Neutral Citation Number: **[2020] EWHC 1445 (QB)**

Case No: QB-2017-000098

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 June 2020

Before :

THE HONOURABLE MR JUSTICE JOHNSON

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Between :

SC **(a child, suing by her mother and litigation friend, AC)**	**Claimant**
- and –	
UNIVERSITY HOSPITAL SOUTHAMPTON NHS FOUNDATION TRUST	**Defendant**

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Catherine Ewins (instructed by Hugh James Solicitors) for the Claimant
Katie Gollop QC (instructed by DAC Beachcroft LLP) for the Defendant

Hearing date: 3 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down are deemed to be 4pm on 4 June 2020.

Mr Justice Johnson :

1. Three months ago, a remote hearing of a clinical negligence trial would have been almost unthinkable. Now, as a result of restrictions imposed in response to the Covid-19 pandemic, it is the default form that this trial will take next week. On that model, the parties, their solicitors and counsel, the lay and expert witnesses, and the judge, will all be in different physical locations. None of them will be in a courtroom. The hearing will take place with the assistance of video conference technology. The Defendant applies to adjourn the trial on the basis that such a hearing, for this case, would be unfair.

The claim

2. The Claimant is now aged 15. On 26 January 2006 she was 15 months old. She had been a healthy toddler. On that day she woke with a high temperature. She was admitted to hospital. On 31 January 2006 (having been discharged, and re-admitted to hospital) she was diagnosed as suffering from meningitis. She subsequently developed hemiplegic cerebral palsy. It is common ground that if it had been appreciated on 26 or 27 January that she was suffering from a serious bacterial infection then she would have been treated with intravenous antibiotics and would have made a full recovery. The Claimant alleges that the Defendant's clinicians were negligent in failing to establish, on 26 or 27 January, that she was suffering from a serious bacterial infection.

3. Proceedings were issued on 27 July 2017. The trial was due to take place in January 2020. The trial was adjourned due to the ill-health of one of the Claimant's expert witnesses. The adjourned trial was listed to commence in the week beginning 8 June 2020 (ie next week). This application to adjourn was made on 28 May 2020.

4. There are five witnesses of fact: the Claimant's parents, the GP who referred the Claimant to hospital, and the two clinicians who saw the Claimant at the hospital on 26 January 2020. The issues of fact include precisely how the Claimant presented to the clinicians and what was said by the clinicians to the Claimant's parents in January 2006.

5. There are four expert witnesses: two experts in paediatrics, and two experts in infectious disease/microbiology. The ultimate issue that is addressed by the expert evidence is whether the clinicians acted in accordance with a practice that was accepted by a reasonable body of medical opinion – *Bolam v Friern Hospital Management* [1957] 1 WLR 582.

6. Counsel and solicitors on each side are ready, willing and (subject to the court being able to facilitate a hearing) able to attend court next week. Most of the witnesses are likewise able to attend court next week. One expert witness is not able to attend court (because of health reasons) but is able to give evidence by video-link.

Anonymity

7. There had been no application for anonymity. At the outset of the hearing I raised this with Ms Ewins, who appears for the Claimant. She then made an application for anonymity. Understandably, Ms Gollop QC, who appears for the Defendant, did not have instructions to respond.

8. The Claimant is a child. She does not have capacity to conduct proceedings in her own right. The detail of the evidence involves sensitive medical matters relating not just to her illness in 2006 but her ongoing medical difficulties. Subject to affording the Defendant, and any other person affected by the order,

a right to make representations, and subject to any such representations which might be made, I consider that non-disclosure of the Claimant's identity is necessary to secure the proper administration of justice and to protect her interests, including her right to respect for private life pursuant to Article 8 of the European Convention on Human Rights, notwithstanding the importance of open justice, and the right of freedom of expression under Article 10, and section 12 of the Human Rights Act 1998. I have therefore made a provisional order (subject to any further representations) that her identity shall not be disclosed, but with a right on the part of the Defendant, or any other person affected by the order, to apply to vary it or set it aside.

The application

9. The application to adjourn is predicated on it being impossible for a hearing to take place in court. Ms Gollop QC argues that a remote hearing would be unfair. That is because, so it is said, the advocates would not be able "visually to assess witness demeanour, judicial approach to evidence as it is given and the reactions of others at the same time as questioning in a way that occurs in a physical courtroom." Moreover, the Defendant's clinicians, who are subject to stringent criticism on behalf of the Claimant, would not be able to give their accounts "face to face with the communication possible between multiple parties" and it would not be possible for the legal representatives to take instructions from their clients, or discuss matters with the expert witnesses, in the course of evidence being given. It is also said that the Defendant's leading counsel and witnesses do not have any experience of a virtual trial.

10. Ms Ewins, for the Claimant, resists the application. She argues that the application has been made too late, this case has already been adjourned once, if it is adjourned now then it is likely to be some considerable time before it is heard, the costs that would be incurred would be disproportionate, a trial in a court room ought to be possible but that, if it is not possible, a virtual trial would be fair (albeit there would be significant practical difficulties).

Should the case be adjourned?

11. The Civil Procedure Rules require that the court give effect to the overriding objective – to deal with cases justly and at proportionate cost – when deciding whether to exercise the power to adjourn a hearing – see CPR 1.1, 1.2(a), 3.1(2)(b). If it would be unfair to hear the case next week then, axiomatically, it would be unjust to do so, and that would be contrary to the overriding objective.

12. One of the arguments advanced on behalf of the Claimant (but not the principal argument) is that the costs thrown away by an adjournment would be disproportionate. I disagree. The case is now fully prepared for trial. Although some further preparation would likely be required if the case were adjourned the additional costs would not be disproportionate to the very high value of the claim (which is said, on behalf of the Claimant, to be several million pounds). The cost of proceedings is a factor in the overriding objective, but it is not in the circumstances of this case a determinative factor.

13. The Claimant also argues that the application has been made too late. The restrictions on court hearings were imposed in late March, and yet it was only on 28 May 2020, very shortly before trial, that this application has been made.

I agree that the application has been made at a late stage. However, that has the advantage of enabling a more informed and focussed inquiry as to the possible mechanisms for a hearing, and the management of the trial. If the application had been made earlier that would, in the particular circumstances of this case, likely have made its resolution more difficult. Moreover, the Defendant argues that it was waiting and hoping that it would turn out that a hearing in court would be possible, thus obviating the need for an application. I do not consider that the timing of the application is a reason for it to be dismissed.

14. The case concerns events that took place 14 years ago. There are factual issues which may turn on the oral recollection of witnesses, albeit assisted by contemporaneous documentation. The parties were expecting a trial to take place in January. There has already been one adjournment. Any further delay in the trial taking place is highly undesirable. If it were possible to be certain that any further delay could be limited to a matter of a very few weeks – and if there were no alternative in order to secure fairness – then the overriding objective might compel the grant of a further adjournment. Ms Gollop QC argues (by reference to information provided by the court as to the court's ability to accommodate an adjourned trial) that a hearing is possible in July. However, it is not at all clear that all the witnesses and legal representatives would be available, and that seems unlikely at this short notice. Further, if a hearing in court is really not possible now (as to which see below) then there can be no certainty that the position in July will be any better. The adjournment that was sought in the application notice was until August or September. One of the Claimant's expert witnesses is unable to give evidence

in August or September (for compelling medical reasons). The Claimant considers that, allowing for the time needed for that expert to be able to give evidence, or alternatively to instruct a new medical expert, if the case is adjourned, then it may well not be possible for the hearing to take place for a further 12 months. The Defendant says that it is unduly pessimistic. What, on any view, can be said is that if the case is adjourned there can be no certainty as to when it will be heard.

15. In the meantime, the Defendant's clinicians, who have much at stake in these proceedings, have the stress and uncertainty of the case hanging over them. The Claimant, and her family, also have a great deal at stake, and would face the continued stress and uncertainty of not knowing whether the Claimant will receive compensation for the permanent and serious consequences of meningitis. They will not, for example, know whether she will be able to secure compensation for the significant ongoing costs of education which are currently being funded by the Claimant's parents.

16. In all these circumstances – subject to the question of whether a hearing can fairly take place next week – the overriding objective militates against the grant of an adjournment.

Would a remote hearing be fair?

17. There are circumstances in which a remote hearing would not be fair. An example is where one of the parties is unable to access or effectively utilise the technology necessary to conduct a remote hearing.

18. Conversely, there are many cases where a remote hearing can, with careful case management, take place in a way that is fair to the parties. As a result of

the Covid-19 pandemic there have been no hearings in court in the Queen's Bench Division since late March. However, hearings have continued to take place, being conducted remotely rather than in court. It is striking (and an indication of the proportion of court business that has continued to be undertaken) that the number of Queen's Bench Division judgments published by Bailii in May 2020 exceeds the number of judgments published in May 2019 (and the same is true of April 2020 compared to April 2019), although some of the underlying hearings took place in court before the end of March. The hearings that have taken place remotely include cases raising issues as diverse as libel (*Depp v News Group Newspapers Ltd* [2020] EWHC 1237 (QB)), enforcement of a judgment (*Quality Solicitors Harris Waters v Okonkwo* [2020] EWHC 1168 (QB)), worldwide freezing injunctions (*Les Ambassadeurs Club Ltd v Albluewi* [2020] EWHC 1313 (QB)), landlord and tenant (*Croydon London Borough Concil v Kalonga* [2020] EWHC 1353 (QB)) and clinical negligence (*Quaatey v Guy's & St Thomas' NHS Foundation Trust* [2020] EWHC 1296 (QB)). In some hearings difficulties have arisen as a result of them not taking place in court, but these have – at least to some extent – been overcome (see eg *Quality Solicitors* at [2]-[3]).

19. A number of witness trials have taken place remotely. Others have been adjourned, and, so far, only one clinical negligence trial has taken place remotely. That is not surprising. First, so far as clinical negligence trials are concerned, there was a compelling need to ensure that practising medical professionals were not diverted from their primary clinical responsibilities by the need to give evidence in civil proceedings. Second, other types of case (for example where liberty or the right to housing was at stake or there was a need

for an immediate injunction) took a higher priority. That does not, however, mean that it would be unfair to try a clinical negligence claim remotely.

20. In this case, both parties are legally represented. All witnesses have access to the technology required to conduct a remote hearing. The disadvantages of a remote hearing would impact on all parties, but it has not been shown that they would do so in a way that is unequal or unfair to the Defendant.

21. Ms Gollop QC relied on the decision of the President of the Family Division in *Re P (A child: Remote Hearing)* [2020] EWFC 32. That concerned the prospect of a 15 day remote hearing in a case where there were a series of allegations to the effect that a young child had been caused significant harm as a result of fabricated or induced illness (see at [2]). The President explained why he considered that the case fell "well outside the categories of hearing which could be contemplated as being appropriate for remote hearings". This was because (at [26]):

> "It simply seems to me impossible to contemplate a final hearing of this nature, where at issue are a whole series of allegations of factitious illness, being conducted remotely. The judge who undertakes such a hearing may well be able to cope with the cross-examination and assimilation of the detailed evidence from the e-bundle and from the process of witnesses appearing over Skype, but that is only part of the judicial function. The more important part… is for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court. It also assumes that the person's link with the court hearing is maintained at all times and that they choose to have their video camera on. It seems to me that to contemplate a remote hearing of issues such

> as this is wholly out-with any process which gives the judge a proper basis upon which to make a full judgment. I do not consider that a remote hearing for a final hearing of this sort would allow effective participation for the parent and effective engagement either by the parent with the court or, as I have indicated, the court with the parent…."

22. The President made it clear that his observations were made "in the narrow context of this being an allegation of [fabricated or induced illness]." Moreover, although he considered that there was "a significant risk" that a remote hearing would not be fair, he did not reach a final conclusion as to whether a remote hearing could be managed in a fair way.

23. The nature of a private law civil action in clinical negligence for damages is very different from a public law family case involving allegations of fabricated or induced illness. To the extent that the observations of the President read across to this, different, context, I consider that the risk of unfairness can (if necessary) be sufficiently addressed and managed by the trial judge. The clinicians are experienced professionals who are well-used to communicating in difficult and stressful conditions (if not by video conference in a court hearing). Case management directions (informed by the valuable work of the Nuffield Family Justice Observatory – see paragraph 28 below) can be imposed which ensure that the disadvantages of a remote hearing in this case are reduced as far as is possible, and to a much greater extent than would have been possible in the very different context of *Re P*.

Should the hearing be conducted remotely?

24. The hearing *could* be conducted remotely in a way that is fair. That does not mean that it *should* be conducted remotely.

25. There are many reasons why such a hearing, in this case, would be undesirable.

26. A remote hearing is a significant departure from the familiar system of civil trials that has operated for centuries. That system is designed to deliver justice. A hearing that is wholly remote lacks many of the features and benefits of a hearing that takes place in court. The solemnity, formality and focus of the courtroom is not easily replicated by a remote hearing. More importantly, the complex multi-layered human communications and observations that take place during a substantial witness trial are significantly impeded when the hearing is conducted remotely. A video-conference is necessarily two-dimensional and permissive only of bilateral communication and observation. For some types of case a satisfactory hearing can nevertheless take place, as the work that has been done by the courts since late March demonstrates. For other types of case (*Re P* being an example), a remote hearing would be wholly inappropriate. In this case, a remote hearing would be possible. However, having regard to the likely length of hearing, the nature of the issues, the volume of written material and the complexity of the lay and expert evidence, a remote hearing would be undesirable.

27. One of the clinicians whose treatment of the claimant is in issue considers that the hearing would be unfair. He does not consider that he would be able to give as full and rounded and effective an account of his actions by video-link as he would in a face to face hearing. He is concerned that his ability to communicate with the Defendant's legal team would be significantly impeded. His professional reputation, medical competence and, potentially, personal

integrity are in issue. It is argued that the unsuccessful party in the litigation may be left with a feeling of injustice occasioned by the manner of the hearing. I have ruled that a remote hearing would be fair (and if a remote hearing does take place measures can be put in place to address these matters), but I accept that the concerns that have been expressed are keenly, genuinely and sincerely felt.

28. Moreover, this is not an isolated or irrational response of a single witness on the eve of a contested trial. The Nuffield Family Justice Observatory (established by the Nuffield Foundation) has, at the request of the President of the Family Division, carried out extensive research into the use of remote hearings in the family courts during the Covid-19 pandemic. It identified a number of concerns, including feelings on the part of many lay participants in hearings that they had not had a fair hearing. Some of the concerns identified arose in the particular context of family proceedings, but many have more general application.

29. For these reasons, even though a hearing can fairly take place remotely, I do not consider that it should do so in this case unless a court hearing is simply not possible.

Can the hearing be conducted in court?

30. It is necessary to consider legality, safety and practicality.

31. There is no legal prohibition on a hearing taking place in court.

32. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020/350 (as amended with effect from 1 June 2020) explicitly permits

attendance at court (including staying overnight away from home in order to attend court) to participate in legal proceedings – see regulations 6(1) and (2)(e):

> "**6 Restrictions on movement**
>
> (1) No person may, without reasonable excuse, stay overnight at any place other than the place where they are living.
>
> (2) For the purposes of paragraph (1), the circumstances in which a person ("P") has a reasonable excuse include cases where—
>
> …
>
> (e) P needs to stay elsewhere to fulfil a legal obligation or participate in legal proceedings;"

33. A court hearing does not infringe the restrictions on gatherings (subject to there being reasonable necessity for each participant to attend) – see regulation 7(1)(b) and 7(2)(e):

> "**7 Restrictions on gatherings**
>
> (1) During the emergency period, unless paragraph (2) applies, no person may participate in a gathering which takes place in a public or private place—
>
> …
>
> (b) indoors, and consists of two or more persons.
>
> (2) This paragraph applies where—
>
> …
>
> (e) the person concerned is fulfilling a legal obligation or participating in legal proceedings;"

34. It has not been argued that it would be unlawful for any of the participants to attend court. If the hearing does take place in court then those attending court (the legal representatives and each of the witnesses, save those giving evidence by remote link) will be doing so in order to participate in legal proceedings. It will be lawful for them to do so.

35. Nor has it been argued that attending a hearing would give rise to a risk to the safety of the participants (save for the position of one witness who will, in any event, give evidence by video link). Her Majesty's Court Service is responsible for the administration of the courts. It has made a published commitment to maintain the safety of all in the courts, in line with public health advice. It has offered a public assurance that it has "comprehensively assessed risk to staff and users and are ensuring the safety of anyone who comes in to our buildings" (https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation and (https://www.gov.uk/guidance/keeping-court-and-tribunal-buildings-safe-secure-and-clean). It provides reassurance that it has done this by applying published safety controls which have been endorsed by Public Health England and Public Health Wales.

36. That then leaves the question of the practicality of a court hearing next week. Some jury trials are now taking place in the Crown Court. Such trials raise obvious practical difficulties (primarily because of the role of the jury) in the light of the need to maintain a 2 metre distance between participants, in line with Government guidance on the steps to be taken during the Covid-19 pandemic. If a jury trial can be conducted then it is difficult to see a practical impediment to a non-jury civil trial. The procedures that have been put in place by Her Majesty's Court Service include mechanisms to assist court users to maintain a 2 metre distance from one another. Nobody has provided a convincing reason why a court hearing next week is not practicable. I have spoken to court staff who, very helpfully, are confident that a hearing next week can be accommodated with appropriate social distancing measures. I

have made directions accordingly. I am very grateful to them for the hard work that is being undertaken to make that happen.

Determination of application and directions for hearing

37. The application is dismissed. It was predicated on the hearing being conducted remotely. There does not currently appear to be any reason why the hearing must be conducted remotely. The premise for the application therefore falls away. In any event (and if it turns out that there is some insurmountable obstacle to a court hearing) a remote hearing could be conducted in a way that is fair to all parties. The application of the overriding objective to the circumstances of this case requires that the hearing should take place next week, even if it had to be conducted remotely.

38. I have made case management directions on the basis that the hearing will be conducted in court (including the timetabling of speeches and witnesses so as to reduce the number of people who have to be in court at any one time and thereby assist social distancing). I have made contingent directions in case it turns out that the hearing has to be conducted remotely. These include directions that seek to accommodate the many concerns that have been expressed by the Defendant about the fairness of a remote hearing (so they include, for example, breaks between witnesses for the parties to give, or the lawyers to seek, instructions, breaks during the court day so as to limit the amount of continuous "screen time" for participants, and steps to ensure that all witnesses and legal representatives have easy access to the same, agreed, court bundle).

Outcome

39. The application is dismissed. I have, however, made directions which seek to ensure that the Defendant secures that which was ultimately sought by its application: its day in court.