Case No: QB-2018-001771
Neutral Citation Number: [2020] EWHC 1147 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 10 February 2020 BEFORE:

MR JUSTICE STEWART

BETWEEN:

KARIM ABU TALEB
(A CHILD PROCEEDING BY HIS LITIGATION FRIEND MOHAMED ABU TALEB)

Claiman

t - and -

IMPERIAL COLLEGE HEALTHCARE NHS TRUST

Defendant

MR R WEIR QC (instructed by Irwin Mitchell) appeared on behalf of the Claimant
MR M BARNES (instructed by Capsticks) appeared on behalf of the Defendant

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JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. MR JUSTICE STEWART: The defendant issued an application dated 19 December 2019 for an order that the parties have permission to rely upon a single joint expert in the field of genetics, the report to be served within two months after the date of instruction. The evidence in support was provided by Ms Rebecca Aldous, solicitor for the defendant, on the application notice. She said this:

> "This is a complex, high value clinical negligence claim relating to alleged negligence during the claimant's birth resulting in a significant brain injury. Directions have been ordered, and a trial has been listed to take place on 21 April 2020. The parties are aiming to exchange liability expert evidence by 10 January 2020. The factual witness evidence was exchanged on 23 October 2019. A conference took place on 10 October 2019 between the defendant's factual witnesses and experts. At the conference, Dr Rosenbloom (the defendant's neurology expert) raised the issue for the first time that the claimant's injuries could be genetic. Causation is denied in full. Dr Rosenbloom sets out his rationale for this in his letter dated 19 December 2019 (attached).
>
> We are applying to court to request that the parties instruct a geneticist jointly to investigate this further. This is necessary so that all the parties can give definitive views on causation. If this had been brought to the defendant's attention earlier, then it would have been raised earlier. However, we believe there is time for this to be explored and investigated before the trial date […]. We are assured by the expert that we have approached that the timescales are in the region of two months from obtaining the sample to obtaining the results. We are confident therefore that the trial date of 21 April 2020 is not going to be prejudiced. We are of the opinion that, now that this issue has been raised, that it would be inappropriate not to undertake these investigations given the gravity of the case."

2. In response, there is a witness statement from Ms Anna-Marie Kavanagh, solicitor for the claimant, the statement is dated 31 January 2020. There is a witness statement from Ms Rebecca Aldous dated 4 February 2020. The statement in support (which I have repeated above pretty well in full) was quite narrow in focus; the statement in response is more substantial. Ms Kavanagh's statement helpfully sets out background to the case:

> "The claimant was born on 21 February 2008; the claim arises based on clinical negligence from the circumstances of the management of the claimant's mother's labour and delivery. Liability and causation are denied. I say that subject to a proviso of some importance to a child in term(?). The claimant's mother developed gestational diabetes during pregnancy, this was diet controlled. She had mildly raised blood pressure at 39 weeks, then an episode of reduced foetal movements. Labour was induced at 40 weeks, labour progressed well, but there was slow progress in the second stage. Uterine contractions were over-frequent, and syntocinon augmentation was not discontinued. There is apparently conflicting evidence about the delivery. Birth was performed by caesarean section. 24 hours after delivery, the claimant was admitted to the neo-natal unit, where he suffered seizures. The point which the defendant makes, is that the claimant's Apgar scores were normal and at birth he seemed to be normal.
>
> The claimant is in fact now very disabled. His condition is described as a moderately severe asymmetric mixed spastic, dyskinetic bilateral quadriparetic cerebral palsy, microcephaly, significant cognitive difficulties, coordination difficulties. He is fully gastropathy tube fed, and has speech difficulties and epilepsy. The epilepsy has proved intractable to treatment with various antiepileptic drugs. In the agreed case summary, dated 13 November 2018, it is said that the claimant alleges that his profound disabilities were caused by an episode of perinatal hypoxic ischemia. He alleges that this episode was caused by a period of intrauterine prolonged partial hypoxemia commencing in the second stage of labour. The allegation is that the injuries were caused by the negligent mismanagement of the syntocinon infusion throughout, and/or failure by the defendant to identify a pathological CTG trace at 6.30 am. It is agreed that the claimant's presentation is in keeping with a chronic partial hypoxic ischemic injury in utero. It is denied that the injury occurred during labour."

3. The procedural history in outline is as follows. The letter of claim was sent on 2 August 2016. The defendant's letter in response is dated 12 July 2017. In that letter the defendant said:

> "Further, while the trust accepts that the claimant did suffer a chronic partial hypoxic ischemic insult in utero, it occurred at some time in the antenatal period, and significantly prior to the onset of labour. It was not, therefore, caused by uterine hyperstimulation."

There was therefore a partial admission on breach of duty, and the causation issue was set out clearly, in a way which is still the position in the defence.

4. The claim form was issued on 11 January 2018, and the claim form Particulars of Claim, and other supporting documents were served on 12 January 2018. On 30 May 2018, the defence was served, again making a partial admission of breach of duty. The case was allocated to the multi-track on 20 June 2018. On 23 November 2018, agreed directions were sealed by the court. On 11 December 2018, the claimant replied to the defendant's Part 18 request. On 18 January 2019, the trial was listed to commence on 21 April 2020, in a four-day window with a six-day time estimate. Lists of documents were exchanged on 21 March 2019. Factual evidence was exchanged on 25 October 2019. The parties have complied with all directions save that the experts' discussions scheduled for 25 October 2019 have not yet taken place. This is not expected in any way to imperil the trial date.

5. Dr Rosenbloom's letter of 19 December 2019, says, having reviewed the available documentation, that, genetic factors may well be playing a part in causing the claimant's very severe neurological disabilities. He says he has come to this opinion as, from his neurological perspective, there is no apparent or clear link between the factors that operated in labour and the claimant's presentation in his new-born period. Further, the claimant's treating paediatric clinicians do not appear to have excluded a genetic contribution to his presentation. He continues by saying that it his understanding from the records that the claimant's parents are third cousins, that his father has the condition termed xeroderma pigmentosum and that he is also described as having a chromosomal rearrangement.

6. In order to consider the genetic possibilities further, the claimant was seen in the genetics clinic at St Mary's hospital by Dr K McDermott, consultant clinical geneticist in February 2009. She noted that, although the claimant had no dysmorphic features, or other congenital abnormalities, on examination he was fisting, with obvious increased tone in the upper and lower limbs. He also showed deep palmar creases. She noted that there had been recently reported microdeletion syndrome, which includes microcephaly and severe intellectual disability, and that these were at the site of a chromosomal rearrangement found on both the claimant and his father. In June 2010, the claimant was seen by a consultant paediatric neurologist, Dr Muradca(?). It was left open as to whether the claimant had a microdeletion in an area of chromosome 2. Dr Rosenbloom says he is aware that this is a recognised cause of microcephaly, and developmental retardation. Further genetic investigations do not appear have been undertaken. This is according to Dr Rosenbloom's letter of 19 December 2019. In fact, all that I have just said comes from that letter, as does this:

> "Since 2010, the variety of genetic tests has expanded. In consequence, techniques are now available that can identify changes at the level of the individual genes, parts of genes, and DNA sequences."

7. It is against that background that Dr Rosenbloom recommends consideration being given to instructing an expert in clinical genetics to review the relevant records in the case, examine the claimant and give an opinion whether his presentation has been caused or contributed to by identifiable genetic factors.

8. Ms Kavanagh makes a number of points in resistance to the defendant's application. She first points out that in paragraph 4 of the defence, the defendant admits that the claimant did suffer a chronic partial hypoxic ischemic insult in utero; in paragraphs 40 to 44 of the defence, the essence of this is repeated. Even in the defendant's case summary for this application dated 4 February 2020, the case on causation is:

> "Both the neuroradiology and the claimant's clinical presentation are consistent with a chronic partial hypoxic ischemic insult in utero. That insult did not, however, occur in labour."

9. Ms Kavanagh therefore submits that the medical cause of the claimant's brain injury is not in issue, and that the defendant in its application now seeks to obtain evidence on a matter which is not in dispute between the parties on the pleadings or in the agreed case summary. The defendant accepts this point. If the evidence from geneticists is permitted, and if it casts serious doubt upon the admission, there would presumably be an application to amend the defence. Mr Weir QC did submit that there was no jurisdiction for this court to consider this application, because the question on causation sought to be explored in the application of the further expert evidence is not in issue on the pleadings, and that there should be an amendment before the court before the court could deal with it. He did not provide me with a copy of any authority, though he did refer to one by name. He also said that, because if he pressed that particular point too hard the defendant could make an application in face of court, ultimately he was relying upon it as a matter of discretion; the pleadings had been from the outset, and indeed before then, in the letter of response of July 2017, such that they made a partial admission as to causation, in the sense that they admitted that the damage caused to the claimant happened in utero and not because of genetic factors.

10. In the circumstances, I am not in a position really to deal with the question as one of jurisdiction and I shall deal with it as one of discretion. The claimant says that a complete set of the claimant's medical records, comprising 11 lever arch files and CDs of radiology, were disclosed to the defendant on 15 September 2016. Dr Rosenbloom examined the claimant in March 2018. The defence was served shortly afterwards. The records were therefore available to him, and were indeed available to the defendant prior to the issue of proceedings. There is no explanation as to why Dr

Rosenbloom failed to raise the point he now raises until the end of 2019. The first the claimant was aware of it was when Ms Kavanagh received a telephone call from the defendant's solicitors on 18 December 2019. Ms Aldous told her that she had been wanting to discuss the matter with her since a conference on 10 October 2019 but she needed confirmation from the experts as to how to proceed. The issue arose in conference when discussing causation, she was told, because the defendant's experts could not explain the claimant's injury on the basis of the admitted breaches of duty of care. Dr Rosenbloom raised the possibility of the genetic element to the claimant's presentation.

11. It is worth looking at the statement from Ms Aldous dated 4 February 2020. She says this:

> "5. A conference took place on 10 October 2019 between the defendant's counsel, experts and factual witnesses. This provided an opportunity for the experts to consider the case again, prior to exchange of liability evidence, and it was at that conference that the issue of a potential genetic cause was first mentioned by the defendant's neurological expert, Dr Rosenbloom. Dr Rosenbloom suggested that, given the lack of apparent clear link between the factors that operated in the labour and the claimant's presentation in his new-born period, there may be a genetic cause for the injuries."

12. Mr Weir raised whether the defendant themselves had ever thought about this, given that they are highly experienced clinical negligence solicitors and have the advantage of leading and junior counsel on their side and that this question of genetic potential cause or contribution to symptoms such as the claimant has would be known. This was disputed by Mr Barnes for the defendant. Professor Gupta's report is dated December 2019. We do not know the actual date of the report in the sense that practically all the reports from all the parties are dated December 2019. It would be unusual if, without making any reference to it, it was responding in any way to the application notice issued on 19 December 2019. At paragraph 631, Professor Gupta had recognised that on 4 January 2011, the claimant had been reviewed in the genetics clinic, where a genetic diagnosis was felt to be unlikely. He said he was not dysmorphic; there were no physical stigmata which could give a clue towards a clinical dysmorphological diagnosis. Then at paragraph 8.7 he said this:

> "As already noted, he has also had some genetic tests performed, and has been found to have a balanced pericentric inversion of chromosome 2p. The clinical geneticist has noted that his finding is coincidental, and does not explain his severe seizure disorder, and developmental delay. I am of the opinion that it is unlikely he has an underlying genetic problem accounting for his neurodevelopmental problems, particularly since his presentation,

> the perinatal history and his MRI brain scan findings are in keeping with him having sustained an intrapartum hypoxic ischemic insult."

13. Ms Kavanagh also relies upon two aspects of medical evidence before the court, the first of which was in the records available to Dr Rosenbloom, but which he did not mention in his December 2019 letter, saying in his letter of February 2020 that he apologises he did not make reference to this in his earlier letter. The first, therefore, of the aspects of medical evidence referred to by Ms Kavanagh are extracts from the claimant's medical records. There is a letter dated 21 January 2011 from Dr Bernhard, a consultant clinical geneticist. She refers to the claimant's family history of xeroderma pigmentosum and his own presentation, comprising the listed features of microcephaly, spastic quadriplegia and seizures. She also refers to what appear to be further genetic investigations. She says she is unable to suggest a diagnosis for the claimant. She states:

> "Recent CGH microarray analysis ruled out a chromosomal imbalance, and we therefore conclude that the microscopically visible chromosome 2 inversion which Karim inherited from his father, is not the explanation for his problems."

14. Dr Bernhard says the claimant's head is very small, but it appears he has been affected by acquired microcephaly, probably secondary to the brain insults in the perinatal
period. She adds that the aetiology of these insults is not entirely clear; it now appears to be more likely that these insults occurred because of environmental reasons, given his latest MRI brain scan report. So, the position seems to be that Professor Gupta, the claimant's paediatric neurologist, had not only spotted these entries in the records from 2011 and earlier and dealt with them in his report, but also that this was very much a live issue in the medical records so that treating doctors had referred the matter to a geneticist as long ago, I think, as 2009, which was the first date (maybe 2010) and then culminating in that letter from Dr Bernhard in 2011. It is therefore surprising that Dr Rosenbloom, who is vastly experienced in this area, (and perhaps also, one might add, lawyers who are also highly experienced) had not considered this possibility, and/or had not taken into account what was there on the face of the notes.

15. The second piece of evidence referred to by Ms Kavanagh, is a recently obtained letter from Professor Reardon. This letter is dated 17 January 2020. Professor Reardon is a consultant clinical geneticist and lead clinician in clinical genetics and head of department of clinical genetics, Children's Health, Ireland. He goes into some detail addressing the difference between terminology about chromosomes, as used in Dr Rosenbloom's December 2019 letter and by Dr Bernhard in 2011. He says he has not himself seen any laboratory reports relevant to the investigations. He then

turns specifically to the claimant's case and says he had two types of genetic investigation undertaken.

16. The first investigation showed he has an inversion of chromosome 2. Subsequent investigation of his parents' chromosomes show that this inversion is a familial variant shared with his father. The second investigation, known as CGH microarray, gives a far more detailed analysis of the integrity of the chromosome, and show no evidence of microdeletion. Dr Bernhard's letter states, "No clinically significant chromosomal imbalance detected." From this investigation, Professor Reardon says that there is no evidence of microdeletion in the claimant's investigations. He concludes:

> "Accordingly, it is reasonable to conclude that this boy's chromosomes are almost certainly normal and that there is no evidence that he has an underlying chromosomal abnormality as the cause of his clinical problems of microcephaly and neurological impairment. His chromosomal investigation has been adequate to support this statement, and while preferable that I should have seen primary reports myself, the fact that I derive this information from a letter of a consultant clinical geneticist means that it should be very secure."

On the basis of this evidence, the claimant submits that there are no reasonable grounds for seeking further evidence from a consultant clinical geneticist.

17. What has been the defendant's response to this evidence, which the defendant has had since it was served on 31 January, some ten days ago? There is a letter from Professor Nemeth dated 3 February 2020. She says she has only limited details of the case, and has not examined the claimant. She has had sight of a clinic letter on the claimant dated 21 January 2011 by Dr Bernhard, referring to previous review by other geneticists and by paediatric neurologists and review of the imaging by several neuroradiologists. She says that where there is a background of genetic abnormality in the context of extensive consanguinity, and where there is no clear relationship between the neurological disorder, the imaging and the perinatal history, then genetic testing would be strongly advised to ensure that no immediately identifiable genetic cause can be found.

18. Professor Nemeth says that there is increasing evidence that "cerebral palsy" can be caused by genetic mutations. Since genetic conditions causing neurological disorders are found in consanguineous families, genetic investigations are highly advisable. In this case, the lack of a clear antecedent history or hypoxic features at birth, combined with unusual imaging, suggest that other causes should be sought. She adds that since 2011 there has been a revolution in genetic testing such that in current clinical practice most of the coding genes of the genome can be tested for the presence of

mutations using the exome or preferably genome sequencing. The lack of an identifiable genetic cause will not entirely exclude a genetic cause but will change the perspective of balance of probability in this case since there does not appear, from the records she has seen, to be other persuasive clinical grounds for arguing that there is a genetic cause. However, the cause of any hypoxic damage, from the information she has, would still be unclear.

19. I make two brief points about that. First, Mr Weir QC challenged the information which Professor Nemeth had been given about the conclusions she should draw in relation to causation in utero; and secondly, that the way that Professor Nemeth describes matters is quite nuanced, but that it is not, to use his expression, that there is a silver bullet here; that it is a factor which may be taken into account, the effect of which may, in conjunction with the other evidence, be such as to change the balance of probabilities in favour of a cause not related to negligence on the part of the defendant.

20. Dr Rosenbloom, in a letter of 3 February 2020, to which I have already briefly referred, says that he remains of the opinion that there is apparent or clear link between the factors that operated in labour and the claimant's presentation in his new-born period. He refers to the progress in genetic investigations since 2010 and he says in this case the lack of a clear antecedent history or hypoxic features of firth combined with the imaging appearances suggests that other causes should be sought.

21. Before coming to my conclusions, I must consider the principles to be applied. The defendant properly drew my attention to the case of *S J Moore (Jeweller) Limited v Squibb Group Limited* [2018] EWHC 2731 (QB), a decision of Karen Steyn QC as she then was. In that case, having identified that late witness statements are governed by CPR 32.10, which has been held to impose a sanction, the judge at paragraphs 46 to 52 considered an application to rely upon late expert evidence from a new expert. She set out CPR 35.1 and 35.4 and concluded that such an application fell to be determined by reference to the principles governing a relief from sanctions. She referred to the commentary at 35.5.1 of the then White Book, where the notes emphasised that it will not be normally acceptable for expert evidence to be served late, particularly so close to the start of the trial window.

22. This case does not, I believe, seem to have been picked up by the editors of the White Book 2019. Was the learned judge right in her decision as to the principles arising from CPR 35.4? I must of course be aware of the persuasive precedence of her decision and can only refuse to follow it if I am convinced she was in error. I am afraid that I have reluctantly come to that conclusion. The reasons can be briefly stated. They are these. First, there is, as I read CPR 35.4, no express sanction. Secondly, in my judgment, there is no implied sanction either. In *Mark v Universal Coatings & Services Limited* [2018] EWHC 3206 (QB), Martin Spencer J, at 52, said this:

> "There are, however, some rules or practice directions which, without themselves expressly laying down a sanction for

> noncompliance, carry with them an implied sanction by reference to the consequences of the rule not having been observed. Two examples are those referred to in paragraph 45 above: the failure of a respondent who wishes to resist an appeal on grounds other than those relied on in the court below to serve a Respondent's Notice (*Altomart v Salford* [2014] EWCA Civ 1408]); and a litigant who wishes to appeal from a court order or judgment but fails to serve and file a notice of appeal in time (*Sayers v Clarke Walker* [2002] 1 WLR 3095]).
>
> In my judgment, the principle behind the reason why those rules carry with them an implied need to apply for relief from sanction when breached can be discerned by reference to the default position if the application is refused. In the case of a litigant who fails to serve and file a notice of appeal in time, without an extension of time the litigant is unable to appeal as any notice of appeal would be invalid as having been served out of time and the judgment in the court below will stand. This is so significant for the purposes of the litigation that the need to apply for relief from sanction is implied. Similarly, as explained by Moore-Bick LJ in *Altomart*, the failure to serve a respondent's notice means that, without permission to do so, the respondent is fixed with relying on the grounds relied on below and may not argue that the judgment below should be upheld for different reasons. This may so significantly confine the scope of the appeal as to be highly significant for the purposes of the litigation and has therefore also been held to require relief from sanction although, as it seems to me, this is much closer to the line than the failure to serve a notice of appeal in time considered in the *Sayers'* case."

23. Thirdly, CPR 35.4 states, "No party may call an expert or put in evidence an expert's report without the court's permission." There is no implied sanction in the wording of that rule; the rule simply requires the court to give permission. By contrast, witness statements from lay witnesses can be served without the permission of the court, and CPR 32.10 imposes a sanction for failure to serve within the time specified by the court (see, for example, *Chartwell v Fergies* [2014] EWCA Civ 506, 24). Mr Weir says that rule 35.4 has a self-contained sanction because the rule controls the trial and that when
parties get directions they are obtaining only directions available to them and which have to be restricted in relation to 35.4 and that the court restricts evidence from experts under 35.1. He therefore says that further experts cannot be used without the court's permission. So far, so good. The question is, on what basis should the court give permission? Should it give permission in accordance with either the overriding objective generally, or, if it is a late application or very late application (which I will come to in a moment) in accordance with the principles governing very late applications, or should it give permission only if the three-stage test in *Denton* has

been satisfied? He mentions, correctly, that in the case of *Mark*, that was a very different factual situation, dealing with failure to serve the relevant documents along with the claim form. But I have come to the conclusion that there is no express or implied sanction in rule 35.4. Therefore, the principles to be applied depend on whether this is a very late application. Such an application is one made where the trial date has been fixed, and where permitting the application would cause a trial date to be lost (see *Quah Su Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), 38). If it is a very late application then it must be recalled that the parties and the court have a legitimate expectation that the trial date will be kept. That is an important factor to take into account.

24. The other matters to be taken into account derived from the authorities on very late applications were summarised by me in the case of *Heiser v The Islamic Republic of Iran & Anor* [2019] EWHC 2073 (QB), [27], as (i) whether there is good reason for the late application, (ii) the significance of the new material, (iii) consideration of prejudice to each party, (iv) the need to do justice to all the parties having regard to the overriding objective. If this is not a very late application then the court's discretion is to be exercised simply in accordance with the overriding objective.

25. I now consider the effect of allowing expert genetic evidence. The claimant says, and I agree, that if evidence from a geneticist is permitted, the report should not be from a

jointly instructed expert. The potential effect on causation could be dramatically disadvantageous to the claimant. In those circumstances, Ms Kavanagh says that, adopting the timetable proposed by the defendant, she anticipates exchange of reports within two months of the instruction, followed by discussions between the experts with a view to providing a joint statement. As of today's date, that means, in my judgment, that it is inevitable that the trial would be vacated unless the geneticist came to the clear conclusion that there was no genetic cause, in which case this whole application would have been a waste of time in any event. But, assuming that there was anything in the geneticist's evidence which needed to be explored further, then there would have to be not only the reports from geneticists and joint statements, there would also have to be consideration in consultation with the experts and preparation for trial. I accept Mr Weir's point that another reason for it not being appropriate to have a joint expert, is that in something as complicated and potentially as important as this, it is extremely desirable for both parties to be able to speak to their experts.

26. There is an email from Professor Nemeth dated 7 February 2020. In this email she suggests a total time required of around six to seven weeks, assuming no problems such as sample failure, which occasionally occur. That sort of timetable would take us to about the end of March 2020 and would leave only three weeks or so for joint expert meetings, joint report, any amendment to the offence, consideration by paediatric

neurologists and other experts, consultations, preparation for trial, not taking into account the Easter break in those three weeks. It seems to me inevitable, or practically inevitable, that the trial date would have to be vacated. Previously, I should mention, on 3 February 2020, Professor Nemeth said that it would take two to three months to provide the relevant evidence. The evidence from the defendant is not totally satisfactory, but even on the basis of six to seven weeks, the trial date would, in my view, almost inevitably have to be vacated.

27. If the evidence from a geneticist does raise a serious issue as to causation, then there is no doubt that the significance of the new material as a factor is of a high order. This is apparent from what Ms Kavanagh herself says as to why such evidence should not be instructed on a joint expert basis. It may possibly amount to a complete defence; alternatively, it may amount to a partial defence. In either case, there will be the potential for very substantial savings to the public purse. The full liability value of the claim, if successful, at least in my estimate (not from counsel, though perhaps I should have asked counsel) is probably somewhere between £10 million and £20 million and could be somewhat more. I only mention those very broad figures to give some idea of the amount of money potentially in issue. As to whether there is a good reason for the late application, the claimant has quite properly raised questions as to why
Dr Rosenbloom did not raise the issue earlier and the conference of 2019. Thereafter, some two months passed before the application notice was issued. The defendant says
that after the conference, it was necessary to investigate the issue with Professor Nemeth and to obtain instructions, and this delayed the issue of the application. I will come in a moment to what detail there is about this. 28. In her witness statement, Ms Aldous says this:

> "Between 10 October 2019 and 22 October 2019, efforts were largely concentrated on attempting to finalise the factual witness evidence, five witnesses which were served on 23 October 2019. On 22 October 2019, I approached Andrea Nemeth, clinical geneticist for her initial thoughts on whether she could assist with this case. We then spoke on the telephone and I explained I did not want to send papers to her with any identifying information, given that the instruction would hopefully be a joint instruction, as I would not want her impartiality to be compromised. She asked that I obtain some non-identifying relevant facts from our experts and send these to her to consider. I obtained these non-identifiable pointers from the defendant's experts and emailed her with these.
>
> Andrea Nemeth responded on 21 November 2019 outlining that she would assist. Written advice was prepared which went to NHS Resolution on 5 December 2019 requesting instructions to

> make an application to rely upon a geneticist. Instructions to proceed with that application were received on 18 December 2019."

29. So, some nine or ten weeks pass. Two weeks passed before Professor Nemeth was approached, the explanation being that efforts were being concentrated on attempting to finalise factual witness evidence. Then from 22 October to 21 November (a period of just over four weeks) there is little detail as to when instructions were taken and how quickly or slowly Professor Nemeth responded. Then from 21 November 2019, it is not quite clear when Professor Nemeth provided her written advice, but it was sent to NHS Resolution on 5 December. It has to be said (and I say this in a way critically) that for something as highly explosive (as the defendant would have me understand this application could be to the potential causation issue between the parties) the pace seems to be relatively leisurely. If there were problems with Professor Nemeth coming back or providing a report, that should be made clear. There is nothing of that sort, and in nine weeks not very much appears to happen, and there appears to be little sense of urgency. If that nine weeks had been reduced by four to six weeks, that may have had an effect on the trial date potentially being able to be kept. I cannot say for sure, but it certainly would have been more persuasively argued by the defence. So, I am not persuaded that, given the circumstances of this case, and the potentially very important nature of the issue, there was any proper galvanising of the obtaining of the evidence, the obtaining of instructions, and the issuing of the application.

30. We then get to the second period, which is from when the application is apparently issued on 19 December 2019. In the witness statement it says this:

> "13. There was then various copious correspondence between ourselves and the court involving telephone calls, emails and attendances at the court and the hearing was listed on 23 January 2020."

I asked Mr Barnes to explore that matter with his solicitors. It was a little difficult because their information was on computer. It is also difficult because I am not in a position to be able to explore the matter with the listing office. My understanding is that there was an email on 9 January 2020, unfortunately sent to QB general listing, following telephone calls and asking for an update about listing. On 13 January there is an email sent to both QB general and QB judges listing, mentioning the fact that there was a trial date in April 2020, and on 17 January 2020, an email was sent, including to QB judges listing, mentioning that a joint genetic report was being sought, and one suggested date was 10 February, namely today, whereafter, apparently a few days later, it was listed on that date. I should add that apparently there are file notes of attempting to contact the court and two attendances at the court. It is unfortunate that this is not in the witness statement so that it could have been

investigated. It is also unfortunate, on the face of what I have (and this may or may not be unfair) that there does not appear to have been clarity as to just how potentially urgent this application was and how the matter should have been listed urgently and heard as quickly as possible.

31. I should say that if an application which may well cause the vacation of a trial date is made then it should go to QB judges listing and it should be made clear just how urgent the matter is, and if, after an initial email and/or telephone call, there is not some response, then it should be asked to be referred to myself as judge in charge of the list.

32. Apart from the fact that trials should only be vacated as a last resort, there are particular circumstances militating against the vacating of this trial. The claimant requires 24-hour care, has seizures every day and is totally dependent on others for all aspects of his care and daily life. He is doubly incontinent. His parents apparently have not had an unbroken night with him since he was born. His mobility is very severely restricted. Unsurprisingly, the claimant's parents have been focussed on reaching a conclusion to the liability matter following trial in April 2020. If the claimant succeeds on causation, a substantial interim payment is very likely to follow, thereby alleviating, to the extent that money can, a number of real-life difficulties.

33. If the claim on causation fails, at least the family will know where they stand and will move on with their lives. If the trial is vacated, Ms Kavanagh says it is unlikely to be heard until at least another 12 months have passed. The court has enormous experience of the difficulty in listing cases of maximum severity injuries because of the availability of experts. As far as the court is concerned, this matter could be reheard sometime around October/November 2020, which will be six months away. Apparently, without geneticists, there are ten expert witnesses, and if there were geneticists there would be 12, and I can well understand, that, that six-month delay may well rise to something in the region of 12 months if the availability of the experts follows the usual type of pattern.

34. So, just to pause at that point, firstly, the trial date will almost inevitably have to be vacated; secondly, the causation issue is not on the pleadings, has never been on the pleadings and has only been raised very recently to the claimant in December 2019; thirdly, there is no good explanation, especially in circumstances where it appears that the claimant, through its paediatric neurologist, had considered this issue earlier and where it is apparent on the records that the treating neurologists had considered the matter up to, and including 2011, as to why the defendant had not previously taken any account of this potential issue, and indeed, had put in a letter of response and pleadings and agreed summaries of facts directly to the contrary.

35. Not only that, but when one looks at the application, one has to say that there is a possibility that the genetic evidence might be relevant, given the advance in that area of medicine, and the court cannot exclude that possibility. However, the weight, so far as the court can assess it (which is difficult) has to be put into the balance. I

would only put the matter as a possibility and no more than that. Why do I say this? Firstly, the evidence from the defendant's neuroradiologist, Dr Stoodley, served in December 2019, may well have been prepared before that date and says this:

> "The abnormalities seen on the scan are likely to be due to a chronic partial hypoxic ischemic or hypoperfusion insult."

So, he, from his discipline, did not seem to have any real difficulty in attributing causation to in utero damage. Secondly, Dr Rosenbloom, although he issued a caveat in his December 2019 report, put the matter in this way:

> "It is my current opinion, therefore, albeit with the caveat that is detailed below with respect to genetic factors, that Karim has sustained his demonstrated brain damage following cerebral perfusion failure that has occurred secondarily to an episode of prolonged partial cerebral hypoxic ischemia at around term."

He mentions, and deals in that December 2019 report, which presumably had been updated towards the end of 2019, after the conference, and he says, at Summary and Conclusion:

> "Karim Abu Taleb has sustained the brain damage that is the cause of his neurological disabilities as a consequence of having sustained an episode of cerebral perfusion failure closer to or around the time of term, ie towards the end of his gestational period."

A little later:

> In addition, I would defer to expert clinical genetics advice on whether Karim's presentation has been caused or contributed to by identifiable genetic factors."

36. So, it is not the position that the experts, certainly not Dr Stoodley or the claimant's experts, do not attribute and cannot attribute damage in utero as being the cause of the claimant's problems. I accept there is a caveat; I accept the possibility that geneticists' evidence may give a causative explanation based on genetics rather than on the defendant's negligence). But also, albeit some years ago, when matters were not as advanced, there were treating doctors who considered carefully whether the claimant's damage was due to genetics, and a consultant geneticist came to the conclusion that it probably was not. I have to weigh all those factors into account, and I have come to the conclusion that it would be wrong, having regard to the

matters I set out in the *Heiser* case, to allow the almost inevitable vacation of this trial date in the circumstances of this application.

37. For the reasons I have given, I refuse the application.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge