Neutral Citation Number: [2024] EW Misc 13 (CC)

Case no: G31YX469

IN THE COUNTY COURT SITTING AT BRADFORD

Date: 15 January 2024

Before :

HHJ MALEK

- -

Between :

MRS APRIL ROSE RICHARDSON **Claimant**

- and -

MID YORKSHIRE HOSPITALS NHS TRUST **Defendant**

- -

Ms. Leila Benyounes (instructed by **Hudgells Solicitors**) for the **Claimant**
Ms. Jasmine Chan (instructed by **Hempsons LLP**) for the **Defendant**

Hearing dates: 4-8 December 2023

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APPROVED JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

HHJ Malek :

Introduction

1. This case is about the medical care afforded to the Claimant when giving birth to her son and whilst she was in the Defendant's care on 5 April 2016. The Claimant alleges that the care she was given was negligent and that, as a result, she suffered serious personal injury and loss. The Defendant denies that it was negligent.

The factual evidence

2. Factual evidence on behalf of the Claimant was given by her, her husband, Mr. Richardson, and her mother, Ms Crossley. It is, largely, uncontroversial and is summarised below.

3. The Defendant did not call anyone to give any evidence.

4. The Claimant fell pregnant with her first child when she was around 24 years old and was, by all accounts, very excited about her pregnancy. She describes being well throughout her pregnancy and had taken hypnobirthing classes because she wanted a water birth. She had also taken the trouble to prepare a "birth plan".

5. On 4 April 2016 the Claimant discussed the induction of labour with a doctor because by this point she was overdue and she had reported reduced foetal movements. A clinical decision to induce (to which the Claimant consented) was taken and the Claimant was admitted to the Defendant's antenatal day unit at 1 pm on the same day.

6. At 4.10 pm a vaginal examination was performed by Midwife Emmett and the Claimant was given a Propess Pessary in order to induce labour.

7. At 12.40 am, on 5 April 2016 the Claimant was noted to be having regular contractions and a Cardiotocograph ("CTG") was used 5 minutes later to measure the baby's heartbeat.

8. The Claimant's medical notes show that at 1.20 am a vaginal examination was carried out and the Claimant is noted as becoming more distressed with contractions and commenced using Entonox. At 1.30 am there was a further vaginal examination and the Propess Pessary was removed.

9. At 1.40 am the Claimant was transferred to the delivery ward under the care of RM Cunningham-Brown and Student Midwife Hewitte- Ward. The notes show that no monitors or CTG belts were available.

10. The medical notes show that the Claimant "*appears to be involuntary pushing*" at 2.15 am and that a CTG was commenced at 2.33 am. The Claimant is again noted to be "*involuntary pushing*" at 2.35 am and that the CTG was normal 2.40 am.

11. At 2.45 am the notes record that the Claimant was given encouragement "*with pushing*" and that "*good maternal effort*" was noted. By 2.46 am the foetal head was "*advancing out of [the – sic] perineum quickly*" and by 2.47 the Claimant had given birth to a baby boy ("Finn") who is described in in the medical notes as being "*delivered in good condition*".

12. At 2.50 am the umbilical cord was cut by Mr. Richardson. However, by 2.52 am significant blood loss was noted and at 2.55 am RM Lloyd was summoned

into the delivery room. She noted that the placenta had not been delivered and that the Claimant had suffered significant blood loss. She asked for an Obstetric Registrar and Anaesthetist to attend.

13. The Claimant was taken into theatre at 3.01 am having suffered a major post-partum haemorrhage, multiple labial and vaginal tears, and a third-degree tear involving the rectum, which required suturing.

14. The Claimant can remember little about the events that followed immediately after the birth of her child, but she remembers being in theatre, signing something and being able to watch the surgery being performed on her because of a mirror. She recalls asking a doctor if she was going to die and it is at this point it dawned on her just how seriously ill she was.

15. The surgery finished at 06:03 and the Claimant was taken into a "High Dependency" room. Finn and Mr Richardson were already in the room and they were all later joined by the Claimant's step dad, sister and mother. Later a surgeon came to explain what had happened. The surgeon explained how Finn had been born quickly with his arm to the side of his head and that this had caused the Claimant damage. The surgeon then demonstrated what had happened with a rubber glove and a bottle of diet coke; using the bottle of diet coke to rip the glove. The Claimant was left upset and embarrassed by this.

16. The Claimant then spent several days in hospital where she struggled to care for Finn. At times she felt confused and recalls one evening when she could not recall her son's name. She remembers that her mother and husband would stay and help her with caring for Finn. She also struggled with her own personal care and had to be helped to shower by her husband.

The expert evidence

17. I heard from six experts in total. Mrs Beresford (instructed on behalf of the Claimant) and Miss Crocker-Eakins (instructed on behalf of the Defendant) are midwives and gave evidence on the issues of breach of duty and causation. Mr Farkas (for the Claimant) and Mr Penny (for the Defendant) gave evidence in the field of Obstetrics and Gynaecology on the issues of causation and condition and prognosis. Dr Ford (for the Claimant) and Dr Buller (for the Defendant) gave evidence in the field of Psychiatry on the issue of condition and prognosis.

18. All the experts, in my judgment, remained mindful of their duties to the court and gave evidence in measured terms with a view to assisting me. As a result they, in reality, agreed more than differed.

Discussion

19. It is trite law that in order for a claimant to succeed in a claim for clinical negligence she must show that (i) a defendant owed her a duty of care, (ii) that the defendant breached that duty, and (iii) she suffered harm as a result.

20. It is accepted in this case that the Defendant owed the Claimant a duty of care. Breach of duty and causation are in dispute and are at the heart of this case.

Breach of duty

21. It is common ground that the test for negligence is that set out in the cases of *Bolam v Friern Hospital Management Committee [1957] 1 WLR 582* and *Bolitho v City and Hackney Health Authority [1997] 3 WLR 1151*: would the

actions of the midwife have been supported by a reasonable and responsible body of midwifery opinion?

22. Further, whilst the Claimant sets out a range of allegations in her particulars of claim (which remained apparently live during the course of the trial) it is clear, as demonstrated by the written closing submissions filed on her behalf, that the Claimant's case is really that there was failure by the Defendant to provide a "controlled delivery". In particular, the pleaded allegations are as follows:

> "*(f) Contrary to NICE guidance, failed to consider hyperstimulation and take steps to ensure that the labour process was slowed to allow a controlled delivery.*
>
> *(g) failed to instruct the Claimant to pant during involuntary pushing to control the delivery*".

23. In respect of allegation (f) the relevant part of the NICE guidelines provide:

> "*1.13.13 Either the 'hands on' (guarding the perineum and flexing the baby's head) or the 'hands poised' (with hands off the perineum and baby's head but in readiness) technique can be used to facilitate spontaneous birth.*"

24. The Claimant submits, with reference to the Defendant's own policy on Care for Women in Labour, that one of the two techniques ("hands on" or "hands poised") should be used to facilitate a spontaneous birth, unless there is clinical justification for not doing so. This seems to me to be uncontroversial and I did not understand either Ms Beresford or Ms Crocker-Eakins to be saying anything to the contrary. To the extent that it might be suggested that Ms Beresford's

view was that only a "hands on" technique was acceptable I reject such evidence.

25. No clinical justification "point" was taken or pursued by the Defendant and the question, therefore, boils down to whether the midwife delivering the Claimant's child used either the 'hands on' or 'hands poised' technique. This, it seems to me, is purely a question of fact.

26. The starting point is that this is the Claimant's case and, of course, it is for her to prove her claim. In this case she must prove, on the balance of probabilities, that the midwife failed to use either the 'hands on' or 'hands poised' technique. She does not give any direct evidence as to whether or not either of the techniques were being employed by the midwife. That is not surprising as I would not have expected her to be able to see what the midwife was doing at that stage and, no doubt, she was in considerable pain at the time. She can only recall that things were "*rushed*" and "*everything was chaotic*", that the midwife appeared to be "*putting her gloves on*", and that "*Finn practically flew out*". The Claimant's husband, the only other person present at the time of delivery and giving evidence, recalls that the midwife had "*gotten*" her gloves, was perched on a stool at the bottom of the Claimant's bed and "*moments later Finn was born*".

27. In short, neither the Claimant nor her husband are able to say that the midwife did not use either of the techniques. In fact, "perching" on a stool at the foot of the Claimant's bed would tend to suggest an element of preparedness and readiness on the part of the midwife. More importantly, whilst acknowledging the difficulties of proving a negative, I agree with the Defendant's submissions

that it is important that the burden of proof not be reversed. Nor is the Claimant's position particularly helped by reliance upon the Court of Appeal's decision in *Wisniewski v Central Manchester Health Authority [1998] EWCA Civ 596* where it was held that "*in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action*". Whilst I accept that the midwife in question clearly had relevant evidence to provide and that I am entitled (that is to say I have a discretion enabling me) to draw adverse inferences from the Defendant's failure to call her, in my view, I should exercise caution in doing so in the present case. This is because, firstly, there is no property in a witness. It was equally open to the Claimant to call the midwife as a witness, by summonsing her if necessary. Secondly, it seems to me that a court should be more willing to draw adverse inferences where a witness has provided a statement or sought to make a positive case and then is absent or silent. That way the inferences are drawn as a shield (as opposed to a sword) where a positive factual position is put forward. In the present case the midwife in question has not made a statement at all. I, therefore, decline to draw any adverse inferences from the failure by the Defendant to call the midwife as a witness.

28. It follows, therefore, that the Claimant is unable to establish as a matter of fact that the midwife attending her failed to use either the 'hands on' or the 'hands poised' technique.

29. There is no dispute between the experts that midwifes routinely instruct women in labour to "pant" (although now referred to as "outward breaths" on the NHS

website) and that this is an intrinsic part of midwifery practice designed to slow down and control a delivery. The rationale behind the instruction is that it is not possible for a woman in labour both to "pant" and to "push" at the same time.

30. The question again boils down to a factual one: Was the Claimant instructed to pant? The point taken against the Claimant is that she does not expressly say so in her witness statement and only said so during the course of oral evidence. Further, the Defendant relies upon the well-known line of authority arising from the decision in *Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)* and urges caution when attaching weight to the Claimant's oral evidence, in particular pointing to:

    i) The passage of time and the inherent unreliability, fallibility and malleability of memory,

    ii) The fact that the Claimant had told Dr Ford that she had a "*patchy recall of events*", and

    iii) The fact that this was necessarily a very distressing and highly emotional time for the Claimant.

31. All of these matters mean that I should, rightly, treat the Claimant's evidence with some caution. However, the difficulty for the Defendant is that, imperfect as it may be, this is the totality of the evidence available on this point. In the absence of more, and where there is no doubt cast on the honesty of any witness, I feel compelled to accept the Claimant's evidence on this point and do so. Accordingly, I find that on the balance of probabilities, the Claimant was not instructed to "pant" during delivery.

32. This means that the Claimant is able to establish a breach of duty.

Causation

33. The Defendant submits that both factual as well medical causation must be established and that Claimant has failed to do so.

34. *Factual causation*

35. The Claimant must show, before turning to medical causation, that, on the balance of probabilities, panting would have led to a slower, more controlled delivery.

36. The Defendant submits that this is primarily a question for the midwifery experts and that Mrs Beresford, the Claimant's expert, could not conclude, on the balance of probabilities, that panting would have slowed the delivery down in circumstances where:

i) the efficacy of panting cannot be guaranteed,

ii) relies upon the mother listening to and putting into practice instructions, and

iii) where the Claimant seemed unable to stop herself from "pushing".

37. The Claimant contends that the midwife experts were instructed solely on the issue of breach of duty and not causation and that Mrs Beresford was attempting to stay within her remit. When cross-examined on whether an instruction to pant would, on the balance of probabilities, have changed the speed of this delivery,

Mr Farkas was clear that it would have reduced the speed of the baby delivered and reduced the extent of tearing.

38. The starting point is that it is for the experts to assist the court by providing opinion evidence on matters within their experience and expertise. It is, ultimately, for the court to make a decision on the issues – including causation (both medical and factual). In this case both midwifery experts agree that instructions to "pant" are an intrinsic part of midwifery practice and slowing down the delivery "*may be assisted by asking the mother to pant*". Mr Farkas goes further and says that "panting" would have reduced the speed of delivery.

39. The Defendant's argument is, essentially, that I should ignore Mr Farkas' evidence on this point. I do not think that I should do so for two reasons. Firstly, it seems to me that the question falls within his area of expertise (albeit it may also properly be answered by a midwife). Secondly, he does not appear to me to be contradicting anything said by the midwifery experts – he simply expresses himself with more certainty as to the outcome.

40. After considering both the available Midwifery and Obstetrics evidence I am satisfied that factual causation is made out.

Medical causation

41. The Claimant must show that the breach of duty either caused or materially contributed to the injury. Material in this context means more than merely negligible.

42. Mr Farkas and Mr Penny agree that, if the Court finds that there was an "uncontrolled delivery", it contributed to the:

i) Tearing/ lacerations including the 3a perineal tear ("tearing")

ii) Post-partum haemorrhage ("the haemorrhage")

iii) Pain, restriction, and consequences of the injuries ("the consequences").

43. On the issue of tearing it is fair to say that both obstetric experts agree that more control during delivery would have resulted in less vaginal trauma and, therefore, tearing. Neither expert was able to go further and opine on the extent of the reduction in tearing or trauma.

44. The obstetricians agreed that the majority contributor to the haemorrhage was the retained placenta and uterine atony and that the bleeding from the lacerations contributed to the blood loss. It is clear, therefore, that the majority of the haemorrhage was caused by reasons unrelated to any negligence.

45. The joint obstetric evidence confirmed "*we agree that if there had been less vaginal trauma, there would have been less vaginal pain in the post-natal period*". I also accept that the pain and restrictions described by the Claimant with normal activities and delayed resumption of intercourse is in excess of that usually experienced, is not part of normal post-natal recovery, and is attributable to the vaginal trauma sustained at delivery.

46. It is therefore clear, on the evidence, that the negligence materially contributed to the injuries that I have identified above.

47. It follows from what I have said above that the Claimant is able to establish causation.

Quantum

General damages

48. There is little between the obstetric experts on the issue of condition and prognosis. Both reported, from the Claimant's account in interview with each, a similar period of pain and suffering following the birth, and similar effects on day to day living and in particular difficulties with intercourse.

49. In short, the Claimant sustained a post-partum haemorrhage requiring surgery and a stay on the high dependency unit with multiple tears to the vagina, labia and rectum (3a internal perineal tear). She required blood and plasma transfusions.

50. Following surgery the Claimant suffered pain which stopped her from sitting comfortably for at least 6 weeks and driving for 12 weeks. She developed faecal urgency. The Claimant was unable to carry out personal self-care, day to day activities, including caring for her newborn baby, and required care and assistance from her husband and mother whilst she was restricted at home. The Claimant was unable to breast-feed as she did not produce milk and was in significant pain, restricting her to lying on her left side for 6 weeks. The resulting vaginal scarring from the tears caused significant sexual dysfunction: inability to have penetrative sexual intercourse, pain on resumption and the use of vaginal dilators.

51. The principal area of difference between the obstetric experts is that of continuing pain. Mr Farkas reports that the Claimant continues to suffer from ongoing pain in the vaginal wall at the time of her period and requires pain relief. However, he could not identify a causal link between the negligence and these symptoms, simply a temporal one. In cross-examination he maintained this position. In those circumstances, I cannot be satisfied that the ongoing pain experienced by the Claimant is caused by the negligence already identified.

52. There is also much agreement between Dr Ford, psychologist, and Dr Buller, psychiatrist. They agree that there were some post-trauma symptoms which did not satisfy the diagnostic criteria for PTSD and resolved within 4 weeks.

53. Drs Ford and Buller agree that the Claimant suffered an Adjustment Disorder. Dr Buller identifies that this was associated with depressed mood, and Dr Ford identifies features of depression and anxiety. The primary diagnosis is the same, but with different sub-diagnoses. I agree that this makes little difference to my overall assessment of quantum.

54. The experts differ slightly in their opinion on severity and duration. Dr Buller considers the Adjustment Disorder with depressed mood resolved by summer 2016, and did not exceed moderate severity. Dr Ford considers that the Adjustment Disorder with anxiety and depressed mood was between moderate and severe for 3 months, moderate for 3 months, then mild for a few months and subsequently resolving. Again, this difference between the two experts has no appreciable affect on my overall assessment.

55. Both experts agree that the Claimant no longer meets the criteria for a recognised psychiatric disorder, but that she would benefit from some counselling therapy.

56. The Judicial College Guidelines (the "Guidelines") deal with psychiatric damage generally at Chapter 4 (A). For the reasons given by the Defendant bracket (c) moderate £5,860 - £19,070 represents an appropriate starting point. These figures will need to be uplifted for RPI updating.

57. There are no relevant sections in the Guidelines which assist with the Claimant's physical injuries. Instead, the parties referred me to a number of quantum cases. The two that I found to be most helpful were:

    i) ET v Shrewsbury and Telford Hospital NHS Trust (2019) – ET received £13,000 (£17,226.94 RPI) in general damages following a 3.5 week delay in diagnosing and removing a retained placenta; she suffered post-partum haemorrhaging leading to her collapse, avoidable re-admission and surgical removal of the placenta, and an Adjustment Disorder with features of post-traumatic stress; and

    ii) KT v University Hospitals Southampton NHS Foundation Trust (2022) Major haemorrhage and placental abruption leading to blood loss and admission to HDU. PTSD and recurrence of pre-existing depression (absence of tearing) PSLA £35,850 (updated).

58. In coming to a view on the overall award for PSLA I have, of course, to bear in mind that it is not simply a case of toting up, in this case, the damages for the physical and the psychiatric injury. There will, of course, be a degree of over lap. I have also to consider the degree to which there would inevitably have been pain, suffering and loss of amenity as a result of the non-negligent injuries (for example the PSLA that would be expected from the non-negligent labour, delivery and recovery, the haemorrhage that occurred due to uterine atony and retained placenta, and the post-trauma symptoms which are attributable to the haemorrhage) that the Claimant suffered. The Defendant is, of course, not liable to compensate the Claimant for any of this PSLA. Taking into account all of the

evidence, the submission made and the matters set out above an appropriate award, in my judgment, would be £20,000.

Special damages

59. That care was provided gratuitously by the Claimant's husband and mother is not disputed by the Defendant. Care is claimed at £4,169.62 plus interest and the Defendant offers £1,437.01. The Defendant discounts the hourly rate to £5.06 and the Claimant to £7.54 on the basis that it is provided gratuitously. In my judgment the 25% discount provided by the Claimant is adequate to acknowledge the gratuitous nature of the care.

60. The Claimant's care claim is based upon 7 hours care being provided per day over 112 days. I agree with the Defendant that this is likely to be an over - estimate. This is not only because the amount of care required would have significantly reduced with time, but also because the Claimant would have required a degree of care and assistance as a result of being a new mother and as a result of the vaginal trauma and pain that would have occurred even absent the negligence. In the circumstances, I am satisfied that reducing the number of hours to 3.5 per day, on average, will produce a more reasonable result. Accordingly, I award the Claimant the sum of (£7.54 x 112 days x 3.5 hours =) £2,955.68 in respect of the gratuitous care provided by her husband and mother.

61. Travel and medication expenses are each claimed at £50. I note that there is no evidence for either claim and accordingly award the sum of £25 each, as offered by the Defendant.

62. As set out above, both psychiatry experts agree that the Claimant will require future psychological treatment. Both agree that this should take the shape of twelve sessions of therapy at a cost of between £180-200 per session. Taking the middle point of £190 gives a total sum of £2,280. I make the award accordingly.

Conclusion

63. For the reasons given the Claimant's claim succeeds to the extent set out.

64. The parties are invited to agree any orders consequent upon this judgment and file a draft in advance of this judgment being handed down. In the event that a draft order is agreed the parties and their representatives are excused from any further attendance. Alternatively, if agreement is not possible I shall hear submissions on any consequential orders following the formal handing down of judgment.