THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S.071 of 2020

Claim No. CV.2013-01909

Between

AEDEN BALWAH

(By Shelly-Ann Balwah, his Mother and Next Friend)

Appellant

AND

SURGI-MED CLINIC CO. LIMITED

First Respondent

DR. MARWAN AHMAD ALSAYED ABDULLA

Second Respondent

Civil Appeal No. S.117 of 2020

Claim No. CV.2013-01909

Between

DR. MARWAN AHMAD ALSAYED ABDULLA

Appellant

AND

AEDEN BALWAH

(By Shelly-Ann Balwah, his Mother and Next Friend)

First Respondent

SURGI-MED CLINIC CO. LIMITED

Second Respondent

Civil Appeal No. S.130 of 2020

Claim No. CV.2013-01909

Between

SURGI-MED CLINIC CO. LIMITED

Appellant

AND

AEDEN BALWAH

(By Shelly-Ann Balwah, his Mother and Next Friend)

First Respondent

DR. MARWAN AHMAD ALSAYED ABDULLA

Second Respondent

Panel:

Justice of Appeal Mira Dean-Armorer

Justice of Appeal Vasheist Kokaram

Justice of Appeal Malcolm Holdip

Date of Delivery: July 30, 2024

Appearances:

Dr M. Powers KC, Mr. R. Persad and Mr. R. Williams instructed by Ms. N. Narine on behalf of Aeden Balwah

Mr. B. Browne KC and Mr. K. Harrikissoon SC leads Mr. N. Harrikissoon and Mr. A. Sinanan instrusted by Mr. A. Ramlal on behalf of Surgi-Med Clinic Co. Limited

Mr. A. Ramlogan SC leads Dr C. Dindial and Mr. J. Jagroo instructed by Ms. N. Bisram on behalf of Dr Marwan Ahmad Alsayed Abdulla

I have read the the Judgment of Dean-Armorer, J.A. I agree with it and have nothing to add

_____
Vasheist Kokakram
Justice of Appeal

I have also read the Judgment of Dean-Armorer, J.A. I also agree and have nothing to add.

_____
Malcolm Holdip
Justice of Appeal

JUDGMENT

Delivered by Dean-Armorer, J.A.

Introduction

1. The Appellant, Aeden Balwah, is now 22 years old. He suffered brain damage prior to his birth and has suffered with cerebral palsy since that time.

2. In May 2013, the Appellant instituted proceedings through his mother, as next friend. He claimed that his mother's attending obstetrician, Dr Marwan Abdulla and Surgi-Med Clinic Co. Limited, the hospital at which the Appellant was delivered, were both negligent.

3. The Judge held that the Appellant had successfully proved that the Respondents had breached their respective duties of care, which they owed to him. The Judge, however, dismissed the claim on the ground that

the Appellant had failed to prove that the breaches of the Respondents were the cause of the damage that he suffered.

4. In that context, the Appellant has filed this appeal. The principal issue which arises is whether the Judge was wrong to decide that the Appellant had failed to prove causation.

5. For reasons which will become apparent in the course of this decision, we upheld the finding of the Judge in respect of the First Respondent and dismissed the appeal against Surgi-Med Clinic Co. Limited.

6. In respect of the Second Respondent, however, we held the view that the Judge was plainly wrong in failing to give effect to the clear admission of the Second Respondent in his Amended Defence.

7. We therefore allowed the appeal in respect of the Second Respondent, entered judgment against him and remitted the issue of damages to a Master in chambers.

Background

8. The Appellant was born on May 19, 2002. At the time of the hearing of this appeal, he was 21 years old. Since his birth, he has suffered a neurological problem which was the result of brain injury. The Appellant has been diagnosed with:

    a. Spastic Diplegic Cerebral Palsy

    b. Global Developmental Delay

    c. Microcephaly

    d. Seizure Disorder

    e. Hypoxic Ischemic Encephalopathy.

9. The cause of his brain injury was uncertain. What is certain, however, is that the injury occurred prior to his birth. The quest to discover the cause

of the Appellant's brain injury was one of the challenges at the hearing at the High Court and remains a challenge on appeal.

10. Many of the facts are undisputed. The Appellant's mother, Mrs. Shelly-Ann Balwah, became pregnant in September 2001 at the age of 24. She engaged the services of Dr Marwan Abdulla for her ante-natal care. Mrs. Balwah was given a due date of May 12, 2002.

11. Her pregnancy was uneventful. She experienced a normal implantation bleed in October, 2001[1]. She later submitted to an ultrasound test in January 2002 and no foetal abnormality was detected.

12. Mrs. Balwah visited Dr Abdulla regularly, initially once per month and more frequently as her pregnancy progressed. At 6 weeks prior to her due date, Mrs. Balwah selected the First Respondent, Surgi-Med Clinic Co. Limited, as the medical facility for the delivery of her baby[2].

13. On May 18, 2002, Mrs. Balwah, not having gone into labour, was advised by Dr Abdulla to seek admission to Surgi-Med Clinic Co. Limited. She did so and was admitted at around 6:30pm, with a view to having labour induced.

14. Dr Abdulla inserted 200 micrograms of misoprostol into Mrs. Balwah for the purpose of inducing labour. He left the hospital at 8:00pm, indicating to Mrs. Balwah that he would return at 6:00am the following day.

15. Mrs. Balwah testified that she started experiencing pain at 8:40pm. Her pains intensified at around 9:00pm. Her amniotic sac ruptured at 3:00am[3]. It is however undisputed that there was no monitoring of the foetal heart beat during the hours of 8:00pm and 12:30am. This omission was contrary to the explicit instructions of Dr Abdulla.

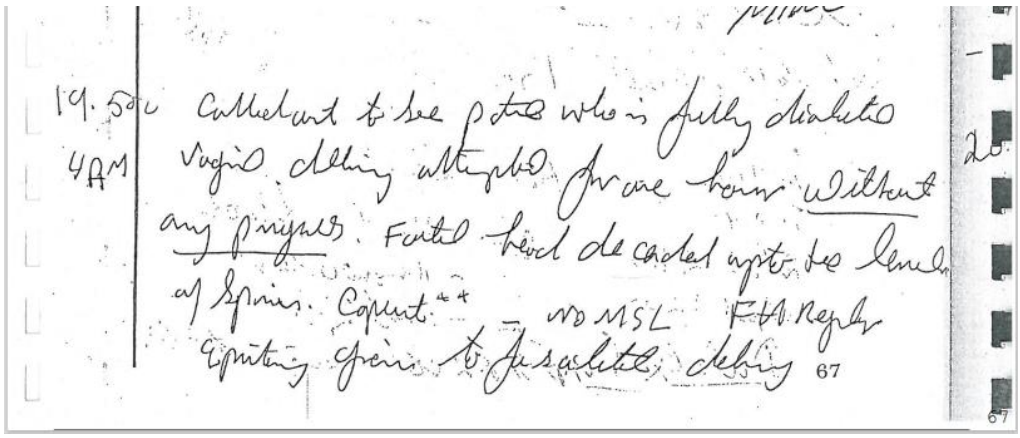
16. Dr Abdulla arrived in the early morning. The exact time of his arrival had been a critical issue at trial and on appeal. Having examined Mrs. Balwah,

[1] See paragraph 9 of the Witness Statement of Shelly-Ann Balwah
[2] See paragraph 16 of the Witness Statement of Shelly-Ann Balwah
[3] See paragraph 32 of the Witness Statement of Shelly-Ann Balwah

Dr Abdulla confirmed that she was ready to deliver. This was the on-set of second stage of labour. Mrs. Balwah was wheeled into the delivery room. The second stage of labour was not progressing and at length , Dr Abdulla made a decision to perform a caesarean section.

17. The exact time at which the decision was made to perform a caesarean section was uncertain. The Amended Statement of Case and the witness Statement of Mrs. Balwah indicate that the decision was made at 5am.[4] The Second Respondent on the other hand places this decision at 5:30 am.[5] This was not however a factor on which parties placed much weight. It was however , accepted that the Appellant was born at 6:15am

18. Dr Abdulla made a handwritten note as to the events leading to the Appellant's birth. The Judge relied on this note in his decision. A copy of the handwritten note is shown here:



19. It is accepted that the contents of the note by Dr Abdulla were:

> *"19.5.02 4am – Called out to see patient who is fully dilated. Vaginal delivery attempted for one hour without progress. Foetal head descended up to level of spines. Caput ++ - No MSL FH Regular. Episiotomy given to facilitate delivery."*

The meaning and effect of this note will be considered below.

[4] See the witness statement of Shelley -Ann Balwah at paragraph 41
[5] See the witness statement of Dr Abdulla at paragraph 37

20. Under the supervision of the paediatrician, Dr Aguilar, the newborn Appellant was taken to the San Fernando General Hospital for observation. He was taken mere hours after his birth in his father's vehicle in the care of a nurse. The Appellant's ailments were recorded by the attending paediatrician, Dr Aguilar in a letter of referral to the San Fernando General Hospital. Dr Aguilar noted that the neonate suffered twitching in the extremities and that he had an initial low apgar score. Significantly, Dr Aguilar noted that there had been prolonged second stage labour.[6]

21. The Appellant experienced developmental problems and was eventually diagnosed with Cerebral Palsy.

22. In her witness statement, Mrs. Balwah described the Appellant at the age of 14 as being completely dependent on others for every aspect of daily living. She stated that he had never spoken, could not walk or talk or stand or brush his teeth and that he was doubly incontinent.

23. On May 1, 2013, when he was almost 11 years old, the Appellant commenced proceedings through his mother, as next friend. The claim was filed against the hospital, Surgi-Med Clinic Co. Limited, Dr Marwan Abdulla and the paediatrician, Dr Aguilar. Proceedings were subsequently discontinued in respect of Dr Aguilar.

The Pleadings

24. The content and amendment of the pleadings were central to the submissions of the Appellant at the hearing of the appeal. I have therefore set them out in some detail.

25. In his original Statement of Case, the Appellant alleged negligence against all three defendants. As against Surgi-Med Clinic Co. Limited, he alleged negligence in failing to follow standard guidelines for documenting the

[6] See exhibit "S.B.6" to the witness statement of Shelly-Ann Balwah

induction of labour and monitoring of vital signs and failure to monitor the foetal heart rate of the Appellant in the hours prior to delivery.

26. As against the Second Respondent, the Appellant claimed both negligence and breach of contract. It was contended that Dr Abdulla was negligent in failing to inform Mrs. Balwah of the risk factors associated with Misoprostol and failing to obtain her consent before using the drug. The Appellant also contended that Dr Abdulla was negligent in failing to carry out Cardiotocography monitoring and recording of the foetal heart beat, for failing to use any acceptable method of foetal heart rate monitoring and for failing to diagnose foetal distress during labour and delivery.

27. Of significance to this appeal is the argument which was made by the Appellants initially at paragraph 17 (g) of the Statement of Case, that Dr Abdulla arrived at the hospital at approximately 4:00am and that Mrs. Balwah was taken to the delivery room. Paragraph 17 (h) continues the narrative by alleging that between 4:00am and 5:00am vaginal delivery was attempted without success.

28. The time of arrival of Dr Abdulla gained significance during the trial since it was linked to the on-set of the second stage of labour, which experts agreed would be the cause of the foetal hypoxia if allowed to exceed one hour.

29. The issue of the time at which Dr Abdulla arrived was admitted in the joint Defence of the Respondents[7] . They there admitted the timeline set out at paragraphs 17 (g) and (h)[8] of the Statement of Case.

30. The Appellant subsequently amended his Statement of Case. At paragraph 18 (g) and (h) of the Amended Statement of Case[9] the Appellant repeated the timelines, which he had identified in the original Statement of Case.

[7] Filed on September 25, 2013
[8] See paragraph 21 of the Joint Defence at page 25 of Record of Appeal Volume 1
[9] Filed on February 26, 2016.

That is to say that Dr Abdulla arrived at 4:00am and Mrs. Balwah was taken into the delivery room.

31. In response, the Respondents filed separate amended Defences. The First Respondent in an Amended Defence filed on March 31, 2016, admitted the timelines as had been done in the joint defence[10]. The Second Respondent also admitted the timelines as identified by the Appellant[11].

32. Accordingly, in March 2019 when the claim proceeded to trial, it was on the basis that the Second Respondent arrived at approximately 4:00am, when Mrs. Balwah was taken into the delivery room and that vaginal delivery was attempted between 4:00am to 5:00am, with an emergency c-section being performed at 6:15 am.

33. In the course of the trial, however, on March 21, 2019, the 6th day of trial, the First Respondent filed a Re-Amended Defence. The First Respondent made this amendment to paragraph 15:

> *"(i) It is admitted that the Second Defendant arrived shortly after 4:00am and that thereafter Mrs. Balwah was taken to the delivery room.*
>
> *(ii) It is admitted that a vaginal delivery was attempted for an hour before 5:30am but save as aforesaid, (h) is not admitted".*[12]

34. The circumstances in which the amendment was allowed was the object of much criticism by Dr Powers in the course of his submissions before the Court of Appeal. The correctness of the Judge's decision to allow the re-amendment will be considered in the Discussion below.

35. The Second Respondent, for his part, never re-amended his admission to the timeline alleged by the Appellant . In the course of the trial , his Counsel, Mrs. O'Rourke , indicated her intention to seek a re-amendment,

[10] See paragraph 15 (g) at page 12 of the Amended Defence of the First Defendant
[11] See paragraph 22 at page 6 of the Amended Defence of the Second Defendant
[12] See pages 176 & 177 of Record of Appeal Volume 1

if it became necessary .[13] However , there was never an application to re-amend and no re-amendment was ever made on behalf of the Second Respondent. This is of great significance to the outcome of this appeal and will be referred to in the Discussion below .

36. On March 29, 2021 , a Notice was filed by Mr Ramlogan S.C. on behalf of the Second Respondent.[14] This Notice related a CT Scan which had been taken of the Appellant on June 6, 2002, mere days after his birth. This scan reflected abnormality in the Appellant's his brain. According to our records however , no re-amendment ever followed this Notice . The net effect is that when this matter proceeded to trial , there was , on behalf of the Second Respondent , only an Amended Defence , in which he had admitted that on May 19, 2002, he arrived at the Surgi-med Hospital at 4am.

37. The trial proceeded for 10 days, from March 14, 2019 to March 27, 2019. On January 17, 2020, the Judge delivered an incomplete oral judgment. This was followed by his draft written decision on January 8, 2021. The Judge dismissed the claim on the ground that the Appellant had failed to establish a causal link between the breaches of the Respondents and the injury suffered by Appellant.

The Judgment

38. After setting out the facts and examining the evidence which had been ventilated before him, the Judge alluded to the law which governs medical negligence as set out in the ***Bolam v Friern Hospital Management Committee***[15] or the Bolam test.

39. The Judge set out the elements which were required to be proved in cases of medical negligence, that is to say: the existence of a duty of care; the breach of the duty; resulting damage and causation.

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[13] See paragraph 144 below
[14] See ROA Vol 1 pages 189 -190
[15] [1957] 1 WLR 582

40. He found that both Respondents (then Defendants) held respective duties of care to the Appellant[16]. The First Respondent, as the hospital, owed a duty of proper record keeping to the Appellant and his mother during their stay[17]. The Second Respondent owed a duty of competency to deliver the Appellant and to avoid anything which would cause the Appellant or his mother any avoidable harm.

41. The Judge found that both Respondents had breached their respective duties of care. The hospital had failed to keep records, and in particular, the Judge held that there was no record as to the discharge of the Appellant to the San Fernando General Hospital and that there was very little record of his condition after birth and no reason given for his discharge.

42. The Judge also found that the First Respondent had failed to monitor the Claimant's heartbeat from 8:00pm to 12:30am contrary to the instructions of Dr Abdulla.

43. He found that the Second Respondent had breached his duty of care by inducing labour by the use of an excessive dose of misoprostol.

44. Accordingly, the Judge found in favour of the Appellant in respect of the issues of whether the Respondents each held a duty of care and whether they had breached their duty. There was no appeal against these findings.

45. At length, the Judge proceeded to consider the issue of causation, that is to say whether there was a causal connection between the breaches of duty and the damage which the Appellant had suffered.

46. At paragraph 136, the Judge observed:

> *"The failure to record could only have caused damage if it were the case that proper recording would have picked up something…"*

47. The Judge held that the failure of the First Respondent to keep a proper record would only be relevant if the Appellant suffered foetal distress

[16] See paragraph 129 of the Judgment
[17] Ibid

during delivery, that is to say, the "intrapartum period". In this latter regard, the Judge relied on the evidence of Dr Wilkinson, who surmised that the Appellant's injury was due to an incident which occurred before the on-set of labour. In such an event, according to the Judge, a failure on the part of the First Defendant to keep accurate records would have had no effect on the Appellant's injury which would already have occurred.

48. The Judge applied similar reasoning in respect of the breach of the Second Respondent and held that an excessive dose of misoprostol would have had no effect on the Appellant if the injury had already occurred.

49. At paragraph 139, the Judge considered the issue of the time of arrival of the Second Respondent at the medical facility of the First Respondent.

50. The Judge explained the importance of this issue by noting that the half hour difference in the respective versions of the parties was critical as to whether enough time would have elapsed to have caused the PPHI[18] due to an intrapartum event[19].

51. Accordingly, the Judge set about to decide whether Dr Abdulla arrived at the medical facility at 4:00am as contended by the Appellant or 4:30am as contended by the Respondents.

52. The Judge proceeded to consider the evidence which had been led on this issue. He rejected the evidence of the Appellant's mother and grandmother. The Judge found that Mrs. Balwah was in substantial pain and under the effects of medication. In respect of Shelly-Ann's mother, the Judge found that there were contradictions in her evidence and he therefore found her to be unreliable[20].

53. The Judge also rejected the evidence of the Second Respondent, since he had stated that he had no recollection which was independent of his notes.

[18] Prolonged partial hypoxic Ishaemic
[19] See paragraph 139 of the Judgment
[20] These were findings that the Judge was entitled to make.

Moreover, by the time of the trial, Nurse Hosten, the attending midwife, had died.

54. The Judge therefore placed his reliance on contemporaneous notes as to the time of the event. In particular, the Judge considered a note of Dr Abdulla which indicated that he had been *"called out to see a patient who is fully dilated*."

    It reads:

    > *"19.5.02 4am – Called out to see patient who is fully dilated. Vaginal delivery attempted for one hour without progress. Foetal head descended up to level of spines. Caput ++ - No MSL FH Regular Episiotomy given to facilitate delivery."*

55. Having found the viva voce evidence to be unreliable, the Judge set out to interpret the note of Dr Abdulla against the hospital's records and in particular a note of Nurse Hosten which placed Mrs. Balwah as having been fully dilated at 4:30am.

    It reads:

    > *"19/5/02 – 4:30am – O/S Fully Dilated"*

56. The Judge drew a number of inferences from Nurse Hosten's note. He held that it was unlikely that the note would have been deliberately fabricated. He bore in mind that he had held Nurse Hosten to have fallen short of her duty of recording but stated that there was nothing to suggest that the entry of the time "4:30am" was incorrect.

57. The third inference was that it was unlikely that a note would have been made at 4:30am if Mrs. Balwah was in the middle of an hour long attempt of delivery. Implied in this statement is that at 4:30am the attempts of vaginal delivery had not as yet begun.

58. At paragraph 146, the Judge alluded to the agreement of the parties that if vaginal delivery began at 4:30am, then the event which caused the

Appellant's condition could not have occurred during the intrapartum period. The Judge therefore dismissed the claim.

59. In the course of his Judgment, the Judge considered ancillary issues. He first considered an issue, as contended on behalf of the Appellant, that Dr Abdulla admitted that he had arrived at the medical facility at 4:00am on May 19, 2002, and that having so admitted, he should not have been allowed to derogate from his pleadings.

60. The Judge expressed the view that it was trite law that a party may not derogate from his pleading. He stated that derogation would affect the credibility of the witness.

    The Judge then had this to say:

    "…it would be in my view foolish for a court in the face of clear evidence to the contrary to blindly hold to the position that a party who has said something in his pleadings (sic)[21]."

61. The Judge proceeded to consider the objection which had been made as to the Judge's reliance on the hospital's notes[22]. It had been contended on behalf of the Appellant that the notes of the hospital were inadmissible since no hearsay notice had been filed for their use. In response, the Judge indicated that he exercised the discretion conferred by Part 30 of the ***CPR*** to admit the notes and to attach such weight as he deemed appropriate[23].

62. As to the experts, the Judge expressed the view that academic and professional experts were of equal value. The Judge held however that the Appellant's expert, Dr Jaiyesimi, was biased and therefore unreliable.

The Appeal

[21] See paragraph 120 of the Judgment
[22] See paragraph 121 of the Judgment
[23] Ibid

63. Notices of Appeal were filed by all parties. The First Respondent, Surgi-Med Clinic Co. Limited appealed against this order of the Judge:

> *"The order of the Learned Judge dated 26th March 2020 wherein the Honourable Court ordered that the First Respondent do pay to the Appellant and the Second Respondent 50% of their costs of the claim assessed on a prescribed basis…"*[24]

64. The Second Respondent also filed his Notice of Appeal on June 16, 2020. He challenged this order:

> *"(i) The Claimant do pay each Defendant 50% of their costs of the claim…"*[25]

65. The Appellant also challenged the Judge's order for costs[26]. Parties had agreed that the issue of costs would abide the determination of the substantive appeal. Accordingly, no consideration is given to the issue of costs in this decision.

Grounds of Appeal

66. The Appellant listed 21 grounds of appeal against the substantive finding of the Judge. They may be categorised under a few major heads which are set out below.

67. The Appellant's first ground criticised the Judge for failing to provide a reasoned comprehensive judgment.[27]

68. Secondly, the Appellant challenged the Judge's decision to allow the Second Respondent to deviate from his pleaded case.[28] In particular, the

[24] See paragraph 1 of the Notice of Appeal filed by the First Respondent on June 23, 2020 at page 108 of Record of Appeal Core Bundle
[25] See the Notice of Appeal filed on behalf of the Second Respondent on June 16, 2020 at page 120 of the Record of Appeal Core Bundle
[26] See page 3 of the Appellant's Amended Notice of Appeal
[27] See paragraph 1 of the Appellant's Grounds of Appeal at page 11 of the Amended Notice of Appeal at page 85 of the Record of Appeal Core Bundle
[28] See paragraph 4 of the Grounds at page 14 of the Amended Notice of Appeal at page 88 of the Record of Appeal Core Bundle

Appellant contended that the Judge was plainly wrong to accept the explanation which had been proffered on behalf of the Second Respondent for deviation from his pleaded case.

69. The Appellant challenged the Judge's decision to permit the First Respondent to re-amend its Defence and in particular the reason for permitting the amendment.

70. The Appellant averred that the Judge erred in finding that *"there was clear evidence to the contrary"* in respect of the time at which Dr Abdulla arrived at the medical facility. In support, the Appellant referred to the February 2016 statement of Dr Abdulla in which, according to the Appellant, Dr Abdulla attempted for the first time to deviate from his pleaded case.

71. The Appellants challenged the Judge's premise that there had been an agreement between the parties that if the Second Respondent commenced vaginal delivery of Mrs. Balwah at 4:30am, there would have been insufficient time for PPHI to have occurred. The Appellant countered rather that the issue was whether there was foetal heart rate monitoring consistently throughout labour and delivery after the administration of misoprostol at 8:00pm on May 18, 2002.

72. The Appellant asserted that it was accepted in evidence that the minimum time for PPHI to have occurred before permanent injury was 45 minutes[29] and that there had been no foetal monitoring at that time to detect foetal distress.

73. At Grounds 11, 12, 13, 14, 15, the Appellant presented his challenge to the Judge's use of the hospital's notes. The Appellant contended that the Judge was plainly wrong in accepting the hospital notes as contemporaneous documents and in accepting them although they had not been produced pursuant to a hearsay notice. They also contended that the Judge erred in his finding that the notes were reliable.

[29] See page 18 of the Amended Notice of Appeal at page 92 of the Record of Appeal Core Bundle

74. The Appellant averred that the Judge was plainly wrong in ignoring relevant contemporaneous facts, evidence and expert opinions that support the timing of the Appellant's injury.[30] This included the contemporaneous diagnosis of prolonged second stage and the finding of that there was impaction of the foetal head during labour and delivery.

Submissions

75. Written submissions were made on behalf of all parties and supplemented by viva voce submissions.

Submissions for the Appellant

76. Dr Powers observed at the outset that all parties had accepted that a diagnosis of full cervical dilation was made by Dr Abdulla immediately upon his arrival and this time was also consistent with the time that attempts at vaginal delivery started.

77. In this regard, Dr Powers submitted the most significant evidence that the Judge failed to consider was the contemporaneous diagnosis of prolonged second stage labour as made by Dr Raymond Aguilar, the paediatrician who attended the birth.[31]

78. Dr Powers submitted that Dr Aguilar's contemporaneous diagnosis of prolonged second stage labour could only have been made if full cervical dilation occurred at 4:00am as pleaded and not at 4:30am. The Judge failed to consider the impact of this evidence on Dr Abdulla's likely arrival at the hospital.[32]

[30] See ground 18 at page 22 of the Amended Notice of Appeal at page 96 of the Record of Appeal Core Bundle
[31] Paragraph 36 of the Appellant's submissions
[32] Paragraphs 39 and 40 of the Appellant's submissions

79. Dr Powers stated further that the Judge observed that he required expert assistance to interpret the medical records.[33] Dr Powers argued that the Judge relied on his own interpretation of the evidence, instead of relying on the interpretation of independent medical experts,[34] In this way , according to Dr Powers the Judge, in effect, wrongly gave evidence himself. Dr Powers also noted that the experts and medical personnel who looked only at the medical records came to the conclusion that the time of arrival of the Second Respondent was at 4:00am.[35]

80. In assessing the note of Nurse Hosten, Dr Powers submitted that the Judge failed to consider two pieces of evidence that suggest that the timing of the nurse's entry was unreliable, namely (1) the entry timed at 4:00am handwritten by Dr Abdulla which was explicit in that the patient was fully dilated at this time; and (2) it is the pleaded case of the Appellant that his mother's membranes ruptured at 3:00am and not at 3:30am as recorded in Nurse Hosten's notes. Notwithstanding this, Surgi-Med Clinic Co. Limited admitted that the membranes ruptured at 3:00am. This admission was an acceptance by Surgi-Med Clinic Co. Limited that the timings of the entries in their own nurse's notes were not reliable as to when the event recorded actually occurred.[36]

81. Therefore, the Judge was plainly wrong in his finding that there was nothing to suggest that the timing of the nurses' records was inaccurate.[37]

82. With respect to Dr Abdulla's derogation from his pleadings, Dr Powers submitted that the ordinary rule of law is that evidence is to be given only on a plea that is properly raised and not in contradiction of the plea.[38] Each party must plead the material facts on which he means to rely at the trial;

[33] Paragraph 48 of the Appellant's submissions
[34] Paragraph 48 of the Appellant's submissions
[35] Paragraphs 50 to 54 of the Appellant's submissions
[36] Paragraphs 56 to 59 of the Appellant's submissions
[37] Paragraph 60 of the Appellant's submissions
[38] Paragraph 17 of the Appellant's submissions

otherwise he is not entitled to give any evidence of them at the trial.[39] Therefore, Dr Abdulla should not have been permitted to depart from his pleaded case on this critical timing.[40]

83. Dr Powers also submitted that the decision to allow Dr Abdulla to depart from his pleadings during trial meant that the Appellant was faced with a factually different defence and, in the circumstances, the Appellant was seriously prejudiced.[41] The Appellant was also faced with the difficulties presented in respect of the cross-examination of the Appellant's witnesses on facts different to those contained in the Respondents' pleaded case.[42] Dr Powers contended that he had continuously raised objections during the presentation of the Appellant's case as all of his witnesses were cross-examined and accused of fabricating evidence on factual timings that were admitted by the Respondents in their pleadings.[43]

84. Dr Powers argued that what makes the issue of the conflict between the Respondents' pleadings, witness statements and viva-voce evidence even more egregious, is that attempts to explore the critical issue of credibility by him during cross-examination were not allowed.[44] At the trial, Dr Powers attempted to cross-examine Dr Abdulla as to the differences between his pleadings and his evidence but was not permitted to do so.[45]

85. Dr Powers also submitted that there was an admission by the parties throughout which takes it out of consideration of the Court as the Court cannot make a determination of a matter which is not in issue between the parties[46]. It was plainly wrong for the Judge to make a finding of fact which

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[39] Naresh Ramlogan vs Orangefield Estates HCA. NO 2572 of 2000; Paragraph 19 of the Appellant's submissions
[40] Paragraph 14 of the Appellant's submissions
[41] Paragraph 22 of the Appellant's submissions
[42] Paragraph 75 of the Appellant's submissions
[43] Paragraph 21 of the Appellant's Response to the First Respondent's Reply to the Substantive Appeal
[44] Paragraph 31 of the Appellant's Response to the First Respondent's Reply to the Substantive Appeal
[45] Paragraph 30 of the Appellant's submissions
[46] Page 23, lines 29 to 34 of the Transcript

depended on evidence that had not been raised in the pleadings and on which the parties did not have the opportunity to properly address.[47]

86. Dr Powers addressed the Judge's decision to permit the First Respondent to re-amend its Defence. He argued that he had not consented to the First Respondent's application to re-amend its defence.[48] He further submitted that the Judge was duty-bound to follow the procedures set out in ***CPR***, Part 20.1 and that there is no exception to that procedure.[49]

87. However, in answer to the Court in his viva voce submissions, Dr Powers acknowledged that he did not draw to the Judge's attention the significance of the amendment[50] and that what happened was a consensual position between the parties.[51] Further, he accepted that the position was that if the First Respondent wouldn't object to the amendments being made between the Appellant and Dr Abdulla, the Appellant wouldn't object to the amendments which the First Respondent was wishing to put forward.[52]

88. With respect to the Judge's use of the Hospital notes, Dr Powers argued that the Judge had no power of his own motion to admit any document into evidence for the truth of its content. The general rule is that a party wishing to admit a document into evidence does so through the maker of the document, who is also the person that must be called to prove the document.[53] There are exceptions to the general rule, none of which applied to any of the hospital's medical notes[54] and attaching them to a statement or pleading does not bring them into evidence as to the truth of their contents.[55]

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[47] Paragraph 22 of the Appellant's Response to the Second Respondent
[48] Paragraph 76 of the Appellant's submissions
[49] Page 6, lines 19 to 24 of the Transcript
[50] Page 13, lines 43 to 46 of the Transcript
[51] Page 14, lines 23 to 30 of the Transcript
[52] Page 17, lines 1 to 6 of the Transcript
[53] Paragraph 55 of the Appellant's Response to the First Respondent's Reply to the Substantive Appeal
[54] Paragraphs 56 and 57 of the Appellant's Response to the First Respondent's Reply
[55] Page 27, line 46 to page 28 line 1 of the Transcript

Submissions for the First Respondent

89. Mr. Browne submitted that the Judge was entitled on the evidence to reach the conclusions at paragraph 145 of his judgment in relation to Nurse Hosten's note for the following reasons:

    (1) It was unlikely that the document was fabricated;

    (2) There was nothing to suggest that the time was incorrect; and

    (3) If the note was made during the hour-long attempt at delivery, it is unlikely that there would be a note of contractions or of full dilatation.

    In the circumstances, the Judge drew the conclusion that Dr Abdulla's assertion that delivery commenced at 4:30am was more likely and it followed that, in the light of the conclusions in Nurse Hosten's note, the Judge was able to conclude that Dr Abdulla was called at 4:00 a.m., attending at 4:30 a.m.[56]

90. With respect to the re-amendment of the First Respondent's pleadings, Mr. Browne submitted that the Appellant did not object to the First Respondent's application to amend[57] and the Judge had a discretion as to whether to permit the application to amend or not[58]. In his viva voce submissions, Mr. Browne submitted that the parties were proceeding upon the basis that all three amendments were appropriate, should be allowed and the case proceed upon the basis of the issues raised within this event[59]. Where you have effectively a joint agreement, that it is appropriate that the matter should be brought into line to reflect the state of the evidence as it then emerged[60].

[56] Paragraph 2.2.2 of the First Respondent's submissions
[57] Paragraph 2.3.1.1 of the First Respondent's submissions
[58] Paragraph 2.3.1.2 of the First Respondent's submissions
[59] Page 42 lines 10 to 14 of the Transcript
[60] Page 42 lines 23 to 27 of the Transcript

91. With respect to Dr Abdulla's derogation from his pleadings, Mr. Browne submitted that the Judge acted appropriately within his discretion in concluding that if there is clear evidence to the contrary, Dr Abdulla is not bound by his admission that he arrived at 4:00am.[61] In his viva voce submissions, Mr. Browne contended that the attitude of the Court is increasingly to seek to adjudicate upon the issues that have actually been ventilated before the Court and which are critical to the outcome of the case as opposed to being bound solely by the pleadings[62].

92. With respect to the Judge's use of the Hospital notes, Mr. Browne submitted that the Judge exercised his discretion to admit the notes giving such weight as he considered appropriate and he had jurisdiction to adopt that approach under ***CPR*** rule 30.8[63]. All parties and their expert witnesses had made extensive reference to those documents and they were the only contemporaneous records which recorded events during the period when the causative breaches of duty were alleged to have occurred.

93. In his viva voce submissions, Mr. Browne reminded the Court that the notes were annexed to Mrs. Balwah's witness statement and there was no objection taken on the ground of hearsay to have the notes struck[64]. Mr. Browne therefore submitted that the Judge did not admit the notes on his own motion[65].

94. In relation to the First Respondent's breaches in its duty of care, Mr. Browne submitted that the breaches do not produce a finding of liability since there is no adequate casual nexus between the breaches and the damage.[66]

95. In conclusion, Mr. Browne's position was that there was a finding of fact, the Judge rejected the evidence of Mrs. Balwah and Mrs. Boodoosingh and

[61] Paragraph 2.3.3 of the First Respondent's submissions
[62] Page 43 lines 46 to 50 of the Transcript
[63] Paragraph 2.3.2 of the First Respondent's submissions
[64] Page 47 lines 13 to 17 of the Transcript; Page 63 lines 21 to 28 of the Transcript
[65] Page 47 lines 17 to 30 of the Transcript
[66] Paragraph 4.2.2 of the First Respondent's submissions

was left with the evidence of the notes, and based upon those notes, the conclusion to which he came is very clearly within the reasonable range of decisions.[67]

Submissions for the Second Respondent

96. Mr. Ramlogan submitted that the Judge was not plainly wrong because the findings of fact and findings of law are justified and consistent with the evidence.[68]

97. During the course of the trial, the parties all agreed to a 'qualifying factor', in determining if there was negligence or not. The Appellant was delivered at 6:15am in the morning. Dr Abdulla claims that he arrived at the hospital at 4:30am and hence he took 1 and ¾ hours to deliver the baby, with one hour being active labour before the decision to do a C-section. The Appellant claims that Dr Abdulla arrived at 4:00am and hence the delivery took 2 and ¼ hours.[69] This difference of ½ hour was agreed between the parties to be of critical significance as to whether the 1 hour of damage occurred intra-partum or pre-partum.[70]

98. The issue therefore arose for the Court, to make a finding of fact as to whether Dr Abdulla arrived at Surgi-Med at 4:00 a.m. or 4:30 a.m. Mr. Ramlogan contended that this matter essentially hinged on this one finding of fact before causation could be explored further.[71]

99. Mr. Ramlogan submitted that the Judge looked at the Labour Record, which is the hospital's notes, and was correct to find that the note at 4:30am had to mean that arrival and delivery starting at 4:00am was incorrect. The Judge specifically considered the importance of this contemporaneous note, and even considered it against the finding that the

[67] Page 48 lines 32 to 44 of the Transcript
[68] Paragraph 1 of the Second Respondent's submissions
[69] Paragraph 7 of the Second Respondent's submissions
[70] Paragraph 8 of the Second Respondent's submissions
[71] Paragraph 11 of the Second Respondent's submissions

nurse's notes were not the best, and found that delivery would have started at 4:30am when Dr Abdulla would have arrived.[72] Mr. Ramlogan submitted that the Judge cannot be said to be plainly wrong in his assessment of the evidence when transposed against the contemporaneous documents.[73]

100. Mr. Ramlogan also submitted that the Appellant failed to recognise the impossibility of a nurse recording "Os fully dilated at 4:30am", while contending that delivery started at 4:00am. There is no way this would make sense, and the Court was not plainly wrong.[74]

101. Importantly, in his viva voce submissions, Mr. Ramlogan submitted that the Appellant's mother went into labour at 4:30am because that's when the cervix was dilated at 10 centimetres, and at that stage if you start delivery at 4:30am and there was an active hour of pushing, that takes you to 5:30am, so regardless of when Dr Abdulla arrived, he could not do anything until 4:30am.[75]

102. With respect to the re-amendment of the First Respondent's pleadings, Mr. Ramlogan submitted that the Judge was duty bound to decide the case on the basis of the evidence and hence exercised his discretion to grant the amendment sought.[76] The Judge cannot be faulted and the justice of the case allowed for the change.[77] Nevertheless, the amendment is not relevant to the impugned finding of fact.[78] In his viva voce submissions, Mr. Ramlogan pointed to the fact that the amendment was made without objection from the Appellant.[79]

103. With respect to Dr Abdulla's derogation from his pleadings, Mr. Ramlogan submitted that there can be deviation from pleadings for the just disposal

[72] Paragraph 31 of the Second Respondent's submissions
[73] Paragraph 44 of the Second Respondent's submissions
[74] Paragraph 138 of the Second Respondent's submissions
[75] Page 74 lines 7 to 29 of the Transcript
[76] Paragraph 13 of the Second Respondent's submissions
[77] Paragraph 49 of the Second Respondent's submissions
[78] Paragraph 45 of the Second Respondent's submissions
[79] Page 65 lines 28 to 41 of the Transcript

of the case, and it is up to the Court to even the scales by making orders for costs or when assessing credibility.[80]

104. With respect to the Judge's use of the hospital's notes, Mr. Ramlogan submitted in his viva voce submissions that it was not simply that the Appellant's mother exhibited the notes to her witness statement thereby tendering it into evidence, but that if the Appellant puts into evidence the notes, he would have waived his right to take an objection to the admissibility of the notes because he himself put it into evidence.[81] Further, in the Appellant's list of documents, the notes were disclosed as a document the Appellant intended to rely on[82] and all parties proceeded on the basis that the notes were relevant evidence having regard to the issues to be decided in the case[83].

105. In conclusion, Mr. Ramlogan submitted that the Judge's ruling ought not to be disturbed. The findings of fact that are in issue in this appeal are largely based on the contemporaneous documentary evidence which was a key component in the overall assessment of the totality of the evidence before the Court. In the circumstances, there is no justification for reversing the findings and conclusions made by the Trial Judge.[84]

Discussion

106. In his Notice of Appeal, the Appellant identified 21 grounds of appeal against the substantive decision of the Judge. These grounds fell into 5 broad categories, three of which related to interlocutory decisions of the Judge. The first concerned his reliance on the Hospital notes of the First Respondent; the second concerned the Judge's decision to allow the First Respondent to re-amend its Defence in the course of the trial; and the third

[80] Paragraph 48 of the Second Respondent's submissions
[81] Page 63 line 43 to page 64 line 6 of the Transcript
[82] Page 77 lines 7 to 13 of the Transcript
[83] Page 65 lines 3 to 9 of the Transcript
[84] Paragraph 141 of the Second Respondent's submissions

issue related to the Judge's decision to permit Dr Abdulla to derogate from his pleaded case.

107. Additionally, the Appellant queried the Judge's rejection of the Appellant's contention that the First Respondent was vicariously liable for the negligence of Dr Abdulla.

108. The principal ground of dispute, however, related to the Judge's finding that the Appellant had failed to prove that the injury which he suffered had been caused by the negligence of the Respondents. This ground revolved around the time at which Dr Abdulla arrived at the hospital on the morning of May 19, 2002. Scientifically, this time was linked to the on-set of the second stage of labour, which if prolonged could be the cause of PPHI, which in turn could be the cause of injury to the brain.

109. Accordingly, for the purpose of this decision, we have identified the following issues for our consideration:

- Whether the Judge was plainly wrong in relying on the hospital's notes;
- Whether the Judge was plainly wrong in permitting the First Respondent to re-amend its Defence;
- Whether the Judge was plainly wrong in permitting Dr Abdulla to deviate from his pleaded case and in particular whether the Judge was wrong to uphold an objection against Dr Abdulla being questioned on his Amended Defence;
- Whether the Judge was plainly wrong in his finding as to vicarious liability; and
- Whether the Judge was wrong in his finding that there was no evidence of causation.

Re the Hospital notes

110. Dr Powers argued that the notes of the hospital were not admissible since they were not presented to the Court by way of a hearsay notice, pursuant to Part 30.2 of the ***CPR***.

111. The Judge addressed this issue at paragraph 121 of his Judgment. He acknowledged that the notes could not be adduced for the truth of their contents and in response, the Judge exercised his discretion conferred at Part 30.8 of the ***CPR*** and the ***Evidence Act*** to admit the notes.

112. Part 30.8 of the ***CPR*** provides:

> *"The court may permit a party to adduce hearsay evidence falling within sections 37, 39 and 40 of the Act even though the party seeking to adduce that evidence has-*
>
> *a) failed to serve a hearsay notice; or*
>
> *b) failed to comply with any requirement of a counter-notice served under rule 30.7."*

113. This decision was an exercise of his discretion pursuant to Part 30.8 of the ***CPR.*** It is well-established that the exercise of a Judge's discretion ought not to be set aside on appeal unless it is "*outwith the generous ambit within which reasonable disagreement is possible".*[85]

114. Similarly, in ***The Attorney General of Trinidad and Tobago v Miguel Regis***[86] the Court of Appeal had this to say :

> *"Where there is an appeal against the exercise of a trial judge's discretion the Court of Appeal will not interfere with the decision of the trial judge unless it is shown to be plainly wrong. As Lord Templeton has explained:*
>
> > *"when a judge alive to the possible consequences, decides that a particular course should be followed in the conduct of*

[85] See Civil Appeal P-364 of 2017 Alana Mohan v Ishwar Seeram per Mendonça J.A. at para 48
[86] Civil Appeal No. 79 of 2011.

the trial in the interest of justice, his decisions should be respected by the parties and upheld by an appellate court unless there are very good grounds for thinking that the judge was plainly wrong.""

115. In our view, it cannot be said that there was an unreasonable exercise of the Judge's discretion to allow the use of the Hospital notes. The notes must be regarded as having been accepted by the Appellant, as Claimant, at trial, since they had been annexed to the witness statement of Shelly-Ann Balwah, who was the principal witness for the Appellant.

116. In all the circumstances, therefore, we find no merit in the challenge to the Judge's decision to accept the notes of Surgi-Med Clinic Co. Limited for the truth of their contents.

The first pleading issue

117. We proceed therefore to consider the first pleading issue, which centres on the decision of the Judge to permit the First Respondent to re-amend its Defence. The Appellant contends that in arriving at the decision to allow the re-amendment, the Judge fell into error by accepting the reason advanced on behalf of the First Respondent as *"a good explanation."*[87]

118. In considering this issue, it is useful to have regard to the context in which the amendment was sought and granted. In the course of the trial on March 21, 2019, Mr. Browne indicated that he had a brief application. He passed the proposed re-amendment to the Court.

119. Mr Browne reminded the Court that Dr Powers had identified "*a mismatch*" between the Amended Defence and the case which was being put in relation to the events between 4:00am and 5:30am.[88]

[87] See Ground 6 of the Grounds of Appeal at page 90 of the Record of Appeal Core Bundle
[88] See page 79 of Record of Appeal Volume 8

120. Mr. Browne alluded to the admission in his Amended Defence as to the time at which Dr Abdulla arrived at the hospital of the First Respondent. He submitted that the evidence had developed in a particular direction. His words were: *"where the evidence has gone."*[89] Mr Browne then applied to re-amend in these terms:

> *~~"(g) Paragraphs 18 (g) and (h) are admitted.~~ As to subparagraphs (g) and (h):*
>
> (i) *It is admitted that the Second Defendant arrived shortly after 4:00 a.m. and that thereafter Mrs. Balwah was taken to the delivery room.*
>
> (ii) *It is admitted that a vaginal delivery was attempted for an hour before 5:30 a.m. but save as aforesaid (h) is not admitted"*[90]

Dr Powers indicated that he would not object.

121. In determining the merit of this ground, the Court considered the provisions of Part 20 of the ***CPR.*** These provisions are set out below:

> "*20.1 (1) A statement of case may be changed at any time prior to a case management conference without the court's permission.*
>
> *(2) The court may give permission to change a statement of case at a case management conference.*
>
> *(3) The court shall not give permission to change a statement of case after the first case management conference, unless it is satisfied that—*
>
> *(a) there is a good explanation for the change not having been made prior to that case management conference; and*
>
> *(b) the application to make the change was made promptly.*

[89] Ibid at line 28
[90] See pages 176 and 177 of Record of Appeal Volume 1

(3A) In considering whether to give permission, the court shall have regard to—

(a) the interests of the administration of justice;

(b) whether the change has become necessary because of a failure of the party or his attorney;

(c) whether the change is factually inconsistent with what is already certified to be the truth;

(d) whether the change is necessary because of some circumstance which became known after the date of the first case management conference;

(e) whether the trial date or any likely trial date can still be met if permission is given; and

(f) whether any prejudice may be caused to the parties if permission is given or refused.

(4) A statement of case may not be changed without permission under this rule if the change is one to which rule 19.2 (change of parties) applies.

(5) Any amended statement of case must be filed promptly at the *court office.*

(6) Where a statement of case is amended, the amendments must be verified by a certificate of truth unless the court orders otherwise."

122. Prior to the introduction of sub-rule (3A)[91], there was an absolute prohibition on the grant of permission to amend after the first case management conference. This was a clear departure from the rules which

[91] The amendment was made by Legal Notice 126 of 2011

obtained pre-CPR, when parties were at liberty to amend pleadings to ensure that they were aligned with the evidence before the Court.

123. The new regime was however committed to engendering greater efficiency and preventing the lassitude that had become the norm under the old Rules. So the Court was prohibited from granting permission to a party to amend their statement of case after the first CMC.

124. The absolute prohibition was softened by the introduction of part 20.1(3A). The Court was still prohibited from granting an amendment after the first CMC. The Court was however empowered to do so if satisfied of two specific factors: that there was a good explanation for the failure to seek the amendment before the first CMC and that the party seeking the amendment had acted promptly.

125. Part 20.1(3A) further provides a menu of factors that the Court is required to consider in its decision to grant permission to amend.

126. Accordingly, Dr Powers has argued that the Judge ought to have refused the amendment. According to him, the explanation offered by the First Respondent was that the evidence was at variance with the pleadings and that this was not a good explanation. In any event, an application should have been made to re-amend.

127. Dr Powers relied on the decision of the Court of Appeal in a procedural appeal which had been filed on behalf of the Second Respondent against the Judge's decision to permit the Appellant to re-amend. The decision of the Court of Appeal was not published but is recorded in the transcript of proceedings in Procedural Appeal S-302 of 2017.

128. The Court of Appeal unequivocally allowed the appeal on the ground that the Appellant, then the Claimant, had failed to act promptly and had no good explanation for the delay.[92]

[92] See page 9 of the Transcript at lines 21-23

129. We proceed therefore to consider whether the Judge was wrong to have granted permission to amend. We observe that the distinguishing feature between the earlier procedural appeal and the question which now engages our attention is that the Respondents, in the procedural appeal, had vehemently objected to the amendment. That objection was voiced before the Judge and before the Court of Appeal.

130. In this appeal, we find that Dr Powers had said explicitly that he had no objection. The question therefore arises whether the Judge could be faulted for granting permission to re-amend in the context of a clear indication by the Appellant that there was no objection.

131. In arriving at a decision to grant permission to re-amend, the Court exercises case management powers. The Appellate Court ought only to overturn that decision where it is outwith the band of what a reasonable tribunal would have decided.[93]

132. In our view, it would be eminently reasonable for a Judge to have regard to an expressed lack of objection and to proceed to grant the amendment.

133. Dr Powers has argued that the consent of the parties is not a factor listed at Part 20.1(3A).

134. However, the converse is also true. Part 20.1(3A) did not prohibit an amendment where consent was the only apparent reason. It was open to the Judge to see consent or the absence of an objection as a good ground on which he could grant the amendment and to do otherwise might lead to incurring unnecessary costs and expenditure of the Court's resources.

135. In all the circumstances, I hold the view that the Judge has not been shown to have acted unreasonably. The grounds of appeal which relate to the re-amendment by the First Respondent must fail.

136. In any event, almost nothing would flow from accepting the Appellant's argument on this ground. The First Respondent produced one witness of

[93] See Alana Mohan v Ishwar Seeram (supra)

fact to testify as to the time of arrival of Dr Abdulla, since the other potential witnesses had died. The sole witness was Dr Anirudh Mahabir who testified at paragraph 15 of his witness statement that Dr Abdulla arrived at 4:00am[94]. Moreover, in his cross-examination, Dr Mahabir admitted that he was not present at the hospital on the morning of May 19, 2002. The evidence therefore supported the case for the Appellant. So that, notwithstanding the re-amendment, there continued to be discrepancies between the evidence on behalf of the First Respondent and its pleaded case.

The Second Pleading Issue

137. Dr Powers has argued that the Judge was wrong to permit the Second Respondent to derogate from his pleaded case. The Judge addressed this issue at paragraph 120 of his Judgment and recognised that it was trite that a party may not derogate from his pleaded case.[95]

138. In his characteristic passionate style, the Judge went on to express the view that "*it would be…foolish for a court in the face of clear evidence to the contrary to blindly hold to the position that a party who has said something in his pleadings (sic)".*[96] The Judge then stated that it was a matter of credibility.

139. He then had this to say:

> "*I hold that if there is clear evidence to the contrary, the 2nd Defendant is not bound by his admission that he arrived at 4 o'clock…however, in [assessing] the credibility…it will affect my assessment of the evidence."*[97]

[94] See page 4 of Record of Appeal Volume 4
[95] In his judgment the Judge said "It is trite law that a party may derogate from its pleading." This seemed to have been an error since in his oral reasons as recorded in the transcript, the Judge said that it was trite that a party may **not derogate from his pleaded case.**
[96] See paragraph 120 of the Judgment
[97] Ibid

140. This was a contingent decision. The Judge did not make a finding here. He indicated what his course of action would be if there was clear evidence which was contrary to the Second Respondent's pleaded admission. The Judge however found no such clear evidence. This is patent from paragraphs 139 to 147 of his Judgment. This will become significant when we come to consider the central issue as to the time at which Dr Abdulla arrived at the hospital on the morning of May 19,2002.

141. Another pleading issue was raised by Dr Powers in the course of submissions. Dr Powers alluded to the decision of the Judge to uphold the objection of Ms. O'Rourke that Dr Abdulla should not be questioned as to the contents of his Amended Defence.

142. The context of this challenge may be found in the cross-examination of Dr Abdulla on Tuesday 26 March, 2019.[98]

143. In the course of cross-examination, Dr Powers, for the Claimant, attempted to direct the attention of the witness, Dr Abdulla, to his Amended Defence, where he had admitted the plea of the Claimant that vaginal delivery was attempted between 4:00am and 5:00am on May 19, 2002.[99]

144. The cross-examination of Dr Abdulla was then punctiliously interrupted by Ms. O'Rourke. Ms. O'Rourke submitted that it was wrong of Dr Powers to be "putting" the question to Dr Abdulla. Ms. O'Rourke continued that if Dr Abdulla remained unshaken in his evidence that he arrived at 4:30am, instead of at 4:00am as he had pleaded in his Amended Defence, she would then:

> *"…make the appropriate amendment to the pleading"*.

It is significant that Ms. O'Rourke did not indicate her intention to apply under Part 20 of CPR for permission to amend.

[98] See pages 89-91 of Record of Appeal Volume 10
[99] See paragraph 18(g) and (h) of the Amended Statement of Case

145. Dr Powers resumed cross-examination, but was again interrupted by an objection by Ms. O'Rourke, who submitted essentially that Dr Powers was putting to the witness pleadings *"which are written by somebody else"*[100] She continued:

> *"Yes, he may sign up to them, but he may not understand the legal language…"*

Ms. O'Rourke continued her defence of Dr Abdulla by suggesting that litigants do not understand the concept of pleadings.[101]

146. Dr Powers countered that he was entitled to suggest to the witness that he had changed the mind he had in 2013 and now wants to put forward a different timing which *"…would be to favour the case".*[102]

147. At length the Judge upheld the objection of Ms. O'Rourke and directed that the issue be left for submissions.

148. The Judge's decision to disallow questions in cross-examination was a matter for the Judge's discretion. In our view, however, this is an instance in which his discretion was wrongly and unreasonably exercised.

149. We hold that view not only because of the clearly inaccurate submissions which was made by Ms. O'Rourke. It is clearly insulting to the intelligence of Dr Abdulla, as a consultant obstetrician, to suggest that he was incapable of understanding the language of pleadings. It is also contrary to the ***CPR*** to deny that a party has responsibility for his pleadings since he is required to sign a certificate of truth at the end of his defence [103]. He must certify that he believes the contents of his defence to be true.

150. A litigant must therefore take equal responsibility for the contents of his statement of case or defence as he does for his witness statement.

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[100] See page 87 lines 31-32 of Record of Appeal Volume 10
[101] See page 88 lines 3-4 of Record of Appeal Volume 10
[102] See page 90 lines 30-34 of Record of Appeal Volume 10
[103] See Part 10.7(4) CPR

151. The Judge therefore had no ground to uphold the objection and to prevent Dr Powers from extracting an explanation from Dr Abdulla as to the contradictions between his evidence and his Amended Defence.

152. We therefore agree with the submission of Dr Powers that the Judge was wrong to shut out this evidence which may, in the interest of justice, have served to clarify a very obscure part of the case.

Vicarious Liability

153. On the subject of vicarious liability, the Judge held that the Second Respondent was an independent contractor in so far as it relates to the First Respondent.[104] This finding was based on the evidence which was led as to the control which the First Respondent exercised over the Second Respondent. We do not find that the Judge was plainly wrong and find no reason to disturb his decision in that regard.

154. By his grounds of appeal, however, the Appellant contended that the Judge was wrong in his application of the law governing vicarious liability. In particular, the Appellant averred that the Judge failed to consider that the First Respondent held a non-delegable duty to the Appellant.[105] Indeed, the Judge did not consider whether the First Respondent held a non-delegable duty to the Appellant and we now do so.

155. In his argument in support of this ground, Dr Powers relied on the authority of ***Woodland v Essex County Council [2013] UKSC 66.***

156. ***Woodland v Essex County Council*** was a decision of the Supreme Court. The Supreme Court there considered the claim of a 10-year-old girl who suffered hypoxic brain damage while at swimming lessons. The swimming teachers were not employed by the education authority. The Supreme

[104] See para 128 of the Judge's Judgment
[105] See paragraph 21 of the Grounds of Appeal at page 97 of the Record of Appeal Core Bundle

Court considered whether the Council owed a non-delegable duty of care to the child .

157. The Supreme Court had this to say about the concept of the non-delegable duty:

> "*[6] English law has long recognised that non-delegable duties exist, but it does not have a single theory to explain when or why. There are, however, two broad categories of case in which such a duty has been held to arise. The first is a large, varied and anomalous class of cases in which the Defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work…*
>
> *[7] The second category of non-delegable duty is, however, directly in point. It comprises cases where the common law imposes a duty upon the Defendant which has three critical characteristics. First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the Defendant and the Claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the Defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the Defendant's…"*

158. When tested against the factors set out in ***Woodland v Essex County Council***, we find that the First Respondent did not hold a non-delegable duty to the Appellant. There was no antecedent relationship between the First Respondent and either Mrs. Balwah or the Appellant. Mrs Balwah had first engaged the services of Dr Abdulla, and it was on Dr Abdulla's recommendation that Mrs. Balwah approached the First Respondent as a suitable hospital for the delivery of her child.

159. As to the second factor identified by the Supreme Court, it might be arguable that the First Respondent held a duty to protect patients against particular risks. Those risks cannot, however, be seen to include risks of negligence by a doctor with whom the patient held a prior relationship and upon whose recommendation the patient engaged the hospital.

160. For those reasons, we do not hold the view that the First Respondent held a non-delegable duty to the Appellant, as against the negligence of the Second Respondent. This ground of appeal is therefore without merit.

Causation

161. We turn now to address the central issue of causation. Before embarking on an assessment of this issue, we remind ourselves of the principle of appellate deference and the numerous cases of lofty authority which expound the principle. Essentially, the principle asserts that an appellate court ought not to disturb the findings of the trial judge unless they are shown to be plainly wrong.

162. The converse is also true, that if a Judge is found to be plainly wrong a Court of Appeal must not shirk its duty to allow the appeal. See ***The Attorney General of Trinidad and Tobago v Anino Garcia***[106] where Bereaux JA said:

> *" …A Court of Appeal cannot shirk its responsibility to reverse wrongful findings of fact (whether primary or inferential) in an appropriate case. Sir Andrew Leggatt in Harracksingh v. Attorney General of Trinidad and Tobago & Anor. [2004] UKPC 3 at paragraph 11 noted that a trial judge's decision may be reversed if it is so "affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.""*

[106] Civil Appeal No. 86 of 2011

163. With this foregoing lodestar, we proceed to consider the findings of the Judge. In his Judgment, the Judge found in favour of the Appellant in respect of 3 elements of negligence. He held that each of the two Respondents owed a duty of care to the Appellant and that each had breached the respective duty. There was no appeal against those findings.

164. The Judge, however, held that the Appellant had failed to prove a causal link between the breaches and the eventual injury which the Appellant had suffered. Accordingly, the Judge dismissed the claim.

165. In respect of the First Respondent, Surgi-Med Clinic Co. Limited, the Judge held that there was a failure to monitor the foetal heart rate between the hours of 8:00pm to 12:30am, but that this failure had not been shown to cause cerebral palsy in the Appellant.

166. In respect of the Second Respondent, the Judge relied on the expert evidence of Dr Wilkinson and held that the insult which led to brain injury of the Appellant was not the result of overdose of the drug misoprostol, which the Second Respondent had administered to Mrs. Balwah.

167. These were findings of fact by the Judge. The decision was made after hearing days of expert evidence, and in accordance with the principle of appellate deference, we will not overturn these findings because they have not been shown to have been plainly wrong. The appeal against the First Respondent is therefore dismissed. There was however another allegation of negligence against the Second Respondent, as it related to negligent management of the labour and delivery of the Appellant.

168. The Judge considered the issue of the time of arrival of Dr Abdulla as it related to the allegation of negligence against him, by general mismanagement of the labour and delivery of Mrs. Balwah in the intrapartum period.

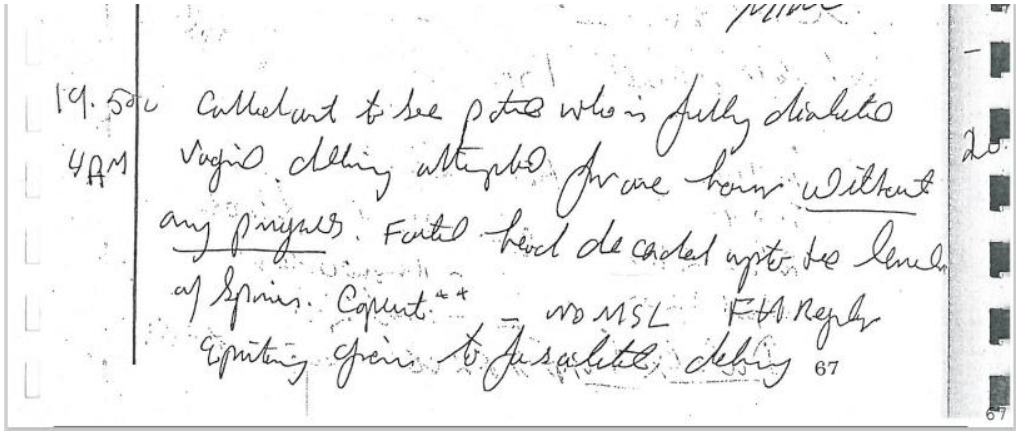
169. The Judge decided this aspect of causation by considering an agreement between the parties that the time at which Dr Abdulla arrived at the

hospital would be an indication of whether Mrs. Balwah suffered prolonged second stage labour. This agreement was referred to by all learned Counsel throughout the submissions and indeed the cross-examination of witnesses. The Judge's finding as to the time of Dr Abdulla's arrival is the main ground upon which this appeal was filed.

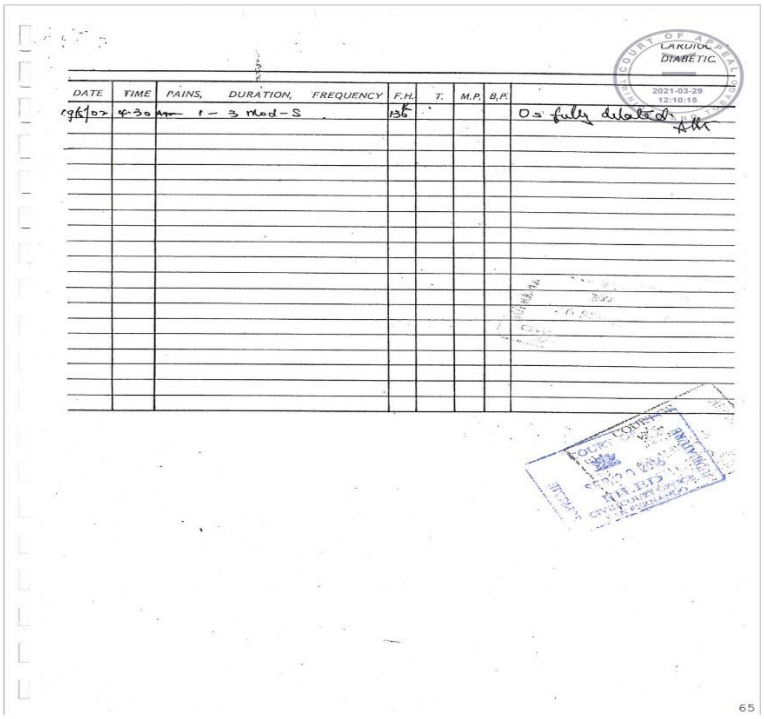
170. Towards the end of his Judgment, the Judge embarked on an assessment of the evidence as to the arrival of Dr Abdulla at the Surgi-med on May 19,2002. The Judge rejected the viva voce evidence of the witnesses of fact: Dr Abdulla himself, Mrs. Balwah and her mother. Nurse Hosten, the attending midwife, had died by the date of the trial.

171. Having rejected the witnesses of fact, the Judge had recourse to 2 existing contemporaneous notes. The first was a note by Dr Abdulla himself. A scanned copy of this note is shown above.[107] The second was a note by the midwife, Nurse Hosten.

172. For ease of reference they are reproduced here again:



[107] See paragraph 17



173. It is accepted that the contents of the note by Dr Abdulla were:

> "*19.5.02 4am – Called out to see patient who is fully dilated. Vaginal delivery attempted for one hour without progress. Foetal head descended up to level of spines. Caput ++ - No MSL FH Regular. Episiotomy given to facilitate delivery."*

174. The Judge held that the note of the Second Respondent did not assist and he seems to have placed no reliance on Dr Abdulla's note.[108] He had recourse to the note by Nurse Hosten who recorded the rate of contractions, foetal heart rate and that the Os was fully dilated.

175. The Judge considered Nurse Hosten's 4:30am note. He opined that because the note was contemporaneous, it was unlikely to have been fabricated.

176. The Judge placed heavy reliance on Nurse Hosten's note and correctly reminded himself that Nurse Hosten's note taking competence was flawed. The Judge failed however to recognise that Nurse Hosten's note did not provide information of the time of arrival of the Second Respondent at the

[108] See paragraph 143 of the Judgment

hospital and more significantly, the note did not provide any information as to the time of the onset of second stage labour. In order to derive such information from the note, it was necessary for the Judge to make an inference.

177. The Judge then made an inference having regard to Nurse Hosten's note. He said:

> *"…thirdly, at 4:30 a.m. if the Claimant's mother was in the middle of an hour long attempt for vaginal delivery it is less likely that there would have been a measurement of her contractions and a note that she was fully dilated at that time."*

178. He continued:

> "*In the circumstances, I drew the conclusion that the 2nd Defendant's assertion of the vagina delivery commenced at 4:30 is more likely than not the circumstances which actually occurred."* [109]

179. The Judge's finding was based on an inference that it was unlikely that Mrs. Balwah would be checked for contractions in second stage labour. In our view, the Judge was not correct to make this inference. He did not indicate the premise upon which he inferred that there would be no measurement of contractions intrapartum. This is entirely a matter for an expert as to protocols normally followed in the management of second stage labour. The Judge was unquestionably unqualified to make such an inference.

180. In our view, the Judge fell into error in two other ways. The Judge also failed to take into account the referral letter of Dr Aguilar, who wrote that second stage labour was prolonged. There must be much evidential value in this note, since it was made mere hours after the Appellant was born and was the basis on which the neonate was hurriedly transferred to San Fernando General Hospital. The Judge however failed to take the referral

[109] See paragraph 145 of the Draft Judgment

letter of Dr Aguilar into consideration. In our view, this was a material error to have omitted to consider the contemporaneous note of Dr Aguilar.

181. Secondly, he had no regard to the pleaded admission of the Second Respondent. He had earlier in his Judgment indicated that if there was clear evidence to the contrary, he would not hold Dr Abdulla to his pleaded case.[110] It is however pellucid that the Judge found no such clear evidence. The viva voce evidence was unreliable, Dr Abdulla's note was ambiguous and Nurse Hosten's note provided indirect information, from which the Judge had to make inferences. In those circumstances, the Judge ought to have held Dr Abdulla to his pleaded case, as the Judge himself had indicated at paragraph 120 of his Judgment.

182. Accordingly, it is my view that the Judge was plainly wrong in so doing. Having rejected viva voce evidence of the witnesses of fact for both the Appellant and the Second Respondent and having no notes upon which to rely, the Judge would have been left only with the pleaded admission of the Second Respondent in his Amended Defence where he certified as true and admitted that he arrived at 4:00am. We remind ourselves that the admission in the Amended Defence was never altered by re-amendment.[111]

183. Accordingly, it is our view that the finding of the Judge should have been that Dr Abdulla arrived at 4:00am. This implied, as agreed between the parties, that second stage labour lasted from 4:00am to 5:30am and was sufficient for the condition of PPHI to bring about the brain damage of the Appellant.

184. It is therefore my view and I hold that the Judge was plainly wrong to hold that Dr Abdulla arrived at the hospital at 4:30am. In my view, his assessment was unreasonable and disregarded the contemporaneous documentary evidence of Dr Aguilar.

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[110] See paragraph 120 of the Judgment

[111] See paragraph 34 supra

185. Having so decided, the Court must decide whether to remit this issue for rehearing. The resolution of the time at which Dr Abdulla arrived at the hospital did not fall to be resolved by viva voce testimony of witnesses but by an examination of an admission made in his Amended Defence. It is within the power of this Court to undertake this exercise and to hold that having regard to the absence of contrary compelling evidence, the Second Respondent should be held to his pleaded case that he arrived at the hospital at 4:00am.

186. The inference, as agreed between the parties, is that this time marks the onset of second stage labour which was allowed to continue until 5:30am, in excess of an hour and allowing adequate time for brain damage to occur. The inescapable conclusion is that the Appellant should have succeeded in establishing causation.

Disposition

187. The appeal against the First Respondent is dismissed .

188. The appeal against the Second Respondent is allowed. The Judge's dismissal of the claim as against the Second Respondent is set aside and judgment will be entered for the Appellant against the Second Defendant.

189. The Second Respondent is ordered to pay to the Appellant damages to be assessed by a Master in Chambers.

190. The issue of costs to be heard together with the Notices of Appeal which were filed on behalf of the Respondents on a date to be agreed .

Dated the 30th day of July, 2024

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Mira Dean-Armorer

Justice of Appeal[112]

[112] Ricardo Ramnath JRC II