

# COURT OF APPEAL JUDGMENT

## ADVERSE INFERENCES, THE EVIDENTIAL STATUS OF CONTEMPORANEOUS NOTES, AND FACT FINDING GENERALLY

*Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882

Autumn 2018

Michael De Navarro QC and Luka Krsljanin succeed before the Court of Appeal in an important case regarding adverse inferences, the evidential status of contemporaneous notes, and fact finding generally. This note, prepared by Luka Krsljanin, highlights the key parts of the judgment.

In its judgment in the case of *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882, the Court of Appeal have given valuable guidance on these issues, which are of relevance to all civil practitioners.

The first instance trial (2016), at which Luka Krsljanin successfully represented the Defendant, turned principally on a question of fact: whether the Claimant, who had given birth at the Defendant's Hospital, had retained a significant amount of placenta. The Claimant alleged she had retained about 8cm of placenta, whereas the Defendant alleged that she had retained only a small amount. The experts agreed that if the Claimant was right, there had been negligence in discharging her home without performing surgical removal of the placenta, and if the Defendant was right, there was no negligence.

There was no dispute that after being discharged, the Claimant spent two weeks at home. At the end of that time, she experienced serious pain, and so she returned to the Hospital. Ultrasound scans identified a significant 8cm mass present in her uterus, which some contemporary notes indicated was or at least might be placenta. She underwent surgery to remove the mass, and subsequently suffered a catastrophic haemorrhage which led to a psychiatric injury.

The Claimant sought to rely on those notes, and on the absence of witness evidence from a doctor who had made a contemporaneous note suggesting that the Claimant had retained about 8cm placenta. The Defendant argued that the 8cm mass was a mixture of placenta and blood clot and decidua, by reference to the inherent implausibility of an 8cm



Michael de Navarro QC  
[mdn@2tg.co.uk](mailto:mdn@2tg.co.uk)  
+44 (0)20 7822 1224



Luka Krsljanin  
[lkrsljanin@2tg.co.uk](mailto:lkrsljanin@2tg.co.uk)  
+44 (0)20 7822 1278

mass being 'missed' at the time of birth, and by reference to expert evidence which said that it would be extremely difficult to tell apart placenta and blood clot after two weeks in utero, such that there was a logical explanation for why certain contemporaneous records indicated that there was an 8cm mass of placenta. The Defendant also said that no adverse inference should be drawn where the decision had been taken not to call the doctor for reasons of proportionality, and where the Claimant had not herself called that doctor to give evidence to support her own case (there being no property in a witness).

At first instance, Nicol J declined to find that the 8cm mass was entirely composed of placenta. His Lordship refused to draw an adverse inference, noting that the absent doctor's involvement in the Claimant's care had been tangential.

On appeal, the Claimant challenged Nicol J's approach both to fact-finding and to the issue of adverse inferences.

In a concise but informative judgment, the Court of Appeal held:

- Courts cannot and should not mechanically draw adverse inferences purely because a witness is absent. In particular:
  - It is a matter for the discretion of the Trial Judge, as part of the multi-factorial fact-finding exercise, to determine whether or not to draw an adverse inference. It is not mandatory, even where a witness is absent.
  - The significance of the role played by the absent witness is a relevant and legitimate factor for the Court to weigh up: a person who had "tangential" involvement in the index events may not be a significant witness.
- Where there is a proper explanation for the witness's absence, it will be less likely for the Court to draw an adverse inference: a proportionate approach to the conduct of litigation may be a legitimate reason of itself.
- A party who invites the Court to draw adverse inferences without having taken proper steps to secure the attendance at trial of the relevant witness may struggle to persuade the Court to draw an inference: *"If the claimant was of the view that [the missing doctor's] evidence was as important to her case as is now asserted and that an adverse inference would be appropriate in [the doctor's] absence, they could have asked for a direction which contained the warning that an adverse inference may be drawn if the evidence was not provided. Even without such a direction, the claimant could have made arrangements to obtain evidence from [the doctor] themselves."* (para 31)
- The fact that case management directions – such as the standard directions in the Queen's Bench Division – orders the parties to provide witness statements from individuals involved in *"the relevant treatment"* or *"relevant events"* does not compel a Trial Judge to draw an adverse inference. *"That would be a disproportionate way of preparing litigation."* (para 32)  
  
(paras 28-32)
- Fact-finding is a multi-factorial exercise. *"The application of a standard of proof is rarely a binary choice between items of evidence that are of equal weight. Weight is a contextual evaluation for the judge who reads, hears and sees the evidence of the witnesses. It is*

*inappropriate for this court to interfere with that evaluation unless it is perverse." (para 23)*

- *As to the evidential value of contemporaneous notes, "[t]he proposition that a contemporaneous clinical record is inherently likely to be accurate does not create a presumption in law that has to be rebutted...To raise the bar so high that an analysis of what might be sufficient to displace inherent reliability is needed in every case is to make the process of fact finding too onerous and mechanistic." (para 25)*

A copy of the first instance judgment can be located [here](#).

---

#### Disclaimer

No liability is accepted by the authors for any errors or omissions (whether negligent or not) that this article may contain. The article is for information purposes only and is not intended as legal advice. Professional advice should always be obtained before applying any information to particular circumstances.