to October 2004 in 2018. Fourteen years of practice as a Doctor had intervened during which the focus amongst practitioners on reduced fetal movements had increased. As a result I have considered the reliability of the recollections of the principal witnesses with great care.

85. The critical medical note records active fetal movement ("*Active FMs*"). However, such an entry, which does not state if the movements were seen on scan or reported by LJR, does not preclude concern having been expressed by LJR that there had been reduced (as opposed to no) movement recently. Dr Salman's evidence was that if such concern has been expressed she would have recorded it, and as she had not made a record of such a concern it cannot have been raised. However as I have already stated I believe that her recollection has been affected by the intervening years of practice and the greater emphasis on reduced fetal movement since 2011.

86. Mr Nolan QC understandably placed heavy reliance on the entries in the medical records on and after the 10Th October which made no reference to LJR's concern about reduced fetal movements on Wednesday (or from Tuesday evening) and in particular upon the entry made on 12th October 2004 by Dr Budge. However LJR's explanation; that she was reassured on the Wednesday by Dr Salman about fetal movement, and so discounted that day, is potentially supported by the record that

"(the) scan reported Ⓝ movements.

The reference to a strong movement on Friday within Dr Budge's note is wholly consistent with her evidence.

Facts; the starting point

87. I start my analysis with four foundation stones. I am are satisfied to a very high degree of probability of the following facts:

a. LJR had a very strong fetal movement on Friday 8th October. This has remained a strong recollection and is recorded in the records

b. Fetal movement was discussed by LJR and Dr Salman during the appointment on 6th October.

c. LJR also clearly remembers, despite being very upset at the time, Dr Salman visiting her after the Claimant was born and mentioning that she had told LJR that she (LJR) needed to monitor things.

d. After a bath on 10th October, LJR's husband said that LJR must go to hospital to have matters checked out. I accept without reservation the evidence of both Mr R and Mrs LJR to this effect.

88. Building on those foundations the first block is formed from the issue as why LJR would have needed any persuasion to go to the hospital on the Sunday evening. An intelligent woman, she had already carried a child to term and knew the importance of fetal movement. Her explanation was that she had been reassured by Dr Salman at the clinic visit on 6th October, i.e. that the Claimant was ready to be born and this would explain the lack of fetal movements. This, taken with the movement on Friday 8th October, was enough to make her believe that there was not a problem. The recollection of her reluctance to have matters checked out was strong for both Mr R, and Mrs LJR as LJR's husband said of his insistence "*Thank God I did*". This evidence is wholly consistent with her case that LJR was reassured on the Wednesday about a lack of movement

The conversation between LJR and Dr Salman on 12th October 2004

89. The next building block is that, as set out above, LJR clearly remembers Dr Salman visiting her after the Claimant was born and mentioning that she had told LJR that she needed to be monitoring matters. Although I remind myself of the observations of Leggatt J as set out in detail above, this conversation appears, for understandable reasons to have been burnt into LJR's memory, her evidence was that she remembers thinking to herself, "No, you did not". Given the context of having a critically ill baby with potential brain damage, such criticism could be expected to be remembered, and it was. Importantly, she recalled the visit in a short witness statement of 1st October 2012 prepared before she had sight of the records.

90. Dr Salman stated that such a comment, made to a woman who had just given birth to a baby who was being cared for in the NICU, "*effectively blaming her for the outcome would be a significant issue that would not pass without comment*" and that "*criticism of a mother, even implicit criticism, is a completely improper approach*" . She stated that if she had made such a comment in front of Mr Fay, the consultant who she thought was present, *"I am sure that Mr Fay would have documented that and explored the issue"* i.e. that it would have been taken up with Dr Salman. It was the Claimant's case that Mr Fay was not in fact present. However, in any event, this is generalised evidence and comes nowhere near to persuading me that LJR's firm recollection is wrong.

91. In weighing up the accuracy of Dr Salman's view that it is highly unlikely that she made such a comment in front of a consultant or other senior doctor, I have borne in mind that I also heard from her how anxious she was at the time to get a national training number and progress her career and that it was her seniors , such as Mr Fay, who would make the decision

92. It was Dr Salman's evidence was that the "no blame" culture was yet to come in Nottingham at that time and that junior doctors were all "terribly scared" about making mistakes. At the time of this meeting it was well known that the Claimant was very ill and that things had gone very badly wrong.

93. In my view, it is likely that Dr Salman knew (through notes or memory) that it was she who had seen LJR only a few days before the birth. Dr Salman had an obvious incentive to make it clear to any senior doctor present that she had not been at fault, and had advised LJR appropriately.

94. Significantly, Dr Salman stated;

> *"If I had said to LJR that she needed to be monitored, that would have been directly contrary to the notes I made the previous week when I saw her in the antenatal clinic on 6th October 2004. That note, which anyone would have been able to read, made no reference to the need for LJR to be monitored."*

However, the lack of a reference to such a warning in a note that may have been read by Mr Fay or other senior doctors when reviewing this tragic case would explain why Dr Salman would have been anxious to specially mention it.

95. Further, and in my judgment very importantly, the issue then arises as to what Dr Salman was referring to as "requiring monitoring". Such a statement is entirely consistent with Dr Salman having at this stage, a week later, a recollection that LJR

had raised some form of concern on 6th October that required monitoring, such as reduced fetal movement. The comment would be consistent with Dr Salman having been happy that there was an explanation for reduced fetal movement when she saw LJR but a week later being of the view that she should have, or being favourable to her believed that she would have, told her to monitor the situation. The comment is certainly not consistent with there being nothing to monitor.

96. These building blocks support LJR's recollection.

Other factual issues

97. I now the other areas of dispute.

Who undertook the scan?

98. LJR was clear in the witness statement prepared before the records were available to her that it was "*the lady who carried out the ultra-sound scam on 6th October that came to see us"*. She has been consistent and unwavering in this evidence and was adamant that she was right during cross-examination. She was supported in this recollection by her mother, Mrs Smith, who remembers the curtain being drawn after Dr Salman had wheeled in what appeared to be the portable scanning machine.

99. The entry on the left side of the records contains the reference to "*ceph*" and the detection of a heartbeat, so it seems likely that the entry was made by or in the presence of the person undertaking the scan.

100. Dr Salman has consistently stated that the entry on the right hand side of the page was hers. This evidence is unsurprising as this entry was signed by her. However, Dr Salman has never stated that the entry on the left hand side was hers, and she has pointed out that others have made entries in the record. I accept that it is her view that someone else made the entry "*ceph*" and made the tick against fetal heartbeat (Dr Salman made another mistake in her witness statement in that there was no tick in a column for fetal movement). However as I have set out the entry is one line and is barely legible; Dr Salman can see little clearly other than "*ceph*" which is fitted into a box, to enable her to draw her conclusion that the left-hand entry is in someone else's handwriting and this has to be borne in mind when considering this evidence. Further, and as I have stated, I consider her evidence with caution, as it is clear that important elements of it were given without the degree of care that should have been taken. In my judgment there is clearly scope for Dr Salman to be wrong as regards the entry not being in her handwriting.

101. It is my finding that there was an ultrasound machine available for use on the ante-natal clinic and that Doctors did carry out basic presentation scans. I do not accept Dr Salman's evidence that she only undertook any scans in December 2004 (as opposed to October 2004) and then not in the ante-natal clinic. I do not think that she can accurately remember such then relatively unimportant matters, so far back.

102. I have considered the possibility LJR and Mrs Smith, are both incorrect and that another SHO (or, in Dr Salman's view, a sonographer) carried out the scan for Dr Salman who was highly likely to be the senior SHO on duty (being that she was, as she accepted, "about as senior as it gets as an SHO"). I have no doubt that LJR and Mrs Smith have discussed what happened on many occasions, and I have to consider the potential for the mistaken recollection of one to have influenced the other.

103. However after careful consideration of all the available evidence on the issue (and also taking into account the lack of some evidence such as any of the usual records completed by a sonographer) I am satisfied that Dr Salman is more likely than not to have undertaken the ultrasound.

104. As I have stated it is sometimes the case, when considering all the evidence in a case, that not all of pieces of the jigsaw can be easily fitted together. This is the case here; there is some inconsistency between the practices and available ultrasound machines on the ante natal clinic. However, I am satisfied that Dr Salman is incorrect in her recollection as to when she was informally trained as to use of a portable ultrasound machine to check presentation and as at 6th October 2004 she was able to, and did in this instance, undertake a quick and straightforward scan using a machine available on or to the clinic.

105. This finding is significant in terms of the central issue in the case as if my conclusion had been otherwise, it would have been likely to adversely impact upon the reliance that can be placed upon the recollection of LJR and Mrs Smith. My finding is that they are correct as to what took place and this further supports their ability to accurately recall the essential elements of what took place on and in the days surrounding the 6th October 2004. However just because I accept that LJR is correct in this aspect of her evidence does not mean that she is necessarily correct as to whether she raised concern over a lack of fetal movement. The recollection of witnesses can be correct in some respects and erroneous in other by reason of the mental processes outlined by Leggat J.

<u>What did LJR say to the Doctors on and after the 10th October about fetal movements?</u>

106. I now turn to the records in relation to LJR's admission on 10th October 2004. Mr Nolan QC submitted that the absence of any reference within these contemporaneous medical notes is highly important (per *Gestmin* above) and seriously undermines the reliability of LJR's recollection.

107. As I have set out above, I am satisfied that LJR had a strong movement on the Friday, two days before her admission. There were then entries (through to and including the record in relation to the 12th October 2004) setting out different timescales for no, or reduced, movement.

108. There is, of course, a very important distinction between reduced movement and no movement however this appears to have been lost in the dialogue between some of the clinicians and LJR. By way of example the midwife admitting LJR on 10th October recorded no fetal movement since Thursday (3 to 4 days), as did Dr Gandhi. Given the strong movement it is unlikely that LJR stated or intended to state that there had been no movement (as opposed to reduced movement) over this period. She believes that she would have said "not a lot" but this is not what was recorded. Within a short space of time of either record Dr Bennett note that LJR had said that she had felt no movement for two days; which fitted in with the last movement being on the Friday.

109. As I have already set out LJR stated that she would have excluded Wednesday when explaining the period of reduced movement as she was reassured by Dr Salman. Mr Nolan QC suggested that it would be unlikely that, in the serious circumstances in which she was asked, she would have not referred to reduced movements on Wednesday a fortiori Tuesday night if that was the correct history. However LJR has been consistent that she was reassured by what happened at the clinic appointment and the sudden movement on the Friday and this is consistent with what she said to Dr Bennett and, subsequently, in a calmer environment, to Dr Budge.

110. I do not know how the other records, such as that of Dr Ghandi, have come to record a different report of no fetal movements for 3-4 days, but I respectfully agree with the observations of HHJ Freedman in *Ismail-v-Joyce* [2020]EWHC 3453 that it is human nature for patients to not to always give precisely the same account of his or her symptoms (or history) to every Doctor to examines him or her. Also that a patient is likely to emphasise and stress the symptoms (or relevant history of symptoms) which are troubling them the most at the particular time (here the lack of movement since Friday, in particular during the bath on the Sunday evening). I would add that different Doctors are likely to ask different questions even in an attempt to explore the same area of concern, so may get answers using different words or phrases. Also the answers are usually not recorded verbatim; rather it is the clinician's summary and clinicians may be influenced by and/or copy extracts from earlier entries in the notes.

111. In any event I am satisfied, having heard LJR, that the records compiled on and after 10th October are not inconsistent with her having been concerned about reduced (as distinct from no) fetal movement on Wednesday and having been reassured by Dr Salman who had conducted a scan and either seen fetal movement or considered a lack of it was not concerning given the Claimant's positioning (one or both leading her to note "active FMs" in the record). I accept that LJR excluded Wednesday from the history she subsequently gave to other clinicians for this reason. It is also explains why she did not seek to blame Dr Salman immediately after the Claimant's birth (despite Dr Salman's comment about post clinic monitoring).

112. Given the matters set out above I now turn to the central issue of fact

Did LJR mention a concern about fetal movement on 6th October 2004

113. Mr R's evidence provided some support to his wife's evidence as he recollected her mentioning concern about reduced movement. Mrs Smith also recollected LJR raising her concerns at the appointment. However, although it is corroborative, I am reluctant to place too much weight on this evidence as to events so long ago given that Mr R and Mrs LJR and Mrs Smith must have discussed this issue on so many occasions and the scope for LJR's husband and Mrs Smith to have been influenced by LJR's recollection is clear. At the time the principal (and understandable) concern and focus for both LJR's husband and Mrs Smith would have been on whether the Claimant was in a breech position.

114. In my judgment my finding must mainly turn upon my assessment of the reliability of LJR's recollection.

115. The building blocks and findings set out above provide substantial support for her evidence that she raised a concern and was reassured by Dr Salman.

116. As I have already set out, medical records are usually of very considerable importance in clinical negligence cases. However, in this case they provide some, but only some, assistance on the central issue of fact. Specifically although the brief entry in the notes made by Dr Salman on the 6th October records active fetal movement, this is not, of itself, contradictory to the expression of a concern about reduced fetal movement. For the absence of a reference to carry substantial weight it required acceptance of Dr Salman's evidence that if reduced movement had been raised she would have recorded it. As I have set out it is my judgment that Dr Salman's evidence needs to be treated with considerable caution generally and as regards this specific point I find that her subsequent years of practice, many of them post 2011 when the emphasis on

the importance of reduced fetal movement changed to a degree, has coloured her recollection. I do not accept her evidence as correct on this issue.

117. I also take into account that LJR compiled her 2012 statement without sight of the medical records i.e. she was solely reliant on her recollection and has, been proved right on issues such as the fact of a visit by Dr Salman after the Claimant's birth.

118. Having carefully considered all the evidence I am satisfied that LJR told Dr Salman that she was concerned about reduced fetal movement and that she had not felt a great deal of movement in the last day or so. I am satisfied that LJR did raise that concern.

Conclusion

119. As I am satisfied that LJR did raise a concern about reduced fetal movement at the clinic on 6th October 2004 she has established a breach of duty.

120. I leave it to Counsel to seek to agree a consequential order.