

5 December 2022
Juror off sick

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Housekeeping

Monday, 5 December 2022

(10.30 am)

(In the absence of the jury)

Housekeeping

MR JUSTICE GOSS: Mr Johnson, Mr Myers, as I anticipate you've been told, unfortunately a juror is unwell this morning and not fit to attend court.

Obviously therefore we can't sit with the jury today, but I thought before the remaining jurors are brought back into court we should just discuss tomorrow and what, if anything, can be done tomorrow, because essentially we've lost today and I was just looking at the proposed witness order for today and seeing whether there is any impediment to us sitting tomorrow.

MR JOHNSON: I'll defer to my learned friend.

MR MYERS: I would be concerned, my Lord, and I'll explain why. The witnesses to be called tomorrow include Doctors Brearey and Harkness. Insofar as their written evidence is concerned, no specific issue arises, but save for those nurses who were questioned about insulin, the question about insulin was put to them, in other instances where witnesses have been called who the defence had initially agreed in writing, quite naturally their evidence, once they give it, has tended to expand upon what's in writing and raised various points that have then been become quite relevant and been necessary to deal with.

So far as Dr Brearey and Dr Harkness are concerned, that's entirely possible if they give evidence.

Certainly the evidence of the witnesses Walker and, to some extent, Booth has less potential to be controversial, though I note, having returned to Christopher Booth's statement, that if he is giving evidence live, he deals with events at the time of the vomit and what took place and immediately afterwards and there's every possibility he will therefore go into detail that requires some response to it, and it really does go to matters that are directly pertinent to the allegation and the way that it may develop.

So I'm grateful to your Lordship for asking me and I have to say that where they are concerned, Doctors Brearey and Harkness and Nurse Christopher Booth, I would be concerned at the prospect of them giving evidence rather than just their statements being read in my absence because there's every possibility they will raise issues that will have to be dealt with and which of course I am able to deal with because I have the material at my disposal and ready because of the cross-examinations that have been conducted already.

So if they had been slated to give evidence on Tuesday, it's something I would have raised and been concerned about. There are a limited number of absolutely non-contentious areas -- I'm thinking of the evidence of Walker, of a doctor whose evidence has just been agreed this morning, and some videos to be played -- which conceivably, of course, could be dealt with and it may be that somewhere there is other agreed evidence that can be dealt with. But the moment we enter into the territory of doctors or nurses who have direct dealings giving live evidence, that then becomes potentially controversial as any other witness.

MR JUSTICE GOSS: Right.

MR MYERS: Thank you, my Lord.

MR JUSTICE GOSS: Mr Johnson, any observations you wish to make in relation to that?

MR JOHNSON: No, thank you.

MR JUSTICE GOSS: I understand the point that Mr Myers is making, but to what extent are these witnesses, that is Doctors Brearey and Harkness and Nurse Booth, going to add to that which is in their witness statements?

MR JOHNSON: Well, I'm in exactly the same position as you, my Lord.

MR JUSTICE GOSS: It's difficult, isn't it? Because on the face of it this is not like an expert evidence who's going to require expert or detailed cross-examination.

Certainly so far as Nurse Booth is concerned, it's one discrete point, namely the evidence relating to that particular moment, which doesn't normally require the services of leading counsel in any case.

Are there any other areas of evidence that could be adduced to try and make it at least a half day?

MR JOHNSON: We had discussions over the weekend and we were worried that we were going to come up a bit short even with the four witnesses, so we had timetabled some more videos, which I'm not quite sure -- together I think they take about an hour and a half. So we could possibly do that.

MR JUSTICE GOSS: We could do sort of half a day and Nurse Walker?

MR JOHNSON: That can be read. There is material that can be read, certainly, tomorrow.

MR JUSTICE GOSS: We can perhaps do half a day. I think it's worth trying to do half a day.

MR JOHNSON: I think we probably can. One never knows when one may get the benefit of that.

MR JUSTICE GOSS: Exactly. Because we are entering that time of year when we can start losing days pretty easily if we're not careful. So I think we've got to use every half day if we can.

MR JOHNSON: Yes.

MR JUSTICE GOSS: All right.

MR JOHNSON: We'll do our best to produce as much as we can without going outside this particular case and without throwing the jury's understanding out to produce as much business as we can tomorrow that is uncontroversial.

That will impede our ability to fill on other days when we might be looking for a filler, but that's the way it goes.

MR JUSTICE GOSS: All right. I appreciate this has to be approached with quite a measure of flexibility in relation to timetabling for various reasons.

All right, Mr Myers, I will not insist on Doctor Brearey and Harkness and Nurse Booth giving evidence tomorrow, but I would like to see if some accommodation can be reached between you as to what evidence can be adduced. And we can certainly play as many videos because videos are a discrete area. It doesn't really matter when they're played. Obviously the closer they are to the relevant event, the better.

Would you mind telling the jury that we'll be ready for them in a minute if they could be a little bit quieter, please?

So you needn't worry about that aspect.

MR MYERS: I'm grateful to you, my Lord, and I'm grateful to my learned friends as well for assisting with regard to that. Thank you.

MR JUSTICE GOSS: The other thing is the application I received. What I'm going to do is have the jury back now, explain that we are not able to proceed with them today, as they will understand and have anticipated, and then send them away, tell them to come back at 10.30 tomorrow, but warn them that it is not likely to be a full day, but we can achieve quite a lot tomorrow, I hope, and then they can go away and we'll just come back to your application.

MR MYERS: Yes, of course.

MR JUSTICE GOSS: To use a modern expression, with which I'm now becoming familiar and we're all becoming familiar, we can scope that out perhaps.

MR MYERS: Very well. We shall scope away, my Lord.

MR JUSTICE GOSS: Thank you. Jury, please.

(In the presence of the jury)

MR JUSTICE GOSS: Good morning, members of the jury. Well, you well know that you are one short today.

Unfortunately, your colleague is not well enough to attend court this morning and, as you know, if any one of you is absent, we cannot proceed. Therefore we can do nothing today as far as you are concerned. So I'm sorry about that.

In a moment you will leave and that'll be it for today. Can you be ready to come back tomorrow morning to start at 10.30? I'm hopeful that he will be fit for tomorrow and everybody else will be fit for tomorrow.

We are at that time of year when various things overtake us in terms of health.

So 10.30 tomorrow morning. I'll just give you this warning in any event: tomorrow was actually likely to be a day when we might not have been able to proceed for entirely other reasons and had today been a normal day, you would have had tomorrow off in any event. So today is your day off and tomorrow is your working day, but I hadn't told you because experience has taught me it's very hard to predict what's going to happen from one day to the next, therefore I don't like to excite expectations and hopes only to dash them. All right?

So 10.30 tomorrow morning, I hope. Of course remember your responsibilities as jurors, of which I have repeatedly reminded you. Thank you very much.

(In the absence of the jury)

MR JUSTICE GOSS: Mr Myers, as I say, all I want to do really is see where we're going to go with this.

I don't know whether you had notice of this, Mr Johnson, before I did, the application.

MR JOHNSON: We discussed it and had not agreed and I'd stood on our rights to have a notice.

MR JUSTICE GOSS: Yes. I thought that's probably what had happened, that there must have been discussions about this. I think then, without being too formal about it, we just need to identify the timetable and see how we're going to deal with this.

MR MYERS: I should say, it occurs to me as we've just served this on your Lordship this morning, I anticipate it would assist for your Lordship to receive hard copies in due course and we can arrange for that. So we'll do that.

MR JUSTICE GOSS: Yes. What I have done is I have caused to be printed off the actual notice itself and the terms of your application, but that's relatively short compared to the report itself --

MR MYERS: Yes.

MR JUSTICE GOSS: -- which I don't have in --

MR MYERS: We can provide a hard copy for your Lordship.

MR JUSTICE GOSS: I think a hard copy of the report would be helpful.

MR MYERS: I can anticipate in response there may be a desire to refer to other parts of the report quite naturally --

MR JUSTICE GOSS: Exactly.

MR MYERS: -- and therefore your Lordship will need that.

Unless your Lordship wishes us to proceed, and perhaps that would be expecting too much in the circumstances the prosecution are in --

MR JUSTICE GOSS: Not proceed now, no.

MR MYERS: Just by way of explanation, the report was prepared by a professional college, which in fact a number of the consultants are either members of or fellows, the Royal College of Paediatrics and Child Health. And that followed the redesignation of the Countess of Chester neonatal unit from a level 2 to a level 1. It was a review, the terms of which are referred to briefly in the application, and are set out in the review itself, that ostensibly was focusing upon the service, the provision of care.

It was in the context of an increase in what were described as a number of unexplained deaths, that obviously is the -- there's a setting within which it takes place, so there is cognisance of that. It wasn't a review into the deaths themselves. That wasn't part of this, which of course therefore is an important part of the trial. But it did look at the service, the staffing, the way that the procedures and the governance of the unit were dealt with. And in fact, in the application that we've provided and the areas of material we wish to adduce, which are at paragraphs 9 and 10, although they subdivide into a number of Roman numeral paragraphs, we have sought at least to identify the terms and the purpose of the review at our large paragraph 9 before going on at large paragraph 10 to put in the items that we would wish to adduce in cross-examination.

MR JUSTICE GOSS: Yes.

MR MYERS: The important matters, just for the court's understanding, that characterise this piece of material are that it is material in which the witnesses with whom we would wish to introduce it either were or had the capacity to be involved. They were all consultees, they're well aware of it, and indeed it's referred to by all bar one, all bar Dr Gibbs, in their witness statements and it forms and has formed to date part of the background to this case.

It would be surprising if it didn't feature in any narrative of what took place. So this isn't an instance of seeking -- the defence seeking to introduce material that is outwith the knowledge of the witnesses or appears from provenance unknown or provenance dubious.

I'm not suggesting that would ever happen, but it's not in that category of material, it's a formal piece of material.

That's, in a nutshell, the background to it and when it took place and it was completed in November 2016 and it appears from what the witnesses say that initially they were not provided

with full copies but they were acquainted with the findings but that was back in 2016.

It would be extraordinary now, given the open source nature of it, if they were not familiar with it and they were certainly part of the process.

We wish to cross-examine and introduce in cross-examination the areas that we have identified because it's our submission that they bring some objective assessment to the question of the level of functioning of the unit. The court has heard questioning by the defence about staffing, consultant cover, nursing cover and tertiary care. Those are matters that are addressed in the review and we've set them out in our paragraph 10. We would like to put those findings, conclusions or recommendations to the relevant witnesses.

We recognise, of course, that there is a wealth of material within this report. We have identified material that in the first instance contextualises what took place -- that's our paragraph 9, so everyone knows what it would be -- and then the critical findings, which we've set out in our paragraph 10.

There are other comments and observations within the review and I don't at this stage seek to pre-empt what the prosecution may say in response to this, but it is a relevant factor, we submit, to bear in mind -- and this may be a matter for legal argument -- the comparative weight to be given to critical findings and less critical findings. The way we would characterise is it rather like confession evidence, inculpatory and exculpatory comments. And the rationale with confession evidence -- and I am not suggesting this is on all fours with that, it is just an analogy. But the rationale of course is that expressions or comments against interest carry with them a kind of weight that may not attach to exculpatory comments.

I say that because there may be material within the report that may be regarded as ameliorating some of the findings. And if there is and the prosecution wish to introduce that, then no doubt they will seek to do so.

It is a many-textured report.

We have identified the material we wish to rely on under very clear -- the application and the terms of the legislation refers to the material. And that's the starting point, not everything associated with it.

Of course, the general circumstances will form part of the consideration the court will perform, both under section 117 and, of course, under section 114, and the criteria set out

there. So it may well be that in due course your Lordship will be asked to consider more than the material that we have identified and argument based upon that. We recognise that and to some extent pre-empt that.

I won't go further than that.

MR JUSTICE GOSS: No, I'm not asking you to say anything further at this stage. I just want to be clear about where potentially we are going in relation to this.

What you have said leads me to the conclusion that I had formed provisionally in any event that not only am I going to have to have the terms of the report but I'm going to have to have the details of the particular cases which are relied on for the general propositions that are advanced by way of conclusion in the report to see whether they have a materiality to any allegation in this case. Because I rather anticipate the prosecution will say that to be admissible this has to be relevant to an issue in this case.

So I'm only saying this so that it's out there for everyone to consider when we come on to deal with the application. So I'm sure you were alive to that, Mr Myers, I would be staggered if you weren't, but that's what the focus is going to have to be on. It's not good just having bald assertions that there were shifts when there was understaffing and that sort of thing. But if that's not a shift that is pertinent in this case, what is its materiality to this particular case?

MR MYERS: Of course we wait to see the way the prosecution respond to it. But an important part of what we say, and your Lordship will see it's apparent from the terms of the review, is it was not a review into the cases --

MR JUSTICE GOSS: No.

MR MYERS: -- and it doesn't form that. It's a review of -- for instance, the question of: in principle, was there sufficient consultant cover?

MR JUSTICE GOSS: Yes. I can see that that is an issue that may have relevance. But by way of other examples -- I'm sorry to cut you short, Mr Myers, because I don't want to prolong this discussion at this stage, I just want to identify where we're going to go with this -- the delays to transferring infants out promptly from the hospital.

Now, thus far, provisionally -- of course I don't have any fixed view about it -- there doesn't seem to be any relevance to any

of the children in this case that they were not transferred out either at all or more quickly.

MR MYERS: That may yet become relevant later with other children.

MR JUSTICE GOSS: It may do, yes, exactly. I would not propose that there should be just a broad-brush approach to this. We have to be particularly careful about it.

I'm articulating this and I have repeatedly interrupted you, for which I apologise again, but I do think that for that reason there is going to be to have detailed submissions in relation to (a) what you want to adduce, particularly what you want to adduce as hearsay evidence, and secondly, the response to that. And in addressing what you want to produce, obviously why it is material to an issue in the case, which I'm --

MR MYERS: May I just observe this? Two observations in response to what your Lordship says. The first is that we would submit -- this really may well be for argument -- that the generality is important because, for example, when we are faced with a witness like Dr Gibbs, who asserts voluntarily that the unit is functioning in a way that's no different from any other unit, we question that and we submit that if there is material which is capable of showing that isn't right then that is admissible generally.

So we would respectfully take issue at this point with the suggestion that this relates to specific cases when what we're looking at is the baseline of functioning of the hospital. And that leads me just to a second observation, which is we certainly are well aware of the question of the totality of cases in the background here. We do not see that in dealing with the issues that we raise that would necessitate a wider enquiry into specifics of cases that don't feature or indeed even those that do feature in this indictment because it's the general level of functioning of the hospital that we are interested in putting before the jury. That can then be applied to the particulars where it's relevant.

So we're very grateful for your Lordship identifying potential issues and it is of course a necessary and helpful exercise to do that because it focuses the mind.

But it may well be that it is an issue of some contention as to whether or not to deal with the general level of service, which is ultimately what this review did, that would necessitate or justify descending to the detail of specific cases. But that's a matter for consideration.

MR JUSTICE GOSS: I think it's helpful to have this discussion because it enables each of us to focus on the application itself and how it is going to be addressed --

MR MYERS: Yes.

MR JUSTICE GOSS: -- by both sides and by me. All right.

Thank you very much, Mr Myers.

Mr Johnson, is there anything you wish to add to that which has been said at this stage?

MR JOHNSON: I can just deal with a couple of matters if I may.

On 31 October, when [Nurse B] gave evidence, this issue was raised with her and she gave a very illuminating answer, which your Lordship will find at page 27 of that day's transcript. This is what she said:

"Just because the amount of babies increased doesn't mean we weren't BAPM compliant on every single shift so for this shift in particular or on any shift that you're making reference to, you'll have to look at the care level of the baby versus the BAPM standard. You have to look at it individually."

And that's the point about this case. It's all very well making general assertions about the level of care or where particular standards weren't adhered to, but one has to look at cause and effect and in order to make this evidence relevant and admissible, it has to make it more or less likely that the accused committed the offences that she is charged with on this indictment.

That's the basic test of admissibility in every criminal case.

Just as a matter of principle in response to -- now that we have seen the defence's application, it's interesting -- I just started to pen a response this morning -- the defence rely on section 117. I haven't gone to 114 yet. If I can just find the statute.

I think the statute is set out at the conclusion of the defence application. It refers to -- I think it's paragraph 11 onwards in the application. I've lost the document for now, I'm going from memory now. I think it was paragraphs 11 to 13 or thereabouts.

From memory --

MR JUSTICE GOSS: It refers to annex 1 to the application.

MR JOHNSON: That's right.

MR JUSTICE GOSS: It's in annex 1 it is set out verbatim.

MR JOHNSON: It is. But interestingly, I think it's paragraph 11 where...

(Pause)

Sorry.

MR JUSTICE GOSS: Are you going to draw my attention to subsections 2(a) and (b)?

MR JOHNSON: No, I'm going to start with a more fundamental point, my Lord. Section 117.1(a):

"In criminal proceedings a statement contained in a document is admissible as evidence to the matter stated if (a) oral evidence given in the proceedings would be admissible as evidence of that matter."

This is expert opinion, the contents of this report, and this report does not satisfy the provisions for admissibility of expert opinion. It doesn't contain all the things that are set out in Rule 19 of the Criminal Procedure Rules.

So we will submit in due course that this application doesn't get beyond first base. Using the hearsay provisions is a way to get round the expert opinion provisions and you can't do it.

MR JUSTICE GOSS: What I'm going to indicate, I am not going to direct, is that the prosecution should formulate a detailed written response in relation to the application --

MR JOHNSON: We will.

MR JUSTICE GOSS: -- raising the legal and evidential matters that they wish to raise. Mr Myers should have the opportunity to respond to that in writing.

Is there going to be a difficulty about delaying this for a few days in terms of -- I'm not asking for these materials to be provided within the next few days, but...

MR JOHNSON: I would have thought this probably all comes into the play in the overarching section of the case.

I don't know how my learned friend wants to deploy it.

MR MYERS: Certainly within the next few days there is no urgency in that sense and if it takes days or a week or so to put the material together for your Lordship, that creates no issue for us.

As to when this or other parts of the evidence of the consultants in particular that comes under the title "overarching material" is concerned, quite when that emerges depends very much on the overall circumstances of the case. It may not all emerge at the end of the case, it may emerge before then.

But in answer to the question of this material, it wouldn't be necessary to refer to any of this within whatever period in the near future your Lordship considered convenient to deal with it. So if it's days or a week or so to put everything together, that will not be a problem for the defence and hopefully not the prosecution.

MR JUSTICE GOSS: All right. We're going to have today and part of tomorrow for people to crystallise their thoughts and commit them to writing. And then we'll see where we are perhaps later this week.

MR MYERS: Yes. Very well, my Lord.

MR JUSTICE GOSS: Mr Johnson, I'm disinclined, as I have been throughout the management of this case, to set time limits or dates so far as matters relating to the responsibility of counsel are concerned. When the responsibility falls or it depends upon the actions of others then it's different. But so far as this is concerned, I'm not going to say by such-and-such a date.

MR JOHNSON: No. Given that we're dealing with, generally speaking, case management issues, one of the things that we on our side have been discussing over the last couple of days is interviews, which all seems a long way off at the moment, but there are very, very, very long interviews in this case and what we are going to try and do between ourselves is to, on both sides, seek to come up with some sort of agreement as to -- it's going to have to be dealt with on a rolling basis, I think, because there are so many interviews.

It may be that we will be seeking to formalise or at least inform your Lordship as to what we have agreed so that there is a degree of inflexibility about when things are dealt with. We see, on our side, that over Christmas we're really going to have to get our proposals to the defence and, in order to have a sensible way of dealing with the interviews, we're going to have to have some of those proposals answered and finalised, and, if

necessary, adjudicated upon as we roll through January and February. So I just thought I'd tell you that.

MR JUSTICE GOSS: I was aware that that was something that was down the track, so to speak. But you're right, that's going to have to be done because it would be unhelpful to everyone concerned to have days and days of interviews. The summaries that have been given to the jury thus far are obviously not the final product, but they indicate an appropriate format. But there will be passages no doubt that the defence will want to have added to those and that's the way it can be dealt with.

MR JOHNSON: There are certainly bits that we want in that we weren't able to agree.

MR JUSTICE GOSS: Yes. So it's a work in progress?

MR JOHNSON: Yes.

MR JUSTICE GOSS: I'll leave that with you, but yes, I am endorsing what you are suggesting and I'm sure that Mr Myers would agree with that.

MR MYERS: Yes, we see the sense in that, my Lord, and would agree with it.

MR JUSTICE GOSS: And the advantage of the number of counsel involved is to assist with just that process.

MR JOHNSON: Yes.

MR JUSTICE GOSS: Good. Is there anything else that we can discuss this morning? I don't think so.

MR JOHNSON: I don't think so, I'm afraid, no.

MR MYERS: If that's the business in terms of the case management and issues arising, may I make one request about Ms Letby's attendance tomorrow? She is anxious and has been anxious throughout to be here when the evidence is being dealt with, although it is arduous, the arrangements for travel, but she's managing with that.

If the evidence that would be dealt with tomorrow is going to be non-contentious, as we anticipate it is, and will involve some material to be read and some videos to be read, not likely, but nevertheless she requests, through me, if her attendance could be excused from tomorrow morning, if that's when the court is convening or such time as it takes. It is a great opportunity for her to recover from the rigours of the travelling, and it is

constant and there's a lot of it. For that reason, she'd be grateful if she could attend next on Wednesday.

If the court requires her attendance here of course she'll come, it's not to be difficult, but by her own choice she would choose to be absent tomorrow if she could be, so I ask that on her behalf.

MR JUSTICE GOSS: Thank you. Do you wish to say anything, Mr Johnson?

MR JOHNSON: All I would ask to be considered is what if anything should be said to the jury about it.

MR JUSTICE GOSS: This is the difficulty and once the precedent starts for absences, although I am understanding of her position, I wouldn't want it to be thought that I am not understanding of her position, but I do think that in this case she should be here when any evidence is placed before the jury.

MR MYERS: Yes.

MR JUSTICE GOSS: As far as the transportation is concerned, I have agreed essentially in principle that the court will not start before 10.30 because I'm mindful of the distances that are being travelled. As far as leaving the court is concerned, I think we can proceed on the basis that we will not be sitting beyond the midday adjournment, in other words 1 o'clock, and I don't know whether a dock officer who is present is able to assist as to how easy it is to arrange for transportation back to prison when we finish early. Can that be done rather than waiting, so she's not waiting here, so she's taken back? Thank you very much. I thought that would be the case.

So today is obviously a day when one imagines she'll be back fairly shortly, but I'm very -- I don't think it's appropriate to have evidence, whatever it is, even though it's not controversial -- if, for example, a question arises in relation to a video that is being played and she hasn't seen it in the presence of the jury, it could just create difficulties. So for that and other reasons, I'm not, I'm afraid, going to accede to your request.

MR MYERS: We understand that. It's something I was asked to raise with your Lordship, but we understand the position.

MR JUSTICE GOSS: I do understand the difficulty and as I've said, I am mindful of the process that's involved, but, on the other hand, I have to weigh up all appropriate factors.

MR MYERS: My Lord, yes, thank you.

MR JUSTICE GOSS: Do you want her to remain here until you or those representing her have had the opportunity to speak to her today?

MR MYERS: Yes, I would, my Lord, please.

MR JUSTICE GOSS: All right. So no immediate removal from the court building, please. Some of her legal representatives will come down to speak to her very shortly, I anticipate. Thank you very much for your assistance.

(11.07 am)

(The court adjourned until 10.30 am on Tuesday, 6 December 2022)