DEKA
CHAMBERS

BRIEFING
October 2024

CLINICAL NEGLIGENCE

Welcome to the Autumn edition of the Clinical Negligence Briefing.

Here, Holly Tibbitts analyses recent causation decisions in birth injury cases where ‘every minute counts’. I then give you a round up of notable interim payment decisions in the context of clinical negligence claims.

We were pleased to be at the APIL Clinical Negligence Conference last week, where Stephen Glynn chaired one of the morning’s sessions. It was good to meet up with so many of our clients.

Next week, Deka’s Clinical Negligence team are thrilled to be hosting a half day conference in London on the topic of surgery. There will be presentations from three acclaimed medical experts who will be sharing insights from their day to day practice and experience of working on clinical negligence claims.

Dr Wael Agur and our own Laura Elfield will together provide an up to date view of issues surrounding vaginal mesh litigation, including in relation to the law on consent. Mr John Leach will follow with an exploration of spinal infection in the clinical negligence context and Professor Bob Masterton will be joining us to discuss the management of patients with sepsis. Finally, Deka’s Abigail Stamp will provide a talk on surgical mishaps, candour and disclosure.

Our conference is currently at capacity but if you’d like to be added to our reserve list please email events@dekachambers.com

Lisa Dobie
Joint Head of the Clinical Negligence Team

CAUSATION IN HYPOXIC BRAIN INJURY CLAIMS

By Holly Tibbitts

Holly Tibbitts considers important lessons from CDE (by her LF FGH) v Surrey and Sussex Healthcare NHST [2023] EWCA Civ 1330 and CNZ (by her LF MNZ) v (1) Royal Bath Hospitals NHSFT (2) Secretary of State for Health and Social Care [2023] EWHC 19 (KB).

As clinical negligence practitioners, we should all be intricately acquainted with the *Bolam* and *Bolitho* tests, but for causation, and the doctrine of material contribution. However, understanding which test to apply and how is sometimes far from straightforward, as is clear from the recent Court of Appeal decision in the case of *CDE*, and the earlier High Court decision in *CNZ*.

CDE was a claim on behalf of a child with quadriplegic cerebral palsy and severe global developmental delay. Her condition was alleged to have been caused by a period of acute profound hypoxic ischaemia (PHI) suffered before, during, and after her birth, due to a negligent delay in her delivery.

CDE's mother, FGH, had attended hospital at 36 weeks gestation complaining of significant abdominal pain. At 16.50 a plan was put in place to transfer her to the labour ward, but she did not arrive until almost an hour later, just before 17.50. She was hooked up to the CTG by the midwife, which took one minute. At 17.51 the transducer was sounding out the Claimant's heartbeat, which was bradycardic. At 17.50 Miss Nicks, the consultant obstetrician on duty, was conducting her ward round and was standing outside FGH's room. She heard bradycardia from the transducer and entered the room at 17.52. The CTG trace started at 17.53 and bradycardia was confirmed. At 17.55 the decision was taken to undertake a super-fast caesarean under general anaesthetic. This was commenced at 18.05 and the Claimant was born at 18.08.

An important aspect of the evidence was that Miss Nicks accepted that she would have acted sooner if FGH had been brought into the labour ward earlier and if bradycardia had started earlier.

At first instance, Ritchie J concluded that there was a negligent delay in transferring FGH to the labour ward, which should have occurred no later than 17.10 with commencement of a CTG at that stage.

However, he concluded that causation had not been established. He found that any CTG trace would have been normal initially and would not have been sufficiently suspicious to lead to a category 1 c-section before 17.48/49, when the period of PHI and bradycardia commenced. Crucially, he found that from 17.48/49 the midwife would probably have called for obstetric assistance within 1-2, or a maximum of 3, minutes. He therefore concluded that Miss Nicks would not have walked into FGH's room any earlier than she in fact did. The Claimant would have been delivered at the same time and would have experienced the same outcome in any event. As such, the claim was dismissed.

The Claimant appealed on two grounds. First it was said that in reaching his conclusion that Miss Nicks would have entered the room at the same time but for the breach, the judge had inappropriately allowed up to 3 minutes for a midwife exercising competent care to call for obstetric assistance, within the parameters of the *Bolam* test. This did not reflect the reality of the situation, which was that Miss Nicks was standing outside the room and came to assist without being called by a midwife. It was alleged that the judge should instead have asked what the

consultant Miss Nicks would have done applying the *Bolitho* test.

Secondly, it was alleged that had the Bolitho test been correctly applied, the judge should have found that Miss Nicks would have attended FGH at least one minute earlier. The CTG trace would have been running already, bradycardia would have started at 17.48/49 and Miss Nicks would have heard the sound from the transducer when she was standing outside FGH's room at 17.50. She would have done what she in fact did which was to go straight into the room, and this would have occurred by 17.51 rather than 17.52. This would have resulted in the Claimant being delivered one minute earlier.

The Defendant's position was that this was an appeal on a finding of fact, namely that even if the CTG trace had become bradycardic at 17.48/49, Miss Nicks would not have intervened any earlier. It did not accept that there was any *Bolam/Bolitho* error of law.

Finding in favour of the Claimant, the Court of Appeal held that, given the unchallenged evidence of Miss Nicks that she was outside at 17.50 and would have entered FGH's room earlier had she heard bradycardia, there was no need for the judge to postulate what a midwife would or should have done when the trace became bradycardic at 17.48/49. Specifically, there was no need for the judge to build into the scenario the 1-, 2- or 3-minute allowance for a midwife to call for obstetric assistance (invoking a *Bolam* type test), because Miss Nicks was outside and would have immediately entered the room upon hearing the bradycardia (a *Bolitho* situation). Miss Nicks would have entered the room at 17.51 rather than 17.52, leading to delivery a minute earlier.

It was therefore accepted that there was a flaw in the judge's reasoning that Miss Nicks would have walked into the room at the same time that she did. Lady Justice Nicola Davies stated that this flaw could be categorised as an error of law, or straightforwardly as an incorrect finding of fact. Having considered the power of the Court of Appeal to interfere with findings of fact made by the trial judge, she concluded that the finding that Miss Nicks would not have entered the room until 17.52 should be quashed and the appeal allowed on the basis that she would have entered the room at 17.51.

The Court of Appeal then went on to consider what difference, if any, that one minute delay in delivery had made to the issue of medical causation. It was noted that Ritchie J had accepted the evidence of the Claimant's neonatology expert that any saving of time or duration of PHI would avoid some injury, and that there was a double benefit of a reduced period as if the period of PHI was reduced the period of resuscitation needed after birth would likewise be shorter. However, at trial the case did not proceed on the basis of a 1-minute delay, and none of the experts were asked specifically to focus on the outcome with delivery a minute earlier at 18.07. As such, the Court of Appeal concluded that this issue should be remitted to the trial judge for specific consideration, supported by further expert evidence.

The Claimant's team may have reason to feel optimistic given Ritchie J's approach to medical causation in the earlier case of *CNZ*. This was a claim by a twin who suffered quadriplegic cerebral palsy following a delay in delivery. After a trial on liability Ritchie J found that there had been negligent delay in delivering the Claimant of between 5 and 8 minutes, with a mid-point of 6.5 minutes. He also found that the Claimant had suffered approximately 16 minutes of acute PHI, with a range of 14-18 minutes. It was agreed that brain damage would not have occurred during the first 10 minutes of PHI, and would only have started to accumulate thereafter. He concluded on a but for basis that a saving of 6.5 minutes would on the balance of probabilities have avoided all the Claimant's brain damage.

Despite this finding he went on to consider the substantial arguments he had heard on material contribution and apportionment, acknowledging that at the end of his ranges

there would have been a split between negligent and non-negligent PHI.

The agreed evidence was that every minute of acute PHI over the first 10 minutes caused increasing or incremental brain cell deaths that could number in the tens or hundreds of thousands. The difficulty was assessing what the functional outcome would have been but for the negligent PHI. The evidence of all the experts was to the effect that detailed and accurate quantification of functional outcome is impossible. Ritchie J concluded that medical science is unable to identify with generality, accuracy, or detail the functional effect of each minute of brain cell deaths.

In terms of the test to be applied, the judge held that it was appropriate to apply the but for test to the question of whether the breach had caused brain injury: the experts supported the fact that every minute of PHI caused increasing brain damage, and it was therefore proven in this case that there was a level of brain damage would not have been caused but for the breach.

However, as there was a scientific gap making proof of causation of a different functional outcome, and therefore also quantification of damages, impossible, it was appropriate to apply the material contribution test to the question of functional outcome: the Claimant would succeed as long as she could prove that the breach made a material contribution to the Claimant's functional outcome which was more than *de minimis*. Based on the expert evidence given, the judge concluded that even one minute of PHI made a material contribution to the Claimant's functional outcome, and the test was therefore met.

He then went on to consider whether there should be any apportionment to reflect the relative contributions of negligent and non-negligent PHI.

The judge was clearly attracted to the proposition that fairness required there should be an apportionment, with the defendant not being liable for damage that would have occurred in any event. Having considered the well-known cases in relation to industrial disease he concluded that brain damage caused by PHI was a truly divisible injury: it was started by PHI and made worse by continued exposure. The disease cases would therefore support an apportionment based on a percentage of the relevant durations of negligent vs non-negligent PHI.

Turning to the clinical negligence case law, he found that many of the well-known cases on material contribution, including *Bailey, Williams v Bermuda,* and *Popple v Birmingham,* had not resolved the issue of apportionment in acute PHI cases where the functional outcome could not be apportioned or divided. However, he noted the comments of Picken J in *John v Central Manchester* [2016] EWHC 407, referring back to the case of *Holtby,* that apportionment is not appropriate where it is not merely difficult but impossible to allot particular loss to a particular cause.

The Defendant's paediatric neurologist had proposed an apportionment based on PHI duration in 5-minute intervals. However, the court found that this approach could not stand up to logical analysis and was problematic in a number of other respects. In rejecting this approach, the judge found that a reasonable and fair quantification of the Claimant's functional outcome on the but for scenario for each minute of negligently caused acute PHI was impossible rather than merely difficult.

In the circumstances, the judge held that, having proved that even a minute of negligent PHI made a material contribution to her functional outcome which was more than *de minimis*, that there should be no apportionment and the Claimant should recover 100% of the damages attributable to her condition.

These cases serve to reinforce what has long been evident in hypoxic birth injury claims, namely that a forensic analysis of timings is absolutely critical. Given the state of the law and medical science at present, even one

minute of negligent PHI may well be enough to found a claim for 100% of the losses attributable to the Claimant's entire condition. It is therefore incredibly important to ensure that the correct test for factual causation is being applied in the but for scenario. Practitioners always need to consider whether this should be assessed by reference to *Bolam*, namely what a responsible body of medics would have done, or applying *Bolitho,* namely what a specific medic would have done in the circumstances. If a specific medic would have acted more quickly than the minimum reasonable standard, this may make the difference between success and failure in any given claim.

INTERIM PAYMENTS IN CLINICAL NEGLIGENCE CLAIMS: TIMING, EVIDENCE, PRESENTATION...

By Lisa Dobie

Interim payments are often essential in Clinical Negligence cases where litigation and the quantification of a claim can be protracted. Often they will be agreed, but in many cases they are not. The success or failure of these applications can change the quality of the Claimant's life during the litigation. There has been a series of reported judgments dealing with Interim Payment applications that are useful to consider. They highlight the range of issues that can arise and remind us how best to evidence any application and/or how to oppose any such application.

Dee v Welsh Ambulance Services NHS Trust [2023] EWHC 2765 (KB)

Master Stevens granted an application for an interim payment, despite the fact that all three Defendants in this clinical negligence case denied liability.

The Claimant sustained a spinal injury following a freak accident when he fell from a (non motorised) scooter and sustained an impact to his head. The Defendants were the Ambulance Service, the receiving hospital and the hospital responsible for the interpretation of imaging.

The central allegation of breach related to inadequate mobilisation. The Claimant was tetraplegic. It was his primary case that, but for the negligence, his lower limb symptoms would have improved, he would not have developed upper limb symptoms, he would not have developed bowel and bladder symptoms and he would have avoided a nasty and prolonged pressure sore.

At four years post-accident, the claim was still in the relatively early stages and there had been no direction to exchange expert evidence. The Claimant made several requests for voluntary interim payments which were refused. Thus, despite this being a case where liability was in dispute, the Claimant made an interim payment application.

The Claimant served its expert evidence:

- As to breach, it was submitted for C that the hospital's own protocol for handling spinal cases had not been followed and that the factual witnesses said that they weren't aware of the guidance.
- C served a preliminary schedule of £7m - there was no separation between the losses that would have been occasioned by the spinal cord injury in any event, and those that were as a consequence of the alleged breaches of duty. There was clarification during the hearing that the claimed losses recognised that C would have suffered *some* permanent neurological deficit in the lower limbs following the accident, but he would have had full use of his upper body and maintained independent bladder and bowel function.
- As we know, the court has to consider the application on the basis of the evidence that is before it. Often Defendants have a decision to make as to whether they want to serve their evidence early in order to meet the application. In this case (and as is often the case) the Defendant opted not to serve its evidence, but instead filed and served two letters from its experts. The defendants sought to highlight that C's evidence could not demonstrate, with a high degree of confidence that the amount sought represented a reasonable proportion of the likely amount of the final judgment pursuant

to CPR r.25.7.

In the judgment Master Stevens gives careful consideration to each pleaded allegation of breach and then considered the expert and factual evidence on each allegation. Her analysis in the judgment is worth reading and considering.

Master Stevens allowed the application, noting:

- The Claimant has the evidential burden of proof. The court is required to look at the material before it and make a determination on the balance of probabilities.
- The court can make findings of fact which are not too complex, but they are not to be conclusive of the issues for the trial judge who will have the totality of the material when reaching a decision.
- On the basis of the expert opinion evidence before her, the Master could not be satisfied that:
  - ◊ the evidence demonstrated that the original spinal cord injury to the lower limbs was of the type where there could be any significant improvement to the baseline condition following the fall, even with good rehabilitation.
  - ◊ the original spinal cord injury would not have included some damage to the bowel and bladder. The timing of onset was unclear. There was insufficient detail within the expert opinions provided by the Claimant for Master Stevens to determine this issue for the purposes of the interim payment application.
- The Master was satisfied on the evidence before her that:
  - ◊ deterioration into the upper limbs was caused by the negligent failure to manage blood pressure. The Claimant's expert evidence universally agreed on this point. The two letters from experts relied upon by the Defendants did not address this point.
  - ◊ The Master was also satisfied that negligence had led to the development of sacral pressure sore lasting a period of 7 months (there being a candid admission by the Defendants that they *may* admit liability for this aspect of the claim shortly).
- On the Eeles calculation, the past losses and general damages for the upper limb injury and pressure sore came to a little over £120,000.
- A 10% discount was applied and the Defendants were ordered to make an IP of a little more £109,000.

XS1 v West Hertfordshire Hospitals NHS Trust, [2024] EWHC 1865 (KB)

In *XS1* Master Stevens was again considering an important Interim Payment application, this time to purchase accommodation.

In an action for clinical negligence, the Claimant, a 10-year-old child, sought an urgent interim payment to enable her to buy suitable alternative accommodation. The property had been found and an offer made and accepted (subject to the granting of this application for the funds).

The Claimant had severe disabilities, including dystonic cerebral palsy at the most severe level. She could not stand or walk independently, she had some visual impairment, no speech, and was largely tube-fed. She lived with her parents, two younger siblings and a carer in a rented three-storey property which, the defendant accepted, was unsuitable for her long-term needs without adaptations.

The Claimant claimed a total of £19.2 million in her claim.

- Liability had been compromised, and approved, at a 70% split in her favour, and interim payments of £825,000 had been made.
- In the application she sought an interim

payment of £2.15m to facilitate the purchase of a £1.65m property which her litigation friend had identified as meeting her needs.

- C submitted that the expert evidence showed that she had a real need for new accommodation, that the number of suitable properties in the area was limited and that moving now would save money overall.

CPR r.25.7(4) limits any interim payment to a reasonable proportion of the likely amount of the final award (applying *Eeles v Cobham Hire Services Ltd [2009] EWCA Civ 204, [2010] 1 W.L.R. 409, [2009] 3 WLUK 344*[1]).

Master Stevens adjourned the application, noting that would be disappointing to the Claimant given that they had made an offer to purchase the property.

- Eeles Stage 1: Of the heads of loss to be valued at Stage 1, it was only possible to put a valuation on PSLA; a conservative valuation of the likely award £449,124. A lack of information meant that it was not possible to make a confident assessment of the likely award for past losses. As for accommodation costs, the court felt uncomfortable with the figures put forward by both parties: the Claimant's contained errors and the Defendant's were too broad brush. On both those heads, better information was required before the court could make an assessment (see paras 18-21, 25, 29, 48-49 of judgment).
- Eeles Stage 2: It was not clear that C had a real need for new accommodation at this stage: there were crucial gaps in the evidence which meant that a determination could not yet be made. The court had some sympathy for the Claimant's desire to move quickly to a long-term suitable home, and it was regrettable that deferring a decision might result in the purchase falling through and C incurring additional expenses for a longer rental period, adaptation and re-instatement costs. However, because the appropriate assessment for the baseline accommodation cost of the alternative property was incomplete and could not be progressed immediately, the court could not yet assess whether the accommodation costs overall were reasonable on a conservative valuation, Eeles followed (paras 37, 60-66).
- Given the gaps in the evidence, a final determination could not be made on the question of an interim payment.

Master Stevens commented that, if the Claimant wished to proceed with her application, the parties should compile a joint schedule setting out their respective positions on each head of loss (paras 63-66). I pause to observe that such a document is useful in most high value contested interim payment applications.

Cripps v Norfolk and Norwich University Hospitals NHS Foundation Trust [2024] EWHC 615 (KB)

In *Cripps*, Alison Morgan KC dismissed the Claimant's Interim Payment application to cover the cost of commencing surrogacy in the USA.

Facts: In February 2018 the Defendant Trust negligently reported that Claimant's cervical smear was normal. By 2019 the Claimant was diagnosed with cervical cancer at the age of 28. She had not yet had children. She required treatment which caused early menopause. Liability was admitted and the Defendant accepted that a significant sum would be recoverable by the Claimant.

The Claimant sought damages to cover the cost of surrogacy in the USA. On 25 January 2023 the Claimant received an interim payment of £75,000. The parties agreed that reflected a conservative valuation of general damages and past losses.

In May 2023 the Claimant made an application for a further interim payment of

£400,000 to enable her to proceed with a surrogacy arrangement in the USA. The Defendant opposed the application, but made a further voluntary interim payment for £150,000 (gross of CRU) (but with no admission that it was for surrogacy and to be set off the damages generally).

Outcome: The court refused the application. It could not say with a high degree of confidence that the amount sought represented a reasonable proportion of the likely amount of the final judgment pursuant to CPR r.25.7, or that a future trial judge would conclude that it was reasonable for her to make a claim for a foreign commercial surrogacy arrangement.

> *"67.... the evidence is far from complete and I consider that a future trial judge will have the benefit of considering, amongst other matters: a fully particularised schedule of loss which will allow a clear determination as to the appropriateness or otherwise of making a periodical payment order; further details of the Claimant's proposed surrogacy arrangements including the costs; and further evidence as to the competing merits of the UK and USA systems in terms of legal certainty.*
> *68. I consider that all of the above matters may have an impact on a future trial judge's determination of the tripartite test in §53 of XX . I further note that there is disagreement between the parties as to how the Court should approach the tripartite test. For example, there is a dispute as to whether the very considerable disparity in the costs of a UK surrogacy arrangement as opposed to a foreign commercial surrogacy arrangement in the USA is a feature that the Court should take into account when determining whether it is reasonable for a Claimant to have selected the USA route."*

---

[1]Stage 1: conservative assessment of the likely amount of the final award, omitting the heads of future loss which the trial judge might wish to deal with by way of periodical payments.

Stage 2: permitted the court to include some elements of future loss in its assessment, but only if it had a high degree of confidence that the trial judge would deal with them by way of a lump sum rather than periodical payments. The claimant acknowledged that she would need a top-up pursuant to an *Eeles* Stage 2 calculation to enable her to purchase the property she had found.

DEKA CHAMBERS
5 Norwich Street, London EC4A 1DR
T +44 (0)20 7832 0500
E clerks@dekachambers.com **W** dekachambers.com