

**FE ( By his litigation friend PE ) v St George's University Hospital NHS Trust [ 2016] EWCH 553**

The Claimant was born by emergency Caesarean section at St George's Hospital on 25<sup>th</sup> January 2011. He suffered hypoxic ischaemic at birth leading to cerebral palsy.

The Claimant alleged that delivery should have been achieved at an earlier stage, and that had this been achieved, he would have avoided his injury. The case was initially advanced on the basis that the neuroradiology revealed brain injury secondary to both chronic partial hypoxia and an acute hypoxic event. However the Claimant's second expert neuroradiologist agreed with the Defendant's expert that the brain damage arose as a consequence of an acute hypoxic event. The Claimant was born at 03.16. It took approximately 4 minutes post delivery to resuscitate him and there was consensus that if he had been delivered at or before 03.11 he would have avoided injury.

The CTG revealed late decelerations. The midwife was concerned about fetal wellbeing and sought medical review. A fetal blood sample was taken at 00.32 (pH 7.33) which was normal and the management plan was to take a further sample in an hour. The second sample timed at 01.43 (pH 7.26) was also in the normal range but revealed a deteriorating pH. At 02.00 the midwife recorded her concern that the baby needed to be delivered soon. She informed the midwife co-ordinator who advised that the doctors were in theatre and would come as soon as they could. The midwifery and obstetric experts agreed that the syntocinon should have been switched off at 02.00. It was averred in the Defence that the syntocinon was not switched off until the Claimant's mother was transferred to theatre but at trial the midwife gave evidence that she turned the syntocinon off at 02.00 even though this was not recorded. The obstetric experts agreed that medical review was required at 02.00.

The claim was defended on the basis that the doctors were busy in theatre dealing with another patient (patient x) who had a uterine tear and that the Registrar came as soon as she could. The Defendant asserted that the Registrar attended at 02.30 (albeit the annotation on the CTG indicated an earlier attendance), undertook an assessment, returned to theatre to see if it was free and decided to undertake a Ventouse delivery in the room. There was consensus that Ventouse commenced at 02.50 and was abandoned at 02.55. Thereafter the Claimant's mother was transferred to theatre and delivery was achieved at 03.16.

Pursuant to a court order the Defendant disclosed anonymised records of the patient x. The notes, particularly the theatre record had various dates which had been overwritten. The Defendant asserted that the timings on the anaesthetic chart, which indicated that the anaesthetic had ceased at 02.00 was incorrect based upon other entries on the chart.

Mrs Justice McGowan did not make any specific findings of fact as to when patient x's surgery was complete, when the Registrar left theatre or arrived to assess the Claimant's mother and whether or not she left prior to the end of patient x's surgery. All the obstetricians agreed that once patient x's uterus was sutured, two doctors were not required for closure of the abdomen. The Registrar had no recollection of leaving the operation before the end and there was no mention in the operation note of this having occurred. There was uncertainty as to the timing of the Registrar's operation note, specifically whether it was written immediately after patient x's surgery ( thereby causing further delay in attending the Claimant's mother) or at some stage later albeit not stated to have been written retrospectively.

The Registrar was not cross examined about the time it took her to achieve delivery following her attendance on the Claimant's mother. A decision which elicited considerable comment on behalf

of the Defendant during closing submissions. Rather the Claimant relied upon the expert obstetric evidence which indicated that delivery should have been achieved within 30-32 minutes of a decision having been made to undertake a trial of instrumental delivery. Whilst the Defendant asserted that the final decision for instrumental delivery was made only shortly prior to the Ventouse commencing at 02.45 this was at odds with the Registrar's statement in which she conceded that the decision to undertake an instrumental delivery was made within 5 minutes of her attendance. It is clear that Mrs Justice McGowan relied upon the expert evidence in reaching her decision that the time taken to achieve delivery was too long.

There was a dispute between the parties as to what caused the collapse. The Defendant asserted that the failure to switch off the syntocinon made no difference because the acute collapse occurred secondary to cord compression in the final stages of labour. Whereas the Claimant maintained that the collapse occurred as a consequence of the Claimant suffering non damaging chronic partial hypoxic ischaemia secondary to cord compression and placental insufficiency which caused progressive fetal exhaustion and ultimately led to an episode of damaging acute hypoxic ischaemia. It was not necessary for Mrs Justice McGowan to determine this issue and she did not make any comment upon the detailed evidence adduced from the two neonatologist. Professor Wyatt for the Claimant and Dr Emmerson for the Defendant.

As with all such cases, this case turned on the facts. Obtaining patient x's records was critical. Notwithstanding the time which had elapsed since the Claimant's birth, the Defendant had been able to obtain lay evidence from the midwife and doctors involved in the Claimant's delivery which was supportive of the care provided. The Court also had available statements from the clinicians which were made very shortly after birth in the course of an internal investigation. The case was not advanced on the basis that the notes were so hopeless that it was difficult to determine what occurred, rather that there was uncertainty in relation to some of the timings but irrespective of which timings the Court found to be correct, earlier assessment and delivery should have occurred. Mrs Justice McGovern made a specific finding that the standard of record keeping was unsatisfactory. She also found that the communication between the staff on duty was inadequate. These findings assisted in undermining the Defence and serve as a reminder how multiple often minor corrections and inaccuracies in the records can cumulatively influence the approach a tribunal adopts to a particular case.

Written by Rachel Vickers who appeared on behalf of the Claimant led by David Westcott QC. Philip Havers QC appeared on behalf of the Defendant.