

Thursday, 8 December 2022

(10.30 am)

(In the absence of the jury)

Housekeeping

MR JUSTICE GOSS: Mr Johnson, Mr Myers, before we address the issue of Mr Myers' application, can I put on the record that the defendant is not present and you can confirm, Mr Myers, that as discussed yesterday, she has waived her right to attend today.

MR MYERS: Yes, my Lord, she has.

MR JUSTICE GOSS: Thank you very much.

The second piece of information is that another juror has tested positive for COVID and is not feeling well so would not have been fit to attend today in any event.

My view, provisional view, which I think was communicated to you is there is really no point in attempting to sit tomorrow with the jury because the chances are a juror will not be well, be it one that's already tested positive or another. Therefore in those circumstances, subject to any representations made by either of you, I would propose that we do not sit with the jury tomorrow and they are told that unless told otherwise they should be here on Monday morning if they're fit to attend.

1 MR JOHNSON: Yes.

2 MR MYERS: We agree, my Lord.

3 MR JUSTICE GOSS: Good. So that deals with that. We'll
4 just have to wait and see where we are on Monday
5 morning, I'm afraid.

6 Mr Myers, thank you very much. I have received
7 this. Unfortunately, by reason of other commitments,
8 I have to say I have not considered it in detail, your
9 response. So please feel free to take me through the
10 initial application and the response unless you'd rather
11 I just completed reading it now.

12 MR MYERS: It would be helpful, my Lord, if your Lordship
13 did. I understand -- I apologise, it arrived --
14 yesterday evening it was sent to your Lordship, so
15 I apologise for that. It look a little time to deal
16 with all the matters yesterday and to deal with that, so
17 we recognise the time constraints and would certainly
18 much rather your Lordship have had the opportunity to
19 read and see what it is we say in that response, some of
20 which we deal with in what we have to say to
21 your Lordship today, but before I address your Lordship.

22 MR JUSTICE GOSS: In which case, if you don't mind -- please
23 sit down -- I'll just sit and read through the rest of
24 it. I had got part of the way though it but I hadn't
25 completed it because I had another meeting this morning

1 this application is concerned. We are concerned because
2 this is, we submit, an entirely legitimate application,
3 but it appears to be used by the prosecution in their
4 response, that response as a means of silencing a basic
5 and necessary aspect of the defence case and, it would
6 appear, looking at the way that is framed, in effect
7 reversing the burden of proof on what is a fundamental
8 and overarching aspect of the prosecution case.

9 It is for that reason, in our recent response,
10 we have approached this by identifying the relevance of
11 this material to the defence case but also the obvious
12 relevance to the prosecution case.

13 The material that the defence seek to introduce by
14 means of this application relates to the performance of
15 the unit arising out of a service review conducted by
16 the Royal College with the assistance of a number of the
17 witnesses in this case.

18 The areas the defence are concerned with are
19 staffing generally, arrangements concerning the
20 consultants in particular, and also the relationship
21 with tertiary units that are able to provide a higher
22 level of care than the Countess of Chester neonatal unit
23 could at the relevant time. They engage with the issue,
24 the defence say, of risk given the increased number of
25 admissions and increased acuity of those admissions

1 between 2015 and 2016. They are also relevant to the
2 circumstances, we say, in which blame came to be focused
3 on Ms Letby by means of an ongoing process at the unit
4 leading into the police investigation as the source of
5 what was wrong.

6 Your Lordship will know in real terms, so far as the
7 evidence to date has been concerned, this has actually
8 only concerned a small part of that evidence. By a long
9 stretch, the balance of the evidence and
10 cross-examination has been focused on the medical issues
11 which are of crucial importance, but these are important
12 issues as well.

13 So far as the prosecution are concerned, it is their
14 case that this unit was functioning well in general, not
15 just with regard to cases on the indictment, and it is
16 their case that there is no fault on behalf of the
17 medical professionals where these charges are concerned,
18 save for the concession in opening that a mistake was
19 made with regard to [Baby D] and antibiotics and
20 in the care of [Baby H]. It is their case,
21 of course, that there have been fair and proper
22 enquiries and investigation throughout. Those are
23 general matters.

24 The prosecution opened their case to the jury on
25 that basis. And in paragraph 29 of our response we have

1 set out assertions the prosecution made with reference
2 to where your Lordship can find them in the transcript.
3 These are general assertions starting with the assertion
4 that the Countess of Chester neonatal unit was
5 a hospital like any other hospital in the UK, which is
6 just about the first thing the prosecution said to the
7 jury, before turning to questions of statistics, the
8 rise in the number of babies dying, and what it is said
9 the consultants noticed and how they searched for
10 a cause, and how they say the presence of the defendant
11 was a common denominator.

12 That's what the prosecution said in opening. The
13 prosecution have also served 250 pages of what's called
14 overarching evidence taken from the consultants and the
15 nursing staff upon which, to a greater or lesser extent,
16 those assertions are based. In the course of the
17 thousands of pages of evidence that we are dealing with
18 in the statements, explicitly or implicitly, those
19 assertions lie behind them.

20 The prosecution have taken the decision, it would
21 appear, to present evidence that relates specifically to
22 those parts of their case at later stages as part of
23 their overarching case. That's a matter for them,
24 they've chosen to do that, but these are issues in the
25 case of general application and this is the baseline for

1 the prosecution case and the basis against which the
2 assertions as to the general level of operating at the
3 hospital are concerned and against which the fairness of
4 the inquiry that is conducted, which begins with two of
5 the consultants at the hospital, moves on from. That is
6 what they say.

7 We say that it is for the prosecution to prove that,
8 and that underlying or overarching material is something
9 the defence are entitled to challenge and it is
10 necessary for us to do so.

11 Therefore, material bearing upon that is of
12 fundamental importance to the case the prosecution
13 present and the way they seek to present it and it would
14 be and is, we submit, wrong for them to seek to prevent
15 the defence from challenging a basic part of the
16 prosecution case and that is what they seek to do in
17 their response and it is wrong to impose on the defence
18 a burden to justify a basis for a challenge to the
19 functioning of unit when it's their case in opening, as
20 a basic starting point, that its performance in general
21 has no part to play. So this is relevant to the
22 prosecution case howsoever they choose to present it.

23 So far as the defence case is concerned, from an
24 early stage the defence have set out the relevance of
25 the background to this and the level of functioning of

1 this unit and the part played in it by those parties who
2 conducted the investigation into their own unit
3 throughout the course of the period June 2015 to
4 June 2016. That's set out, and reference to this,
5 my Lord, is in the defence response at paragraphs 13 to
6 15, but it's set out in the defence statement at length
7 in paragraphs 11 to 20. That was uploaded to the DCS on
8 14 December 2022 -- February, I apologise,
9 14 February 2022.

10 The defence set out the relevance of the standard of
11 care and what we say is the relevance of potential
12 deficiencies in that in the defence introduction to the
13 issues to the jury. Your Lordship will find that in the
14 transcripts on LiveNote for 13 October 2022 and
15 references are included in paragraph 14. But we were
16 clear then that matters that arise are issues as to
17 whether the unit could deliver the care required,
18 whether imputations against Ms Letby are self-serving,
19 whether substandard of care generally creates an
20 environment of risk, and whether the consequences of
21 poor performance generally have led to a bias, conscious
22 or otherwise, against the defendant, emanating from the
23 investigation that was conducted by the unit into its
24 own affairs and out of which this investigation then
25 develops.

1 Those are crucial parts of this case. They don't
2 attach to any particular count, they are overarching in
3 just the same way that those matters set out by the
4 prosecution at the beginning of their introduction to
5 the jury are overarching and the vast amount of evidence
6 they have at their disposal is overarching in general.

7 We are compelled to observe that criticism of the
8 defence case as to this coming now is fundamentally
9 undermined when we see that that is only raised as
10 a reaction to a hearsay application introducing,
11 potentially, material from a source that is referred to
12 by the prosecution witnesses but material that is
13 potentially inimical to the prosecution case and it is
14 in those circumstance, after all this has passed and
15 after 45 days of trial, that the prosecution say
16 henceforth the defence should be, to use their language,
17 forbidden from pursuing what has been a crucial part of
18 the defence case, appropriately balanced within the
19 evidence, and as it happens, and even more surprisingly,
20 an overarching part of the prosecution case.

21 So far as the general application of this evidence
22 is concerned, it is relevant to both cases and sets
23 a context against which overarching issues like the
24 performance of the hospital can be considered, issues as
25 to what lies behind the investigation conducted by the

1 consultants will be considered. We will be coming to
2 that. It's the prosecution's choice that it hasn't been
3 dealt with now but it's in the evidence and it occupies
4 a large part of the overarching part of this case. The
5 prosecution have indicated they will deal with it at
6 a later stage.

7 That's general. Its application to individual cases
8 will, in due course, be a matter for the jury and, we
9 submit, it's something the jury may apply in individual
10 cases so far as relevant. We do not submit, and haven't
11 done, that this goes to determine in every instance the
12 individual cases, but in fact there is an overlap that
13 will be apparent.

14 For example, and I give these, the cases we've dealt
15 with, in the case of [Baby A] we know he was left
16 without fluids for 4 hours and, we say, a badly sited
17 long line for 2 hours, all of which play a part in his
18 deterioration and collapse. That's the defence case.

19 It is evident from the passages of evidence relating
20 to that that Dr Harkness was occupied with many duties
21 at the time. We submit that's a consequence of
22 a hospital that is overstretched. We've dealt with the
23 staffing issues on that count and the fact that one
24 nurse is dealing with two intensive care patients.
25 That's wrong. That is symptomatic of the overarching

1 condition of this hospital. I give that as an
2 illustration, and that type of thing applies, to a
3 greater or lesser extent, to various cases on the
4 indictment. But the type of background material that we
5 refer to and have dealt with in the evidence and lies
6 within this report is therefore relevant potentially on
7 individual cases but that's rather incidental. Its
8 greater relevance is to the overarching state of the
9 hospital and its practitioners and in that way it's
10 a baseline standard for both cases.

11 It also, though -- we observe this, and this is
12 referred to in our response, it also bears upon the
13 evidence of the prosecution witnesses. Significantly,
14 notwithstanding critical observations in their response
15 to our application, this evidence has largely come from
16 these witnesses and comes from their witness statements,
17 which were taken as part of the investigation because it
18 was understood that the functioning of the hospital is
19 a relevant part of this case.

20 The nurses' statements, where we have identified
21 them, have referred to how busy the unit was and the
22 staffing levels. The passage referred to in the
23 evidence of [Nurse B] comes from her statement; we've
24 given the reference to that in our response. The
25 consultants deal in detail with what took place. The

1 prosecution cannot have at their disposal this
2 evidence -- and evidence that, as we understand, is
3 due to form some part in this case and has certainly in
4 general terms being outlined in the opening -- and then
5 complain when the defence turn to address it.

6 Therefore, so far as the relevance of the material
7 we identify is concerned, it is relevant, in fact, to
8 both parties in this case. It has already -- the issues
9 it touches upon have been set out in opening by the
10 prosecution. It has formed, consistently, an important
11 part of the defence case. To leave it undefined in
12 evidence at this point is a matter for the prosecution
13 and their choosing, but to seek to prevent the defence
14 from dealing with it when it's necessary and meets this
15 case is no, we submit, appropriate response to the
16 application we make or the defence case.

17 We understand the scale of the prosecution case and
18 those defending all have experience of prosecuting as
19 we have defending and there has been a constructive
20 degree of cooperation between the parties in this case
21 and we have left it to the prosecution as to how they
22 approach the overarching evidence in this case. We are
23 compelled to observe, if the position we reach when
24 making an unconventional application like this is to say
25 that we should simply be shut out from raising this as

1 our defence then we will require the prosecution to set
2 out in detail what it is precisely they rely upon from
3 the vast amount of material in the overarching case.

4 They have already opened it, but we fail to
5 understand how what we're seeking to introduce is
6 irrelevant in the way the prosecution maintain in their
7 response. We submit that approach is wrong and capable
8 of leading to significant unfairness.

9 I turn from that, my Lord, to the material itself
10 and the basis for the application. I deal with that
11 because the prosecution response objected on three
12 bases. It objected on the basis of relevance; we submit
13 this material is plainly relevant to both cases. The
14 prosecution submit that the use of hearsay here
15 circumvents the calling of witnesses; I will deal with
16 that in due course. And they submit that the material
17 constitutes expert evidence in accordance with Rule 19
18 of the Criminal Procedure Rules (2020) and therefore
19 would be constrained by that in any event. We have
20 dealt with that point briefly at the conclusion of our
21 response.

22 Just dealing with that, because it's a discrete
23 point, we submit this is not expert evidence. The
24 purpose or, rather, the role and status of an expert is
25 defined by Rule 19.1 of the Criminal Procedure Rules:

1 "An expert is characterised by his or her role
2 in the criminal proceedings and the status that attaches
3 to them within that."

4 That is not what this is. This is a report that was
5 undertaken at the request of the trust with the
6 participation, as it happens, of key prosecution
7 witnesses, and is an amalgam of findings presented by an
8 official professional body. It isn't expert evidence in
9 the sense that the prosecution seek to use it as a means
10 of excluding it.

11 The terms of the application are as set out in our
12 original document, dated 4 December 2022. It is made
13 under section 117(1)(b) and 114(1)(d) of the Criminal
14 Justice Act (2003). They are appended to the
15 application.

16 The general nature of the report is set out there,
17 your Lordship has a copy, and the material the defence
18 seek to adduce has been identified with particularity at
19 paragraphs 9 and 10. Paragraph 9 deals with material
20 that sets out the parameters of the review.

21 Paragraph 10 sets out material relating to findings and
22 conclusions.

23 We deal with section 117(1)(b) at paragraphs 11 to
24 13 and 114(1)(d) at paragraphs 14 through to 20. I'll
25 summarise now because your Lordship and the prosecution

1 have that set out, but of course I will enlarge upon
2 anything that assists the court or arises out of the
3 prosecution response.

4 The application under section 117(1) (b) is on the
5 basis that this contains -- it's a document or part of
6 a document containing statements that were created or
7 received by a person in the course of a trade, business,
8 profession or other occupation and that the requirements
9 of subsection (2) are satisfied.

10 It's an important part of that that this is
11 a professional inquiry, the terms of reference are
12 clear, the sources of material are set out at the
13 appendix to it, it includes the witnesses who would in
14 fact be cross-examined upon it. And the defence would
15 seek to utilise this material, if leave was given to use
16 it, in the cross-examination of certain of the
17 consultant witnesses in this case who are perfectly
18 familiar with the content of this report and whose
19 statements were made in knowledge of the report and, so
20 far as we understand, with participation or potential
21 participation in its creation. And indeed, what
22 triggers this application at this stage is the evidence
23 of Dr Gibbs, who, when he came to give evidence in the
24 case of [Baby F], chose, having reflected upon
25 questioning when he first gave evidence, to volunteer

1 what could be described as a speech into the standard of
2 operating of this hospital. That's what he talked about
3 and how it was no different from other hospitals.

4 That prompts the application at this stage, although
5 we observe in parentheses it is almost inevitable this
6 application would have been made sooner or later given
7 the contents of the witness statements.

8 Returning to the point under section 117, we submit
9 that in the circumstances this can properly be adduced
10 or these passages can properly be adduced in accordance
11 with that section. In addition, or alternatively, so
12 far as section 114(1)(d) is concerned, of course the
13 test there, whatever factors the court focuses upon, is
14 whether the material meets an interests of justice test,
15 can be admitted in the interests of justice, and we
16 understand that is a balancing exercise the court must
17 perform, informed by but quite independent of the
18 question of relevance, because of course if it was not
19 relevant then we wouldn't get to this point, but we have
20 dealt with that and this is distinct from that.

21 The nine factors in section 114(2) are set out.
22 Your Lordship will know, of course, I am well
23 experienced in the fact that it is not exhaustive, the
24 court doesn't have to reach a decision on all of them,
25 but they are matters the court must have regard to. We

1 observe the relative weight attributed to them, or any
2 of them, depends on the circumstances of the case.

3 We sought to assist by setting out in paragraph 16
4 what we say as to each of those nine factors.

5 It seems, unless of course it would assist the
6 court, perhaps unnecessary simply to read out everything
7 we say about each of those factors.

8 MR JUSTICE GOSS: It wouldn't be helpful.

9 MR MYERS: We anticipate that, which is why I short-circuit
10 it by saying that perhaps of particular -- I don't wish
11 to pre-empt any submissions that are made as to
12 section 114(1)(d), but there are particular features of
13 the report that bear upon it and we simply direct
14 your Lordship's attention to what we say about factors
15 (e) and (f).

16 MR JUSTICE GOSS: (f) is (e) as well.

17 MR MYERS: (e), (f) and (g). We recognise the consideration
18 to be given to them. We don't say that presupposing
19 that militates against admission, but we do recognise
20 those are factors perhaps that the court will focus
21 upon, but we don't pre-empt it, and we have sought to
22 set out there detail that can assist with regard to
23 that.

24 (e) and (f) deal with reliability of the maker of
25 the statement -- the making of the statement -- sorry,

1 (d) and (e) deal with the reliability of the making of
2 the statement and the maker of the statement and (f)
3 with whether or not oral evidence of the matter can be
4 given and if not why not. My numbering may be out
5 there, but I can correct the numbering.

6 MR JUSTICE GOSS: That's right, that's (d), (e) and (f).

7 MR MYERS: As to the circumstances and the makers of the
8 statements within this, we submit there's no question in
9 general to questions of reliability of the process,
10 given how it was conducted, who was involved in it,
11 although we do observe there may be some weighting to be
12 given to certain aspects of the contents of the report.

13 And the point -- we made this point when
14 your Lordship first received this application -- that
15 there may be some difference as to matters that are
16 inculpatory or exculpatory. That's a matter, maybe, for
17 further consideration. But the actual process engaged
18 is a formal process and crucially one in which the
19 witnesses were engaged, which makes this quite unusual
20 and quite different from those cases where very often
21 the source of hearsay evidence may be something quite
22 distinct from the witnesses who are to be cross-examined
23 upon it.

24 With that in mind, and bearing in mind factor (f),
25 whether oral evidence can be given, we submit it's not

1 realistic or really possible to find one person who can
2 give oral evidence of a report, a formal report, by
3 a body to which these witnesses have contributed. It's
4 a composite document based upon different sources of
5 material that they are aware of and able to comment
6 upon. That's one of the aspects of this which is
7 unusual and, we submit, weighs in favour of admission,
8 even though it is a multi-authored report by
9 a professional body because the way in which it would be
10 used would be in cross-examination of the witnesses who,
11 doubtless, would acknowledge what is contained within
12 the passages we identify, but are then pre-eminently
13 able to respond to questions about it.

14 They have knowledge of it and that's in distinction
15 to those cases where a witness may be presented with
16 a document that they have no prior knowledge of, have
17 not been involved with, and are then asked to respond to
18 material they are some distance from. This is
19 completely different. This deals with matters these
20 witnesses are well aware of and to which they
21 contributed.

22 So bearing in mind factor (f) we submit that in
23 fact, on the circumstances of this case, that is in
24 favour of admission.

25 I should say in addressing your Lordship, I note,

1 this is what caused me to -- I note that the annex to
2 section 114 where it sets out the Criminal Justice Act,
3 there are two subsection 2(a)s, which has made me
4 hesitate as I was going through (a) through to (i). It
5 should be (a) to (i), not (a), (a), (b), (c), (d), (e),
6 (f), (g), (h). In fact, the way it's set out in our
7 application is by reference to the correct lettering for
8 those sections.

9 MR JUSTICE GOSS: Yes, not to the annex.

10 MR MYERS: Yes, not to the annex. That needs a (b)
11 inserting and then the letters all move along one. As I
12 was dealing with I realised that's why I was looking at
13 one thing and seeing another --

14 MR JUSTICE GOSS: Don't worry, I'll correct my --

15 MR MYERS: I'm grateful.

16 We recognise those are elements upon which the court
17 may focus and we've dealt with that in some detail
18 in the application and I deal with it there and do so
19 further if called upon to do so.

20 MR JUSTICE GOSS: Yes.

21 MR MYERS: My Lord, that's the application that we make.

22 I'll wait to assist further if I can.

23 MR JUSTICE GOSS: Can I just be clear then precisely what
24 it is you are seeking to adduce in terms of evidence
25 from this report? Because I've read the review and

1 I think it's important to know before, obviously, I hear
2 what Mr Johnson says about it, precisely what it is
3 you are wanting to put in evidence from this review.
4 You're not seeking for the whole report to be put in
5 evidence?

6 MR MYERS: No.

7 MR JUSTICE GOSS: The whole review, sorry. I must call it
8 the review and not the report.

9 MR MYERS: No, we don't. We've set out with particularity
10 the specific sections or the specific points, with the
11 references, in paragraphs 9 and 10.

12 MR JUSTICE GOSS: Yes. So what you want to do is to put
13 those specific findings by the review team to
14 witnesses --

15 MR MYERS: Yes.

16 MR JUSTICE GOSS: -- who will have knowledge of that
17 particular matter?

18 MR MYERS: Yes.

19 MR JUSTICE GOSS: So that's what you're seeking to do?

20 MR MYERS: Yes, to put it to them, but of course to do so
21 in the context of the review having been conducted and
22 these being findings of the review. So it's not simply
23 as questions disembodied without making plain what the
24 source is. But the witnesses, all bar Dr Gibbs, make
25 reference to this review in their statements, so they

1 know precisely what it relates to and we suspect the
2 only reason Dr Gibbs didn't is because it didn't come up
3 in the way he was describing it but it is inconceivable
4 he will not have been aware of this or even participated
5 in it because he's the most senior consultant in that
6 unit and all of them were invited to consult on it and
7 they all work together and would be well aware of the
8 process which took place over 2016.

9 MR JUSTICE GOSS: Exactly. I'm not questioning any of that.

10 But that's what you're specifically wanting to do?

11 MR MYERS: Yes.

12 MR JUSTICE GOSS: Now, would you then say that the jury also
13 need to be told, if you are permitted to do that, what
14 the parameters of the review were and the nature of the
15 review -- I'm looking at the executive summary now -- as
16 to why it was the review was requested, the fact that
17 the team, which consisted of two paediatricians with
18 special interest in neonatology, plus a senior neonatal
19 nurse manager and a lay reviewer, attended at the
20 hospital for 2 days on 1 and 2 September, met staff and
21 stakeholders, including obstetric, network and transport
22 representatives, and were not commissioned to conduct
23 detailed case note reviews but, given the circumstances,
24 recommended that that, in other words detailed case note
25 reviews, be initiated immediately, prioritising the

1 deaths that were considered unexpected, and that
2 essentially this was a review into the system and not
3 into the deaths and collapses of the patients who are
4 now the subject of this prosecution?

5 MR MYERS: My Lord, not only would we agree that's
6 necessary, we submit that is necessary to say that
7 because this is a service review.

8 MR JUSTICE GOSS: Exactly.

9 MR MYERS: It most definitely is not an inquiry into cause
10 of death --

11 MR JUSTICE GOSS: Yes.

12 MR MYERS: -- and it doesn't go to explain that. But it
13 does go to explain the context within which this
14 happens, which is relevant to both cases. And indeed,
15 in paragraph 9 of our application we have particularised
16 what seemed to us to be relevant matters to be put that
17 were not findings or conclusions but set out the
18 parameters within which this review was conducted. So
19 we had anticipated that and were making it quite plain
20 what it related to and the limits of it.

21 MR JUSTICE GOSS: Yes. Right. Because at 3.13 of the
22 review, it sets out in sentence two:

23 "The RCPH was invited to review the investigations
24 of each death and the wider service, including network
25 support and advice protocols and transfer arrangements

1 to provide a view on whether there were any contributory
2 factors in the deaths or missed opportunities to take
3 action that could have prevented or mitigated them."

4 But then expresses no view in relation to that.

5 MR MYERS: No. We've included that at our paragraph 9(iv),
6 because we recognise it's important that's understood.
7 It is the baseline, the background service of the
8 hospital that's considered in principle here, not the
9 individual deaths.

10 MR JUSTICE GOSS: Yes.

11 MR MYERS: So we understand that. It doesn't give the
12 "answer" to that, but questions such as was the staffing
13 adequate or what was the level of communication between
14 senior doctors and the consultants? Those sort of
15 things are touched upon -- well, dealt with in the
16 findings and conclusions and they're of general
17 application, as well as applying sometimes in specific
18 instances that we are dealing with in this case.

19 MR JUSTICE GOSS: At 4.1.4, nursing staff levels, it says
20 at the bottom of the page 9:

21 "Across the network [I'd like to know what the
22 network is] staffing is 27 below target. At the
23 Countess of Chester Hospital it is 21% [as read]."

24 So in other words, the Countess of Chester was
25 performing better than the network, whatever the network

1 is.

2 MR MYERS: Well, certainly the staffing levels are depicted
3 in that way. The performance from that, of course, is
4 one of the things that is in dispute. But the point is
5 the finding is that all levels were too low and it's
6 particularly critical --

7 MR JUSTICE GOSS: I think one has to be very cautious by
8 just putting in the bald statement "all levels were too
9 low". They may not have been strictly in compliance
10 with BAPM standards or other standards that were
11 applicable and there is -- specifically in relation to
12 consultants there is a specific criticism, but
13 nursing -- some witnesses have said, and I can't
14 remember which ones now, "Well, nursing levels -- we'd
15 always like to have four nurses there but it simply
16 doesn't happen".

17 MR MYERS: That's correct, and of course this is against the
18 background -- this is what is significant and what we've
19 referred to -- and we referred to this in opening this
20 to your Lordship -- is against a background of a unit
21 that has experienced, on the evidence of these witnesses
22 so far, increased admissions with increased acuity over
23 the relevant period. And that's where this engages and
24 it's important because if staffing levels are low, and
25 that's a system that's running in that way for some

1 period of time without change, there may be risk but it
2 might be understood and controlled. But if the numbers
3 increase and if acuity increases without a corresponding
4 increase in the level of staff or the number of staff,
5 then, we submit, risk increases. It must do --

6 MR JUSTICE GOSS: I have that point. I'm sorry to interrupt
7 you, Mr Myers. I have that point. But does one not
8 then have to investigate the statistics in relation to
9 that, rather than the bald statement, saying: well, to
10 what extent?

11 MR MYERS: We submit, so far as our proposition is
12 concerned, we don't have to because that must follow,
13 that if a system is already overstretched and then the
14 demands are increased, then risk must increase. We
15 certainly agree that if comparisons are to be drawn with
16 other units elsewhere, which is a different question,
17 then matters of statistics do arise and we submit we
18 don't have that material, and anecdotal comments about
19 how this unit is performing alongside other units
20 without a proper statistical analysis are ill-founded.

21 MR JUSTICE GOSS: Yes, but that passage to which I've
22 referred appears to be indicating that this was not --
23 this hospital was not an outlier.

24 MR MYERS: Staffing levels may be low across the board, but
25 whilst we cannot, on the evidence that's available,

1 start comparing statistics with other units, we can
2 compare this unit against itself. And the point that is
3 made by the unit, by its witnesses and by the
4 prosecution, is that there was, as it's put, a spike
5 in the mortalities between 2015 and 2016. That was
6 investigated in the first instance by the consultants
7 responsible for the unit and, for reasons that may
8 become apparent, their focus landed upon Ms Letby as the
9 unifying feature in this situation.

10 MR JUSTICE GOSS: Well, a common feature.

11 MR MYERS: A common feature presented as the unifying one
12 for the prosecution case.

13 So far as the defence are concerned on this issue
14 over the same period that unit experienced an increase
15 in admissions and acuity. That's quite different from
16 any comparison with any other unit. No statistical
17 analysis is required with other units to support the
18 proposition that if a unit that is already understaffed
19 and has other structural deficits then comes under
20 increased demand because of increased numbers or
21 increased acuity, and it's that in particular that we
22 focus upon, then the level of risk increases. That
23 doesn't require a comparison with other units or
24 statistics in that way. If the evidence is that there
25 are more babies with higher acuity who were admitted,

1 and certainly the witnesses who have been asked about
2 this have generally agreed as to that over this period,
3 then, however the hospital compares with other units so
4 far as understaffing is concerned, there must be, we
5 submit, an increased risk at this unit. We are not
6 dealing with what levels of acuity changed in other
7 units. That doesn't feature anywhere in this evidence.

8 MR JUSTICE GOSS: I understand you invite the conclusion --

9 MR MYERS: We invite it, yes.

10 MR JUSTICE GOSS: -- that follows, but it comes back to the
11 point that I made, as I recall, when this application
12 was first made: is there going to be expert defence
13 evidence pointing in the individual cases which are the
14 subject of this indictment saying that in the case of
15 this baby staff shortages or some systemic failure was
16 relevant to the death or collapse of that baby?

17 MR MYERS: No, we don't have expert evidence as to
18 systemic --

19 MR JUSTICE GOSS: No, any evidence.

20 MR MYERS: No, we don't call evidence as to system failure.
21 We're relying, in fact, upon the conclusions to be drawn
22 from the prosecution's own evidence, which we submit are
23 uncontroversial -- or at least the fact they may be
24 drawn is uncontroversial, it may be a question for
25 a tribunal of fact to decide whether or not they can

1 draw those conclusions, but if a unit has systemic
2 problems with the number of staff, with its use of
3 tertiary care --

4 MR JUSTICE GOSS: No, no, let's be careful in the phrases we
5 use. Systemic failures. That suggests that there were
6 specific failings relevant to the care of patients.
7 What this review reveals is that, according to guideline
8 or required staffing levels, there may have been
9 occasions when there was understaffing over the relevant
10 period. But what is the relevance of that to the issues
11 in this case, which are: were these natural collapses of
12 babies or were they as a result of some interference,
13 wrongful act, in relation to the care of those babies?

14 MR MYERS: Well, my Lord, those aren't the sole issues
15 in the case. The prosecution, in their response, have
16 identified the question of cause of collapse, in effect
17 the misconduct issue, and the identity issue. They've
18 defined that as the issues in the case.

19 MR JUSTICE GOSS: They are the main issues, aren't they?

20 Not the sole issues but they are the core issues.

21 MR MYERS: They are core issues in the case, but the
22 prosecution can't proceed by defining what they say are
23 the core issues and then, off the back of that,
24 excluding other issues that actually are relevant --

25 MR JUSTICE GOSS: Mr Myers, I'm sorry to interrupt you, but

1 I entirely agree, they can't exclude the fact that there
2 was a review that was undertaken at invitation and it
3 was found that in certain respects there were these
4 matters.

5 MR MYERS: Correct, my Lord.

6 MR JUSTICE GOSS: If that is in evidence, which it is
7 effectively in evidence, because it has been put in
8 cross-examination already, what more are you wanting?
9 And also -- I'm sorry to bombard you with questions like
10 this but I think it's helpful to focus on the issues --
11 does one also have other aspects of the report
12 admissible in evidence which are favourable to the
13 hospital and the way it ran?

14 MR MYERS: We recognise that there may be a response to
15 that, although the response so far has been to deny the
16 relevance of the defence case on these issues before we
17 even get to the report.

18 Your Lordship asked me about what the issues are
19 beyond the question of what happened, in effect the
20 misconduct issue and of course the identity issue.

21 But --

22 MR JUSTICE GOSS: I'm sorry, I'm thinking in particular of
23 paragraph 4.3.1:

24 "The review team found extremely positive
25 relationships amongst the various teams that contribute

1 to the neonatal unit. The consultants appear to be
2 a cohesive group who are proud of the unit and how well
3 they work together, for example in developing and
4 agreeing clinical guidelines. The senior nurses were
5 very strong as a team and provided appropriate challenge
6 to the medical staff and support to nursing colleagues.
7 The more junior nurses and doctors all spoke highly of
8 the atmosphere on the unit and the accessibility of
9 other staff to assist with questions and clinical
10 advice. The neonatal/paediatric team were reported by
11 other trust staff to have 'far fewer problems than
12 others' and seemed to get on well with each other and
13 the nurses."

14 MR MYERS: Well, my Lord, the nature of the relationship
15 between the staff, how well they gel together, how
16 collegiate they are and how supportive they are of one
17 another is not the issue in the case and that isn't what
18 this is about and that's an entirely different matter.
19 We don't doubt that the consultants have very close
20 relationships with one another on this unit but
21 that isn't the issue we're dealing with.

22 I do want to return to the question your Lordship
23 asked, which is, what is the issue in effect, if
24 it isn't cause and it follows also identity. That's the
25 point: the issue is what the prosecution have said in

1 opening to the jury, that this is a hospital like any
2 other hospital in the UK and what follows from that, and
3 the wealth of material that they intend to deploy to
4 support the assertion that the common factor in this is
5 Ms Letby. We say there are other factors to be
6 considered.

7 MR JUSTICE GOSS: Well --

8 MR MYERS: The weight of them may depend upon the view to be
9 taken of all of the evidence, but to say that that isn't
10 an important factor, we respectfully observe, cannot be
11 right when the starting point is an assumption by the
12 prosecution, in effect, that the actual functioning of
13 the unit in itself is beyond criticism. That is the
14 starting point. That's the baseline from which they
15 proceed.

16 MR JUSTICE GOSS: I'm not sure that they do, actually.

17 I haven't heard from Mr Johnson yet, but I think
18 it is -- perhaps it would be appropriate -- I understand
19 your point, Mr Myers, please don't think I'm not
20 grasping what you're wanting, but what I'm seeking to
21 identify is precisely what more you want to adduce,
22 apart from putting to the consultants, for argument's
23 sake, that there was found to be in the review an
24 insufficient consultant -- number of consultants
25 available at all material times and nursing, which has

1 already been identified in evidence, that there were
2 some designated nurses who were responsible for more
3 than one intensive care baby at a time. That's in
4 evidence.

5 MR MYERS: Well, I'd like to explain that and I will answer
6 that, but I'd like to use an analogy. And like all
7 analogies, no doubt when viewed from every possible
8 perspective it will prove to be imperfect, but I will
9 attempt to assist with an analogy there.

10 In other types of case where there is particular
11 offending alleged against the defendant, the prosecution
12 may seek to show background matters which go to show
13 a general propensity or a general context within that
14 defendant, within which that defendant has allegedly
15 done what he or she is alleged to have done.

16 And with that background propensity or that
17 background material, the jury are better placed to
18 inform themselves as to the weight to be given, for
19 example, to what the defendant says. At the moment,
20 we are dealing with witnesses who can be questioned upon
21 what they've said in their statements and, we submit
22 unremarkably, at times appear to seek to ameliorate what
23 is said, to sometimes distance themselves from what is
24 said in their statements or to be ready to deny any
25 blame and to minimise any fault whatsoever.

1 Therefore, the material in this report, insofar as
2 it is critical -- and this is an important distinction,
3 which is why I make the reference to again another
4 analogy, confession evidence, given the nature of the
5 source of this material. But insofar as it is critical
6 of the functioning of the unit, that enables us to have
7 an objective measure against which qualifications by
8 prosecution witnesses can be gauged and it enables the
9 jury to have a baseline against which questions of
10 service can be measured. Because whilst we can ask
11 witnesses questions about, for instance, the level of
12 communication between a senior doctor and a consultant,
13 it is significant, for example, at paragraph 4.5.2 --
14 and this is our 10(xi) -- the report finds:

15 "There were several reports that doctors will wait
16 too long before escalating concerns about an infant,
17 both from junior to consultant and also from the
18 network. When they do seek tertiary level advice, the
19 transport team is not informed sufficiently early to be
20 on standby."

21 That's in the findings. That's at 4.5.2.

22 MR JUSTICE GOSS: Yes, I'd highlighted it.

23 MR MYERS: Yes.

24 MR JUSTICE GOSS: Sorry to interrupt you yet again, but it

25 leads me to the question: is it suggested in relation to

1 any of the babies that are the subject of this
2 indictment that there was such a failing?

3 MR MYERS: We've already had that with [Baby E], my Lord,
4 and we're only into seven of them.

5 MR JUSTICE GOSS: But is it going to be? This is an
6 application being dealt with now. Is it going to be
7 suggested? Is that the defence case?

8 MR MYERS: At times, yes, concerns haven't been passed
9 in the way they should. It's certainly been suggested
10 in the case of [Baby E] and to some extent we have to
11 see how witnesses deal with the questioning. In fact if
12 that case [Dr C] largely accepted what was said.

13 But it is important that the jury have access to an
14 objective measure of judgement on the critical matters
15 that we raise. That is the value of this. It's
16 a source beyond just what the witnesses say, although
17 they are involved in its creation.

18 The weight to be --

19 MR JUSTICE GOSS: Can I just then ask -- it comes back to
20 a point that I asked earlier -- what would you seek to
21 do then? Would you seek to put to a witness that
22 paragraph, 4.5.2, and say, "This was the review's
23 finding"?

24 MR MYERS: Yes.

25 MR JUSTICE GOSS: So you just want to read that out to them

1 and say, "This was the review's finding", and say
2 that is evidence then in the case?

3 MR MYERS: We would want to be able to do that --

4 MR JUSTICE GOSS: Right.

5 MR MYERS: -- and if or where we find ourselves in
6 a position to illustrate that with a particular example
7 with that witness, then plainly we may seek to do that
8 if we can. But I emphasise, as I emphasised both in the
9 -- and I do this respectfully, my Lord -- but as we did
10 in the original application, as we have done in our
11 response, and as I have done in our submissions now,
12 there are aspects to this case that are general and
13 aspects that are particular, and this issue cannot be
14 resolved into expecting the defence to sort of say on
15 a case-by-case basis, "We're going to use this point
16 with this case and this point with that case". In just
17 the same way as the prosecution opened this with a
18 general assertion, "This is a hospital like any other
19 hospital in the UK", we wish to challenge that and one
20 of the steps to do that for us is to show an objective
21 level of criticism as then applied to the particular
22 circumstances of this hospital that are particular to
23 it, for example, increased admissions and increased
24 acuity. And it's a combination of sources of evidence
25 that we would then use.

1 But yes, as to the findings in the report, when
2 we are presented, for example, with a witness like
3 Dr Gibbs who tells us how the hospital was functioning,
4 we would want him -- to put to him findings from the
5 report and, of course, he is then able to comment on
6 them. That is the way we would seek to introduce it and
7 the way in which we would seek to use it, in particular
8 instances where it is applicable and, and I have given
9 examples already so far as [Baby A] and [Baby E]
10 are concerned, but also --

11 MR JUSTICE GOSS: They are specific ones where the
12 prosecution don't dispute that there was a failure.

13 MR MYERS: My Lord, they do -- they haven't accepted that.
14 They don't dispute that in the case of [Baby D]
15 there was a delay to prescribe antibiotics and they
16 don't dispute there was, I recall it was put,
17 sub-optimal performance in the case of [Baby H],
18 who we will come to next. No concessions are made
19 anywhere else but they reserve the right to say the
20 hospital is functioning, in effect, perfectly well.
21 That is their overarching case.

22 MR JUSTICE GOSS: The evidence is the evidence and that's
23 what the jury will decide on. But coming back to this
24 particular point:

25 "There were several reports that the doctors will

1 wait too long before escalating concerns."

2 Now, that is very vague: several reports identified
3 when, by whom, in relation to whom, what -- anything.
4 It's just a vague assertion in a review. Now, that is
5 relevant, is it not, to the section 114 point because
6 it's very vague? And one would be entitled to say,
7 well, in these 2 days you spent there, from whom did you
8 get these reports, who has noted that, and what were the
9 circumstances of it?

10 This is the difficulty. You will know, Mr Myers,
11 from your vast experience of cases, that general
12 propositions like that cannot be put to witnesses. They
13 have to be specific to particular cases and relevant to
14 an issue in the case.

15 MR MYERS: Certainly some of the matters we have identified
16 may be regarded as more specific than others. Having
17 said that, an unusual feature of this is a witness to
18 whom that is put is probably very well placed to deal
19 with that because this is their unit and they've been
20 involved in this process and they can answer upon it.
21 I recognise how unattractive that would be, for example
22 if put to a witness who couldn't even comment upon the
23 content of this. But these witnesses are familiar with
24 this report and therefore we recognise that whilst it is
25 relatively unspecific in the way it's set out there,

1 it's one of the findings of the report that they
2 participated in and they can comment upon it if we're
3 allowed to use it.

4 But my Lord, the concerns in making the application
5 were, first of all, to establish the relevance of these
6 issues in general and, in particular, to make clear our
7 position it is that it is entirely wrong to suggest that
8 as a general area of this case this is something that
9 the defence should not be allowed to deal with because
10 it's crucial to both cases, actually.

11 Moving from --

12 MR JUSTICE GOSS: I understand that, but I've moved to the
13 next stage, that assuming it is relevant and therefore
14 admissible, what is relevant and what is admissible?
15 That's what I'm seeking to drill down into.

16 MR MYERS: Yes. Well, my Lord, we've set our position out
17 there. We have endeavoured to be particular in what
18 we have found from the report, and we have done, set it
19 out specifically by reference to the paragraphs. It
20 isn't just a request to use the report in a general and
21 random fashion.

22 So far as there is specificity to what is said, then
23 the concerns your Lordship raises would not apply. So
24 far as there is uncertainty as to any finding that is
25 there, it is our submission, that the witnesses who

1 others in the UK. But unlike many other hospitals
2 in the UK, and unlike any other neonatal units in the
3 UK, within the neonatal unit at the Countess of Chester
4 a poisoner was at work."

5 So the suggestion that's being made that underpins
6 this argument isn't justified from what I said. So
7 that's my starting point.

8 There seems to be, we would respectfully submit,
9 a blending of issues here, in that because some of the
10 things that are in the report are in evidence, therefore
11 the report should be in evidence. So taking as an
12 example of that, the BAPM staffing levels and how many
13 nurses should be caring for children of various
14 acuities, that's all in evidence, and it seems to be
15 suggested that because that's a point that's dealt with,
16 albeit it isn't actually directly dealt with in the
17 report, the report should be admissible. And we
18 respectfully submit that that approach is fundamentally
19 wrong. There are some things in the report that are in
20 evidence, they're in evidence, but that doesn't make the
21 report admissible as evidence.

22 Your Lordship referred to the acuity issue and, in
23 particular, paragraph 4.5.2. I'll just find that.
24 I say report -- what the review says is:

25 "There were several reports that doctors will wait

1 too long before escalating concerns about an infant both
2 from junior to consultant and also to the network and
3 when they do seek tertiary level advice."

4 That really highlights one of our points: which
5 cases? Are they cases the jury are concerned with? We
6 don't know the answer to that question from this review.
7 That bears on section 126 of the Criminal Justice Act,
8 which I respectfully invite your Lordship to refer to.
9 I'm just trying to find it. It's in Archbold at
10 paragraph 11.79. It's page 1734.

11 MR JUSTICE GOSS: Thank you.

12 MR JOHNSON: It's a provision that I had overlooked in our
13 response. It's not addressed in the application, but
14 it's of critical relevance, I would submit, in the
15 context of this application:

16 "In criminal proceedings the court may refuse to
17 admit a statement as evidence of a matter stated if (a)
18 the statement was made otherwise than in oral evidence
19 in the proceedings..."

20 Tick:

21 "... and (b) the court is satisfied that the case
22 for excluding the statement, taking account of the
23 danger that to admit it would result in an undue waste
24 of time, substantially outweighs the case for admitting
25 it, taking account of the value of the evidence."

1 MR JUSTICE GOSS: Well, that's satellite litigation. That's
2 essentially what it's saying, isn't it?

3 MR JOHNSON: It is, but one of the points to which we have
4 already referred is this point about the transport
5 issue. How are we to know -- what are the jury to make
6 of that sentence in this review in the context of this
7 case when my learned friend doesn't want to call the
8 maker of the review, or any of them, to give us further
9 details about what they're talking about at various
10 stages of this review? What weight is the jury to give
11 to that evidence if it is allowed to be evidence?

12 My learned friend refers, both in writing and again
13 this morning, to the acuity of the patients and the fact
14 that a number of prosecution witnesses have accepted
15 that this was a time in the operation of the unit when
16 acuity was increased. We pose another question, which
17 we would pose to the makers of this review: are the
18 patients to whom you are referring the ones that died in
19 this case and collapsed in this case?

20 Because if that is the answer to the increased
21 acuity then this "evidence" has no value at all.

22 MR JUSTICE GOSS: Well, I don't know whether an answer could
23 be provided to that, but I would rather think, because
24 when one reads the terms of reference for this review,
25 that's what they were looking into. They were just

1 looking to see, from a system point of view, were there
2 any aspects that may have had some bearing on the
3 increased mortality rate. That's all it was.

4 MR JOHNSON: Yes. In fact, the answer to the issue that my
5 learned friend says is so important that arises out of
6 this review is in the review and it's in paragraph 3.8.
7 This really draws together the point that your Lordship
8 has just made and the point that I'm seeking to make and
9 it's the third sentence of paragraph 3.8:

10 "This was not a systemic review but concluded that
11 there was higher activity and lower admission birth
12 weight than average during the period corresponding to
13 the increase in mortality. This was not, however,
14 considered to have been significant enough to explain
15 the increase in mortality."

16 Well, there you go. If the bits that the defence
17 want in, as they say, that single sentence completely
18 undermines the basis for admitting any of this material
19 at all because the people making this review say you
20 can't explain the increased morality on this unit by
21 referring to the increased acuity of the patients during
22 the period under consideration, which is the point
23 that's trying to be made through the review.

24 MR JUSTICE GOSS: Well, if it doesn't exclude the
25 admissibility of it, it should at least be in evidence

1 if there is the acuity point that is made.

2 MR JOHNSON: Exactly.

3 MR JUSTICE GOSS: So it would have to be in there. But I'll
4 hear what Mr Myers says about that.

5 MR JOHNSON: Of course.

6 But then of course we're coming back to the issue of
7 section 126, which is, in effect, this material has no
8 evidential value in the context of the case as a whole.

9 We raised a serious point in our response, albeit
10 very quickly and shortly, about expert evidence. And in
11 response, probably because we referred to Rule 19, the
12 defence replied by suggesting that an examination of
13 Rule 19 shows that this material is not expert evidence.

14 Well, Rule 19 defines expert evidence in the context
15 of the applicability of the rules, but one needs, with
16 the greatest of respect, to go back to basics in this
17 respect. Can I invite your Lordship to look at
18 section 10.19 of Archbold, which is -- it starts at
19 page 1689. But the part I want to refer to is at
20 page 1690 at the very top of the page.

21 MR JUSTICE GOSS: It starts at the bottom of 1689?

22 MR JOHNSON: It does. As the editors say:

23 "As a general rule, (inaudible) oral evidence is not
24 admissible with regard to anything not immediately
25 within knowledge of the witness... speak of facts that

1 happened in his presence."

2 Over to 1960:

3 "In matters of science or trade, the opinion of an
4 expert or persons intimately acquainted with it is
5 admissible to furnish the court with information
6 which is likely to be outside the experience and
7 knowledge of a judge or jury."

8 This is precisely what this information in this
9 review is. And one could argue that it's outside the
10 knowledge of -- or the fact that the hospital was
11 seeking the intervention of the Royal College implies,
12 to a degree at least, that it's outside the knowledge of
13 those that were working within the hospital, that they
14 didn't feel comfortable conducting this sort of review.
15 So it is specialised information or specialised material
16 and it falls, we would submit, within the bounds of
17 expert opinion evidence and therefore is governed by the
18 rules relating to expert opinion evidence.

19 But reading on to the second sentence of that
20 page 1690:

21 "If on the proven facts a judge or jury can form
22 their own conclusions without help then the opinion of
23 an expert is unnecessary."

24 Then skipping a sentence, which refers to several
25 authorities:

1 "... and as to the need to guard against allowing
2 a witness of undoubted expertise in his field to give
3 opinion evidence with an unwarranted appearance of
4 science on account of the use of technical language
5 where the opinion is not in fact founded on his
6 specialist knowledge, but on observations equally open
7 to a layman; see an Australian case called Honey
8 (inaudible) v Regina."

9 That's exactly the situation we have here. We have
10 several witnesses, all who have conceded the fact that
11 from time to time the relevant BAPM guidelines were not
12 being followed and that is the context where it is
13 relevant for the collapses of some of these children and
14 you don't need an expert to illuminate that particular
15 issue.

16 This review doesn't take the issue with which this
17 jury is concerned any further. But it is an expert
18 opinion in the review.

19 MR JUSTICE GOSS: Well, the problem with all of this is that
20 it is a review and that was why I read out at an early
21 stage the review team who it comprised, based on a visit
22 over 2 days, speaking to people there, no reference to
23 having looked at any documents that I've detected --

24 MR JOHNSON: No.

25 MR JUSTICE GOSS: Actually, they must have done because

1 there are significant gaps in both medical and nursing
2 rotas, so they must have looked at medical and nursing
3 rotas.

4 MR JOHNSON: I think that must be a reference, actually, to
5 the fact that they are understaffed.

6 MR JUSTICE GOSS: But that's in evidence already.

7 MR JOHNSON: Exactly.

8 MR JUSTICE GOSS: Therefore can there not be an admission or
9 an agreed fact in relation to the aspects from this
10 report which are relevant to those matters about which
11 the jury have specific evidence from witnesses?

12 MR JOHNSON: I'm sure there can.

13 MR JUSTICE GOSS: I think it should be, if it's to be
14 admitted, a two-way process. In other words, there
15 should be the matters that Mr Myers wants to adduce, but
16 there could also be the other aspects of it and
17 identification of the parameters of the review. Because
18 the jury know about it and one doesn't know what goes
19 through their minds and one doesn't want speculation.

20 MR JOHNSON: One doesn't, but equally one doesn't want the
21 jury to be distracted by the suggestion that this review
22 in some way really illuminates the actual issues that
23 they're concerned with. That's why we oppose the use of
24 the report.

25 But my Lord, with the greatest of respect, we

1 suspect that the truth of the defence's anxiety to be
2 able to wave this report under a witness's nose is set
3 out in the final sentence of paragraph 25 of their
4 response sent last night where it says:

5 "It may be relevant to the credibility and
6 reliability of prosecution witnesses where they have
7 given evidence in response to these matters that are put
8 in cross-examination by the defence."

9 MR JUSTICE GOSS: Well, that is the one passage in this
10 document that I have double lined.

11 MR JOHNSON: Yes. It can't be used to do that. What my
12 learned friend wants to be able to do, I guess, is to
13 say, "Well, you say this but this review says that".
14 And that then inevitably invites from the jury: well,
15 can we see the review? And for the reasons that have
16 been expanded on this morning, this review is very
17 double-edged and -- so we come back to section 126 -- to
18 divert this trial into a granular analysis of a review
19 that was undertaken in 2 days by people that actually
20 said, "You want to be looking very carefully at the
21 circumstances in which these children died", which is
22 what the jury are doing and what we are doing, this
23 review is not admissible because it is not -- I stand by
24 this -- it is not actually relevant to the issues in
25 this case.

1 It fails the admissibility test under section 117
2 because an individual would not be entitled to give oral
3 evidence about it. It fails the admissibility test
4 under section 114, I think it's (g), because the defence
5 can't point to why you can't bring somebody to give oral
6 evidence about it and allow us, the prosecution, to get
7 into the detail underlying some of these assertions, and
8 it fails because it's expert evidence and the party
9 seeking to admit it can't even identify the expert that
10 can attest to its provenance in effect. They simply say
11 that it's a report by the Royal College, therefore in
12 effect the jury should be taking quasi-judicial notice
13 of its content without knowing what's underlying
14 a number of the critical factual assertions on which
15 they propose to rely. So it is inherently dangerous and
16 it is designed -- it will have the effect of diverting
17 the trial from the real issues. That's why we submit
18 this is not a permissible process.

19 MR JUSTICE GOSS: Right. Thank you, Mr Johnson.

20 Mr Myers.

21 Reply by MR MYERS

22 MR MYERS: My Lord, there are some discrete points that I'd
23 like to respond to that were raised then. I'll try and
24 address them with some logic in the order in which I do
25 so.

1 Firstly, in the terms of the review, the review is
2 conducted/started, we understand, in August 2016 and
3 reported back in November 2016. So although it refers
4 to 2 days during which interviews were held, the actual
5 authoring of it took longer than that.

6 As to --

7 MR JUSTICE GOSS: Do we know that?

8 MR MYERS: Well, we have --

9 MR JUSTICE GOSS: This is one of the problems. It's not
10 like a judicial report into something where a judicial
11 inquiry is conducted into something and there is chapter
12 and verse about all the sources of the material that's
13 been relied on.

14 MR MYERS: It does set out, my Lord, at appendix 2 -- well,
15 appendix 1 sets out the review team. Appendix 2 sets
16 out the information sources and reference documents, to
17 which I'll turn in a moment.

18 The first item under appendix 2 is that staff are
19 interviewed on the 1st and 2 September 2016. But we see
20 the interview (sic) is dated November 2016. That's why
21 I refer to the period over which it was prepared, so
22 we can see from the terms of it, it's not that they were
23 just interviewed and that is it.

24 We know that there are documents -- it's been said
25 that there were no documents referred to. If we go to

1 page 30 of 31 it sets out the documents that were
2 provided by the trust and there are a large number of
3 them. It includes staffing details, job plans, rotas
4 and training records, as well as a service overview and
5 team structures, and they're all set out there. So
6 there are documents and a number of them, it's not right
7 to say there weren't.

8 MR JUSTICE GOSS: And details of neonatal death reviews.

9 MR MYERS: Yes.

10 MR JUSTICE GOSS: But nothing saying, well, there was an
11 obvious failing in relation to any particular babies.
12 That's the difficulty: we don't know which neonatal
13 death reviews have been referred to.

14 MR MYERS: That takes me to the second point, my Lord. The
15 first was as to the terms of it, which we submit don't
16 provide a basis for complaint.

17 The second one, as to which babies are looked at,
18 the prosecution in effect approach that point by looking
19 at paragraph 4.5.2, upon which we wish to rely, which is
20 the paragraph that deals with communications between
21 doctors and consultants before escalating concerns and
22 the relationship with tertiary level advice and the
23 transport team, to which the prosecution said, "Are
24 these the patients that died and collapsed?", rather, as
25 your Lordship asks, as to which are the deaths they're

1 talking about, which brings me back -- and I apologise
2 for the element of circularity to the argument -- to the
3 point that these are matters that the defence seek to
4 rely upon generally because they set the overarching
5 context within which this service was being provided.

6 Once a jury know that there are concerns as to
7 doctors escalating concerns, for example to consultants,
8 and the engagement of tertiary advice, once that is an
9 identified failing then, when we turn to where that may
10 apply in a particular case, that informs the
11 understanding of that case, even if it doesn't apply
12 specifically to it, in much the same way -- I gave the
13 analogy of someone in a case where there is background
14 evidence of character or propensity that can assist
15 a jury in determining an issue on the specifics of the
16 charge that they're looking at once they know that
17 someone has a propensity.

18 So once the jury know, if it is admissible, that
19 there is a finding that doctors delay before escalating
20 concerns, they can consider that when, for example, they
21 look at a particular witness who maintains that he acted
22 with standard practice in not engaging a consultant,
23 notwithstanding the situation that he was dealing with.
24 It may inform them as to that.

25 So these matters are of general application as well

1 as particular application. And to seek to limit the use
2 of it, the report, by taking it to the particular every
3 time, isn't what the defence seek to do and we submit
4 it is legitimate to use it to show the context within
5 which that hospital used (sic) when the starting point
6 is, we submit, that there's nothing in its procedures or
7 performance that is capable of criticism save for the
8 two matters the prosecution adverted to in opening.

9 Next and linked to that is what the prosecution said
10 about section 126 of the Criminal Justice Act, which in
11 effect is the bar against satellite litigation. We
12 didn't refer to the section, but we refer to satellite
13 litigation in paragraph 19 of our application to make
14 the observation what we're dealing with here, which in
15 fact could take a relatively short period of time in the
16 scale of the trial, is not satellite litigation, it
17 deals with matters that these witnesses are already
18 dealing with and will deal with: staffing,
19 communication, tertiary care. It doesn't deviate from
20 where we are to go to a finding in a report and put that
21 to a witness, both to show what the finding was, we
22 acknowledge that, and to hear what the witness says
23 about it.

24 So we submit that satellite litigation or the bar
25 against that is no bar to adducing this material if the

1 court is satisfied it is relevant and admissible.

2 MR JUSTICE GOSS: To the offences upon which the defendant
3 is being tried.

4 So in other words, if you are saying, for example --
5 and I'm taking a general example here rather than
6 a specific baby -- if you are to say that Dr Harkness,
7 for argument's sake, as a registrar, delayed
8 inappropriately in seeking the advice of a consultant
9 in relation to a particular baby and that was, to use
10 the loose term, medical negligence, and that is relevant
11 to that child's condition, deterioration and death,
12 where the child died, or deterioration but survived,
13 then that's fine. But that's not been put to any of
14 them yet.

15 What I want to know is: is it going to be put
16 in relation to any of these babies?

17 MR MYERS: My Lord, that was put to Dr Harkness. It was put
18 to him in stark terms that he was out of his depth and
19 he should have involved the consultant before he did and
20 it elicited quite a sharp response from him as to how
21 disrespectful he found the question, which we submit --

22 MR JUSTICE GOSS: Of course. But are you going to adduce
23 evidence saying that a registrar, in that situation,
24 should have done that and it is material in that baby's
25 case? You can just put it. You could put the

1 assertion, you can put any assertion you like
2 in relation to the way that any of these babies were
3 treated. But then I want to know: are you just making
4 the assertion or are you going to adduce evidence?

5 MR MYERS: We may not. There are many assertions --

6 MR JUSTICE GOSS: If you don't adduce evidence, then what is
7 the relevance of the assertion?

8 MR MYERS: The assertion follows from his evidence, my Lord.
9 We are entitled to put to a witness that -- we've put it
10 to him that he didn't do what he should have done in the
11 circumstances and that's what we put to him. In fact
12 [Dr C] said it was a matter of regret for her that
13 she hadn't attended earlier than she did in the context
14 of what was taking place on that occasion.

15 MR JUSTICE GOSS: That was with hindsight. But you have
16 that then. You have that in evidence.

17 MR MYERS: We do and we have a witness -- one witness who in
18 effect accepts criticisms that can be made of the
19 situation and we have another witness who doesn't but
20 it's significant that when the writers of the report put
21 their findings together this is one example of one of
22 the situations that they were critical of and we submit
23 for that reason it is relevant, as well as the fact that
24 it bears upon the overall level of service at the
25 hospital which the prosecution do rely upon and will

1 rely upon.

2 So we are quite entitled to cross-examine witnesses
3 as to what we put to them are criticisms where that
4 follows from what they have described. Material such as
5 this supports us in that.

6 May I deal with a related point, my Lord, which
7 deals with that and the prosecution refer to and that's
8 our paragraph 25 where we in the application, or rather
9 in the response, say this. It deals precisely with the
10 situation we return to in the course of these
11 submissions:

12 "There are occasions where these general matters
13 coincide with details of particular cases. We submit
14 [my Lord] it is the overarching evidence as to the
15 performance of the unit and its staff upon which the
16 defence seek to rely and that is why we seek this
17 material."

18 Then we say this:

19 "It provides relevant context to the points the
20 defence raise as a necessary part of the defence case
21 and in response to the prosecution case [that's correct]
22 and we do accept it may be relevant to the credibility
23 or reliability of prosecution witnesses where they have
24 given evidence in response to these matters as put in
25 cross-examination by the defence."

1 It seems to us strange to be criticised for being
2 frank as to the purposes for which we would use this and
3 that may arise. It isn't the principal purpose for
4 seeking to adduce this, but to assist the court and be
5 quite clear about the use of it. That's why we set that
6 out and we submit that is uncontroversial.

7 Of course we can use available evidence to challenge
8 a witness if it's relevant to the matters they're
9 dealing with. And I have to submit we fail to see how
10 that is a criticism of the application that we make.

11 MR JUSTICE GOSS: 4.5.2, sorry, coming back to this point,
12 the recommendation of the review was:

13 "Ensure tertiary advice calls include an early
14 warning or conference call to the transport team to
15 enable better planning and deployment of the crews."

16 MR MYERS: It's the critical finding that's made on the way
17 to reaching that recommendation that we are interested
18 in, my Lord.

19 MR JUSTICE GOSS: It's not a critical finding:

20 "There were several reports that the doctors will
21 wait too long before escalating concerns about an
22 infant."

23 And reference to seeking the advice from both junior
24 to consultant and also to the network, in other words
25 the tertiary hospitals.

1 MR MYERS: We submit it's relevant as to the level of
2 functioning of the hospital. It's one small point
3 within the number that we identify.

4 There are two other matters I would like to deal
5 with, if I may, my Lord.

6 MR JUSTICE GOSS: Certainly.

7 MR MYERS: The first is what was said about paragraph 3.8,
8 just because some of the detail, if your Lordship
9 focuses upon this, it's important to have about further
10 in-depth analysis by the neonatal lead in July 2016 and
11 so on, concluding with:

12 "[That analysis] did not consider the higher acuity
13 and lower admission birth weight [in effect] to be
14 significant enough to explain the increase in
15 mortality."

16 It says that. Of course the neonatal lead is
17 Dr Jayaram, who at this point is conducting an inquiry
18 into the functioning of his own unit, as it happens.
19 That passage refers to what he thinks about his unit or
20 what he has said to the writers of the report and
21 it isn't something we seek to rely upon because
22 that isn't in fact a conclusion of the report, it's
23 simply reporting back what Dr Jayaram thinks about his
24 own unit. It's important I identify that because it was
25 portrayed as if that's something that should be included

1 because it reflects a finding in the report and it
2 doesn't.

3 MR JUSTICE GOSS: Well, what it is is a term in the report.

4 It says:

5 "This was not a systematic review but concluded that
6 there was higher activity and lower admission birth
7 weight than average during the period corresponding to
8 the increase in mortality."

9 A fair point, if you want that in.

10 MR MYERS: Yes.

11 MR JUSTICE GOSS: Then:

12 "This was not, however, considered to have been
13 significant enough to explain the increase in
14 mortality."

15 By whom? It doesn't say.

16 MR MYERS: Well, it seems to follow on from what is the
17 in-depth analysis of the neonatal lead, Dr Jayaram. As
18 I say, that seemed to me to be what that refers to. It
19 begins with:

20 "Further in-depth analysis by the neonatal..."

21 This is giving the history of this investigation.
22 This isn't part of the report dealing with the findings,
23 these are the concerns that were raised prior to the
24 report, and it is dealing with an in-depth analysis, as
25 it is described, described by Dr Jayaram into activity

1 and acuity, but that this did not -- was not significant
2 enough to explain the increase in mortality, and he's
3 actually going to, I suspect, we'll find out, we haven't
4 been told yet, I suspect he will be invited to give that
5 evidence or be questioned upon it. It's in his
6 statement and it's part of the overarching case.

7 MR JUSTICE GOSS: This is all adding to my concerns as to
8 precisely what is going to be adduced and on what
9 matters are they going to be questioned, these witnesses
10 dealing with these issues.

11 MR MYERS: It may be, my Lord. It may be that the court
12 may -- I say this in as constructive approach as
13 possible -- wish to consider how some of this
14 evidence -- not this evidence but other evidence in the
15 case -- evolves before making a conclusion as to the
16 pertinence, relevance or admissibility of the evidence
17 in this report.

18 MR JUSTICE GOSS: Yes.

19 MR MYERS: We were prompted to make the application we do
20 because of the evidence of Dr Gibbs, but, as is apparent
21 from the way the case has proceeded, where these matters
22 arise and are relevant, we have dealt with them in any
23 event with the witnesses, and because they're a crucial
24 part of our case and it is in response to the
25 prosecution case we continue to do so.

1 My learned friend also, I'm grateful, draws
2 attention to paragraph 3.10 -- I'll just interrupt
3 myself so your Lordship has this -- as to what the
4 review team agreed about:

5 "No obvious factors linked to the deaths and
6 circumstances on the unit were materially different from
7 those that might be found in any other neonatal units
8 within the UK."

9 We are aware of that and in fact --

10 MR JUSTICE GOSS: And then:

11 "However, in June 2016 the deaths of two of the
12 three triplets provoked further concerns and triggered
13 this review."

14 This is the difficulty: this was a review, this was
15 not an in-depth investigation. Indeed, that's what was
16 recommended. I come back to where we started an hour
17 and a half ago basically, to say that one of the main
18 conclusions of this review, as I understand it, was to
19 say: you need to conduct a really detailed investigation
20 into these unexpected deaths.

21 MR MYERS: It was, my Lord. In fact, paragraph 3.10 we
22 refer to in paragraph 18 of our application --

23 MR JUSTICE GOSS: Mr Myers, I'm in no way critical of you in
24 any respect in relation to this. What I'm trying to do
25 is to, as I've used this expression before, drill down

1 into why this evidence is admissible by virtue of being
2 relevant to an issue that the jury have to reach
3 conclusions upon because if it's not relevant, it's not
4 admissible, regardless of its status. Whether it's
5 expert evidence or not, if it's not relevant, it's not
6 admissible.

7 MR MYERS: We submit it most definitely is relevant because
8 it deals with the question of the service and that is
9 what the review was: it isn't a review into specific
10 cases, it is a review into service. That is part of the
11 prosecution case, it's how they opened it. It's part of
12 the defence case, it's how we've always put it. It lies
13 along the other issues so our submission is it is most
14 definitely relevant.

15 What I raise and have just raised before I dealt
16 with 3.10 of the report was the point at which the court
17 may be best placed to make any assessment, and I raise
18 this respectfully, as to the requirement or otherwise or
19 admissibility or otherwise of what is in this
20 application. We submit it's most definitely relevant
21 and it is admissible and I simply identify what I do as
22 to the timing of any determination of that to be of
23 assistance. If the court were able we would, of course,
24 seek a determination sooner rather than later, but it's
25 a matter entirely for the court.

1 The way in which we are dealing with these matters
2 in evidence is something we are compelled to do. This
3 is these issues.

4 MR JUSTICE GOSS: Yes, all right.

5 MR MYERS: As to when this evidence features, if it does, we
6 seek to introduce it sooner rather than later but we
7 leave that with the court, it's just an observation
8 I make in dealing with it.

9 May I make one final, observation, my Lord, because
10 it relates to expert evidence.

11 MR JUSTICE GOSS: Yes.

12 MR MYERS: Expert evidence, of course, is evidence from
13 a witness who has specialist knowledge of an area and
14 can give evidence to a jury that they otherwise would
15 not have. We submit this is not expert evidence by any
16 analysis: it is a drawing together of material by
17 a professional body and their conclusions upon that
18 material. It isn't expert evidence and therefore is not
19 bound by those rules. Similarly, to argue that a jury
20 could form these conclusions, therefore there is no need
21 for this evidence, would not be a proper basis to
22 exclude it because that may be a reason to exclude
23 expert evidence but that wouldn't be a reason to exclude
24 a report that is not expert evidence but simply a review
25 of the available material by professionals. This is

1 a different thing.

2 I'm grateful, my Lord, for the opportunity to set
3 the matters out in detail that we have done, and the
4 court will understand our position is this material is
5 most definitely relevant. We submit it is admissible,
6 but of course recognise the court will determine that
7 and determine when it is appropriate to make those
8 conclusions.

9 Can I be of any further assistance, my Lord?

10 MR JUSTICE GOSS: Not at the moment, but perhaps I can
11 articulate my view at this stage, Mr Myers. I do not
12 consider that as matters and the evidence and the case
13 presently stands, that this material or any part of it,
14 other than that which is already in evidence and those
15 discrete areas, is admissible.

16 Should it be the case that you are of the view that
17 it does become or a part of the review becomes
18 admissible then we will address the issue again. But at
19 the moment I am certainly not prepared to say that
20 you have carte blanche to put tranches of this review to
21 witnesses. I think you will understand where I'm coming
22 from: it has to be of direct relevance to the particular
23 baby who is being considered and on the basis that the
24 findings of the service review have relevance to that
25 particular baby. All right?

1 MR MYERS: Very well, my Lord.

2 MR JUSTICE GOSS: Mr Johnson, I'm saying that at this stage.

3 So essentially, I am refusing the application as it
4 stands.

5 MR JOHNSON: Yes.

6 MR JUSTICE GOSS: I can, if necessary, provide a judgment
7 in relation to that, Mr Myers, but I think one of the
8 problems is that if I do provide a judgment, it would be
9 in the form of an interim judgment. But I can do it if
10 you want.

11 MR MYERS: My Lord, we don't wish to add to the burdens upon
12 the court. We do have what your Lordship has said in
13 making a decision now. If the terms of an interim
14 judgment were to extend significantly beyond that,
15 naturally we would wish to have that. But if in effect
16 it would formalise in written form what your Lordship
17 has said in judgment now then we respectfully observe
18 it would add nothing to that, so I leave that with
19 your Lordship. It's a question of whether the court
20 would wish to go into further detail. If none is
21 necessary, we don't ask for a judgment that simply says
22 what your Lordship has said in passing judgment now.

23 MR JUSTICE GOSS: Right. Mr Johnson, would you seek a more
24 formal reasoning for it? I think during the course of
25 this interesting, certainly from lawyers' point of view,

1 discussion about this particular aspect, I think we've
2 covered the ground and identified the points that are
3 the controversial points in the case, which were very
4 helpfully identified in the written materials provided
5 to the court. But as matters presently stand, I'm not
6 inclined -- well, I have ruled that I am not going to
7 permit you just to put discrete sentences as such to
8 witnesses because that then opens up the whole nature of
9 the report and, as Mr Johnson said, it would very
10 possibly provoke in the jury's mind, "Well, can we see
11 this report?" and we all know how juries do ask to see
12 documents that are referred to and it would be clearly
13 inappropriate for the jury then to have this report. It
14 becomes complicated to identify what then in relation to
15 the various matters that are raised, what does become
16 relevant and therefore admissible and what doesn't and
17 then, like that passage that we focused on, there were
18 several reports identifying reports from whom,
19 in relation to which children, was there one saying that
20 the consultant should have been contacted earlier to
21 address a baby's particular needs or the tertiary unit
22 should have been contacted. It's all just general,
23 unspecific...

24 MR JOHNSON: The point we would make if this ever became
25 an issue would be that there is absolutely nothing to

1 prevent the defence approaching the authors of the
2 report, getting a witness statement from them,
3 clarifying the issues that have been identified this
4 morning, and seeking to call the evidence if they
5 believe it is admissible.

6 MR JUSTICE GOSS: Exactly. You have that?

7 MR MYERS: Well, of course, the court has heard from us as
8 to why we believe that isn't necessary, but my learned
9 friend has set that out. I won't reopen what we've
10 already discussed in the course of submissions.

11 MR JUSTICE GOSS: Exactly. Well, there we are. That's it.
12 Thank you very much indeed. I shall keep the papers,
13 obviously, here.

14 MR MYERS: Yes, my Lord. I should say for the avoidance of
15 any doubt, we shall, of course, continue to deal with
16 the issues of relevance in cross-examination as we have,
17 but we shall not, in light of the ruling, seek to
18 introduce findings from the report in questioning
19 witnesses, obviously.

20 MR JUSTICE GOSS: Well, save in relation to the BAPM
21 standards, for argument's sake, and the number of babies
22 for designated nurses. You can adduce that because
23 that's already been adduced. What you can't do is go
24 beyond that.

25 MR MYERS: I'll probably take the precaution of discussing

1 it with my learned friend. In light of the ruling
2 I would not seek to trespass into the report unless
3 there was a clear reason to do so and without parties
4 being on notice to it. That seems safest in the
5 circumstances. So we'll continue to pursue the case
6 that we do, we take your Lordship's ruling exactly as it
7 is and we will not turn to that report unless we give
8 prior notice or unless of course -- one doesn't know
9 what the witnesses will say in any event. We'll cross
10 that forensic bridge when we come to it.

11 MR JUSTICE GOSS: Exactly. If and when we do, we'll address
12 that. All right.

13 I've already indicated that we're not going to sit
14 with the jury tomorrow in this case. Therefore I don't
15 see there's any need for the case to be listed at all
16 tomorrow.

17 MR JOHNSON: No.

18 MR MYERS: No, my Lord.

19 MR JUSTICE GOSS: So that message can be got back to where
20 the defendant is. Obviously, she will not be brought to
21 court tomorrow, but they should prepare to bring her
22 Monday morning.

23 MR MYERS: My Lord, yes.

24 MR JUSTICE GOSS: As far as the timetable is concerned,
25 thank you again, Mr Driver, for your fourth or fifth

1 version, whatever it is now, in relation to the
2 remaining witnesses to be called. No criticism there,
3 events have overtaken us. But if we are able to proceed
4 with the jury on Monday then I anticipate we will reach
5 the stage that you hoped to reach next week.

6 If we can't proceed on Monday but we can proceed on
7 Tuesday, again we may reach that stage.

8 MR JOHNSON: We do have a degree of influence on things, so
9 we'll do everything we can to ensure, if we can, that we
10 finish [Baby G]'s case by...

11 MR JUSTICE GOSS: We'll do what we can. I'm not saying
12 we will sit longer hours, but we will sit full days if
13 necessary.

14 MR JOHNSON: We'll start backing up witnesses and that sort
15 of thing, which we haven't been doing, really.

16 MR JUSTICE GOSS: I think we're going to have to have them
17 on standby so if, for example, by 12 o'clock it looks as
18 though we're going to need one in the afternoon, they
19 can be here.

20 MR JOHNSON: Yes. We're not short of resources in that
21 sense.

22 MR JUSTICE GOSS: No. I'm sorry if it causes inconvenience,
23 but we're going to encounter these sorts of
24 difficulties, I fear, because no one has control over
25 the COVID-19 virus and its various mutations.

1 MR MYERS: We don't mean to reiterate a refrain that we've
2 been prone to go to, but there are a number of the
3 witnesses coming for whom we don't have questions.

4 MR JUSTICE GOSS: I know.

5 MR MYERS: That's entirely a matter for my learned friends.
6 There are some, of course, for whom we have a good
7 number of questions, but it may be -- it's entirely for
8 the prosecution -- possible to review those currently
9 listed to be called. If they are capable of agreement,
10 that might assist.

11 MR JOHNSON: I've been cryptic about it, but that's one of
12 the things we are considering.

13 MR JUSTICE GOSS: Right. I just have a question for
14 Mr Murphy. I know we're in open court. Do you know
15 whether the issue in relation to the iPads is resolved
16 or not? In other words, will an iPad work outside this
17 courtroom or not?

18 MR MURPHY: Unfortunately not today.

19 MR JUSTICE GOSS: That's fine.

20 MR MURPHY: A laptop could be provided.

21 MR JUSTICE GOSS: No, no. If I want to consult the iPad,
22 I shall come into the courtroom and do it. Thank you
23 very much. I'm very grateful for the technological
24 assistance that we have received.

25 So the case will not be listed tomorrow, though in

1 fact I shall be here until certainly the mid-afternoon.
2 Not that I'm suggesting any of you need be here, but
3 you'll know that I'm contactable and working.

4 Thank you very much indeed. I hope none of you go
5 down with any form of infections that are going around.

6 It's a bit debilitating. All right, thank you.

7 (12.23 pm)

8 (The hearing adjourned until 10.30 am
9 on Monday, 12 December 2022)

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