

8 December 2022

Application re admissibility of the
Royal College of Paediatrics and Child Health (RCPCH) report

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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.

MR JOHNSON: Yes.

MR MYERS: We agree, my Lord.

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

Mr Myers, thank you very much. I have received this.
Unfortunately, by reason of other commitments, I have to say I

have not considered it in detail, your response. So please feel free to take me through the initial application and the response unless you'd rather I just completed reading it now.

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

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

(Pause)

Thank you, Mr Myers. I'm sorry --

MR MYERS: Not at all, my Lord.

MR JUSTICE GOSS: -- I hadn't been able to read that beforehand but I have read it now.

Application re admissibility Submissions by MR MYERS

MR MYERS: My Lord, this is an application on behalf of the defendant to admit hearsay evidence that is taken from a report by the Royal College of Paediatrics and Child Health and that's set out in an application to the court dated 4 December.

Your Lordship also has a response from the prosecution dated 6 December and then, as requested by the court, a response by the defence to the matters raised in the prosecution response, and that is dated 7 December. Your Lordship has a copy of the report and reference to supporting legislation.

The details of our application are set out in the 4 December document. I don't repeat all of that but I will repeat what's necessary so far as it assists the court and so far as we are required to do.

Straightaway I deal with a concern the defence have arising from the prosecution approach to relevance where this application is concerned. We are concerned because this is, we submit, an entirely legitimate application, but it appears to be used by the prosecution in their response, that response as a means of

silencing a basic and necessary aspect of the defence case and, it would appear, looking at the way that is framed, in effect reversing the burden of proof on what is a fundamental and overarching aspect of the prosecution case.

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

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

The areas the defence are concerned with are staffing generally, arrangements concerning the consultants in particular, and also the relationship with tertiary units that are able to provide a higher level of care than the Countess of Chester neonatal unit could at the relevant time. They engage with the issue, the defence say, of risk given the increased number of admissions and increased acuity of those admissions between 2015 and 2016. They are also relevant to the circumstances, we say, in which blame came to be focused on Ms Letby by means of an ongoing process at the unit leading into the police investigation as the source of what was wrong.

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

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

The prosecution opened their case to the jury on that basis. And in paragraph 29 of our response we have set out assertions the prosecution made with reference to where your Lordship can find them in the transcript.

These are general assertions starting with the assertion that the Countess of Chester neonatal unit was a hospital like any

other hospital in the UK, which is just about the first thing the prosecution said to the jury, before turning to questions of statistics, the rise in the number of babies dying, and what it is said the consultants noticed and how they searched for a cause, and how they say the presence of the defendant was a common denominator.

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

The prosecution have taken the decision, it would appear, to present evidence that relates specifically to those parts of their case at later stages as part of their overarching case. That's a matter for them, they've chosen to do that, but these are issues in the case of general application and this is the baseline for the prosecution case and the basis against which the assertions as to the general level of operating at the hospital are concerned and against which the fairness of the inquiry that is conducted, which begins with two of the consultants at the hospital, moves on from. That is what they say.

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

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

So far as the defence case is concerned, from an early stage the defence have set out the relevance of the background to this and the level of functioning of this unit and the part played in it by those parties who conducted the investigation into their own unit throughout the course of the period June 2015 to June 2016. That's set out, and reference to this, my Lord, is in the defence response at paragraphs 13 to 15, but it's set out in the defence statement at length in paragraphs 11 to 20. That was

uploaded to the DCS on 14 December 2022 -- February, I apologise, 14 February 2022.

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

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

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

So far as the general application of this evidence is concerned, it is relevant to both cases and sets a context against which overarching issues like the performance of the hospital can be considered, issues as to what lies behind the investigation conducted by the consultants will be considered. We will be coming to that. It's the prosecution's choice that it hasn't been dealt with now but it's in the evidence and it occupies a large part of the overarching part of this case. The prosecution have indicated they will deal with it at a later stage.

That's general. Its application to individual cases will, in due course, be a matter for the jury and, we submit, it's something the jury may apply in individual cases so far as relevant. We do not submit, and haven't done, that this goes to determine in

every instance the individual cases, but in fact there is an overlap that will be apparent.

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

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

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

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

The nurses' statements, where we have identified them, have referred to how busy the unit was and the staffing levels. The passage referred to in the evidence of [Nurse B] comes from her statement; we've given the reference to that in our response. The consultants deal in detail with what took place. The prosecution cannot have at their disposal this evidence -- and evidence that, as we understand, is due to form some part in this case and has certainly in general terms being outlined in the opening -- and then complain when the defence turn to address it.

Therefore, so far as the relevance of the material we identify is concerned, it is relevant, in fact, to both parties in this case. It has already -- the issues it touches upon have been set out in opening by the prosecution. It has formed, consistently, an important part of the defence case. To leave it undefined in

evidence at this point is a matter for the prosecution and their choosing, but to seek to prevent the defence from dealing with it when it's necessary and meets this case is no, we submit, appropriate response to the application we make or the defence case.

We understand the scale of the prosecution case and those defending all have experience of prosecuting as we have defending and there has been a constructive degree of cooperation between the parties in this case and we have left it to the prosecution as to how they approach the overarching evidence in this case. We are compelled to observe, if the position we reach when making an unconventional application like this is to say that we should simply be shut out from raising this as our defence then we will require the prosecution to set out in detail what it is precisely they rely upon from the vast amount of material in the overarching case.

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

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

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

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

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

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

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

Paragraph 10 sets out material relating to findings and conclusions.

We deal with section 117(1)(b) at paragraphs 11 to 13 and 114(1)(d) at paragraphs 14 through to 20. I'll summarise now because your Lordship and the prosecution have that set out, but of course I will enlarge upon anything that assists the court or arises out of the prosecution response.

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

It's an important part of that that this is a professional inquiry, the terms of reference are clear, the sources of material are set out at the appendix to it, it includes the witnesses who would in fact be cross-examined upon it. And the defence would seek to utilise this material, if leave was given to use it, in the cross-examination of certain of the consultant witnesses in this case who are perfectly familiar with the content of this report and whose statements were made in knowledge of the report and, so far as we understand, with participation or potential participation in its creation. And indeed, what triggers this application at this stage is the evidence of Dr Gibbs, who, when he came to give evidence in the case of [Baby F], chose, having reflected upon questioning when he first gave evidence, to volunteer what could be described as a speech into the standard of operating of this hospital. That's what he talked about and how it was no different from other hospitals.

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

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

The nine factors in section 114(2) are set out.

Your Lordship will know, of course, I am well experienced in the fact that it is not exhaustive, the court doesn't have to reach a decision on all of them, but they are matters the court must have regard to. We observe the relative weight attributed to them, or any of them, depends on the circumstances of the case.

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

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

MR JUSTICE GOSS: It wouldn't be helpful.

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

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

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

(e) and (f) deal with reliability of the maker of the statement -- the making of the statement -- sorry, (d) and (e) deal with the reliability of the making of the statement and the maker of the statement and (f) with whether or not oral evidence

of the matter can be given and if not why not. My numbering may be out there, but I can correct the numbering.

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

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

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

With that in mind, and bearing in mind factor (f), whether oral evidence can be given, we submit it's not realistic or really possible to find one person who can give oral evidence of a report, a formal report, by a body to which these witnesses have contributed. It's a composite document based upon different sources of material that they are aware of and able to comment upon. That's one of the aspects of this which is unusual and, we submit, weighs in favour of admission, even though it is a multi-authored report by a professional body because the way in which it would be used would be in cross-examination of the witnesses who, doubtless, would acknowledge what is contained within the passages we identify, but are then pre-eminently able to respond to questions about it.

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

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

I should say in addressing your Lordship, I note, this is what caused me to -- I note that the annex to section 114 where it sets out the Criminal Justice Act, there are two subsection 2(a)s, which has made me hesitate as I was going through (a) through to (i). It should be (a) to (i), not (a), (a), (b), (c),

(d), (e), (f), (g), (h). In fact, the way it's set out in our application is by reference to the correct lettering for those sections.

MR JUSTICE GOSS: Yes, not to the annex.

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

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

MR MYERS: I'm grateful.

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

MR JUSTICE GOSS: Yes.

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

I'll wait to assist further if I can.

MR JUSTICE GOSS: Can I just be clear then precisely what it is you are seeking to adduce in terms of evidence from this report? Because I've read the review and I think it's important to know before, obviously, I hear what Mr Johnson says about it, precisely what it is you are wanting to put in evidence from this review.

You're not seeking for the whole report to be put in evidence?

MR MYERS: No.

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

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

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

MR MYERS: Yes.

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

MR MYERS: Yes.

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

MR MYERS: Yes, to put it to them, but of course to do so in the context of the review having been conducted and these being findings of the review. So it's not simply as questions disembodied without making plain what the source is. But the witnesses, all bar Dr Gibbs, make reference to this review in their statements, so they know precisely what it relates to and we suspect the only reason Dr Gibbs didn't is because it didn't come up in the way he was describing it but it is inconceivable he will not have been aware of this or even participated in it because he's the most senior consultant in that unit and all of them were invited to consult on it and they all work together and would be well aware of the process which took place over 2016.

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

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

MR MYERS: Yes.

MR JUSTICE GOSS: Now, would you then say that the jury also need to be told, if you are permitted to do that, what the parameters of the review were and the nature of the review -- I'm looking at the executive summary now -- as to why it was the review was requested, the fact that the team, which consisted of two paediatricians with special interest in neonatology, plus a senior neonatal nurse manager and a lay reviewer, attended at the hospital for 2 days on 1 and 2 September, met staff and stakeholders, including obstetric, network and transport representatives, and were not commissioned to conduct detailed case note reviews but, given the circumstances, recommended that that, in other words detailed case note reviews, be initiated immediately, prioritising the deaths that were considered unexpected, and that essentially this was a review into the system and not into the deaths and collapses of the patients who are now the subject of this prosecution?

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

MR JUSTICE GOSS: Exactly.

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

MR JUSTICE GOSS: Yes.

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

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

"The RCPH was invited to review the investigations of each death and the wider service, including network support and advice protocols and transfer arrangements to provide a view on whether there were any contributory factors in the deaths or missed opportunities to take action that could have prevented or mitigated them."

But then expresses no view in relation to that.

MR MYERS: No. We've included that at our paragraph 9(iv), because we recognise it's important that's understood.

It is the baseline, the background service of the hospital that's considered in principle here, not the individual deaths.

MR JUSTICE GOSS: Yes.

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

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

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

So in other words, the Countess of Chester was performing better than the network, whatever the network is.

MR MYERS: Well, certainly the staffing levels are depicted in that way. The performance from that, of course, is one of the

things that is in dispute. But the point is the finding is that all levels were too low and it's particularly critical --

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

MR MYERS: That's correct, and of course this is against the background -- this is what is significant and what we've referred to -- and we referred to this in opening this to your Lordship -- is against a background of a unit that has experienced, on the evidence of these witnesses so far, increased admissions with increased acuity over the relevant period. And that's where this engages and it's important because if staffing levels are low, and that's a system that's running in that way for some period of time without change, there may be risk but it might be understood and controlled. But if the numbers increase and if acuity increases without a corresponding increase in the level of staff or the number of staff, then, we submit, risk increases. It must do --

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

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

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

MR MYERS: Staffing levels may be low across the board, but whilst we cannot, on the evidence that's available, start comparing statistics with other units, we can compare this unit against itself. And the point that is made by the unit, by its witnesses and by the prosecution, is that there was, as it's

put, a spike in the mortalities between 2015 and 2016. That was investigated in the first instance by the consultants responsible for the unit and, for reasons that may become apparent, their focus landed upon Ms Letby as the unifying feature in this situation.

MR JUSTICE GOSS: Well, a common feature.

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

So far as the defence are concerned on this issue over the same period that unit experienced an increase in admissions and acuity. That's quite different from any comparison with any other unit. No statistical analysis is required with other units to support the proposition that if a unit that is already understaffed and has other structural deficits then comes under increased demand because of increased numbers or increased acuity, and it's that in particular that we focus upon, then the level of risk increases. That doesn't require a comparison with other units or statistics in that way. If the evidence is that there are more babies with higher acuity who were admitted, and certainly the witnesses who have been asked about this have generally agreed as to that over this period, then, however the hospital compares with other units so far as understaffing is concerned, there must be, we submit, an increased risk at this unit. We are not dealing with what levels of acuity changed in other units. That doesn't feature anywhere in this evidence.

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

MR MYERS: We invite it, yes.

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

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

MR JUSTICE GOSS: No, any evidence.

MR MYERS: No, we don't call evidence as to system failure.

We're relying, in fact, upon the conclusions to be drawn from the prosecution's own evidence, which we submit are uncontroversial -- or at least the fact they may be drawn is uncontroversial, it may be a question for a tribunal of fact to decide whether or not they can draw those conclusions, but if a

unit has systemic problems with the number of staff, with its use of tertiary care --

MR JUSTICE GOSS: No, no, let's be careful in the phrases we use. Systemic failures. That suggests that there were specific failings relevant to the care of patients.

What this review reveals is that, according to guideline or required staffing levels, there may have been occasions when there was understaffing over the relevant period. But what is the relevance of that to the issues in this case, which are: were these natural collapses of babies or were they as a result of some interference, wrongful act, in relation to the care of those babies?

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

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

Not the sole issues but they are the core issues.

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

MR JUSTICE GOSS: Mr Myers, I'm sorry to interrupt you, but I entirely agree, they can't exclude the fact that there was a review that was undertaken at invitation and it was found that in certain respects there were these matters.

MR MYERS: Correct, my Lord.

MR JUSTICE GOSS: If that is in evidence, which it is effectively in evidence, because it has been put in cross-examination already, what more are you wanting?

And also -- I'm sorry to bombard you with questions like this but I think it's helpful to focus on the issues -- does one also have other aspects of the report admissible in evidence which are favourable to the hospital and the way it ran?

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

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

But --

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

"The review team found extremely positive relationships amongst the various teams that contribute to the neonatal unit. The consultants appear to be a cohesive group who are proud of the unit and how well they work together, for example in developing and agreeing clinical guidelines. The senior nurses were very strong as a team and provided appropriate challenge to the medical staff and support to nursing colleagues. The more junior nurses and doctors all spoke highly of the atmosphere on the unit and the accessibility of other staff to assist with questions and clinical advice. The neonatal/paediatric team were reported by other trust staff to have 'far fewer problems than others' and seemed to get on well with each other and the nurses."

MR MYERS: Well, my Lord, the nature of the relationship between the staff, how well they gel together, how collegiate they are and how supportive they are of one another is not the issue in the case and that isn't what this is about and that's an entirely different matter.

We don't doubt that the consultants have very close relationships with one another on this unit but that isn't the issue we're dealing with.

I do want to return to the question your Lordship asked, which is, what is the issue in effect, if it isn't cause and it follows also identity. That's the point: the issue is what the prosecution have said in opening to the jury, that this is a hospital like any other hospital in the UK and what follows from that, and the wealth of material that they intend to deploy to support the assertion that the common factor in this is Ms Letby. We say there are other factors to be considered.

MR JUSTICE GOSS: Well --

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

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

I haven't heard from Mr Johnson yet, but I think it is -- perhaps it would be appropriate -- I understand your point, Mr Myers, please don't think I'm not grasping what you're wanting, but what I'm seeking to identify is precisely what more you want to adduce, apart from putting to the consultants, for argument's sake, that there was found to be in the review an insufficient consultant -- number of consultants available at all material times and nursing, which has already been identified in evidence, that there were some designated nurses who were responsible for more than one intensive care baby at a time. That's in evidence.

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

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

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

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

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

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

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

MR MYERS: Yes.

MR JUSTICE GOSS: Sorry to interrupt you yet again, but it leads me to the question: is it suggested in relation to any of the babies that are the subject of this indictment that there was such a failing?

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

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

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

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

The weight to be --

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

MR MYERS: Yes.

MR JUSTICE GOSS: So you just want to read that out to them and say, "This was the review's finding", and say that is evidence then in the case?

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

MR JUSTICE GOSS: Right.

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

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

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

MR MYERS: My Lord, they do -- they haven't accepted that.

They don't dispute that in the case of [Baby D] there was a delay to prescribe antibiotics and they don't dispute there was, I recall it was put, sub-optimal performance in the case of [Baby H], who we will come to next. No concessions are made anywhere else but they reserve the right to say the hospital is functioning, in effect, perfectly well.

That is their overarching case.

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

"There were several reports that the doctors will wait too long before escalating concerns."

Now, that is very vague: several reports identified when, by whom, in relation to whom, what -- anything.

It's just a vague assertion in a review. Now, that is relevant, is it not, to the section 114 point because it's very vague? And one would be entitled to say, well, in these 2 days you spent there, from whom did you get these reports, who has noted that, and what were the circumstances of it?

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

MR MYERS: Certainly some of the matters we have identified may be regarded as more specific than others. Having said that, an unusual feature of this is a witness to whom that is put is probably very well placed to deal with that because this is their unit and they've been involved in this process and they can answer upon it.

I recognise how unattractive that would be, for example if put to a witness who couldn't even comment upon the content of this. But these witnesses are familiar with this report and therefore we recognise that whilst it is relatively unspecific in the way it's set out there, it's one of the findings of the report that they participated in and they can comment upon it if we're allowed to use it.

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

Moving from --

MR JUSTICE GOSS: I understand that, but I've moved to the next stage, that assuming it is relevant and therefore admissible, what is relevant and what is admissible?

That's what I'm seeking to drill down into.

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

So far as there is specificity to what is said, then the concerns your Lordship raises would not apply. So far as there is uncertainty as to any finding that is there, it is our submission, that the witnesses who would be asked to deal with this are in a position to respond to that and so we submit that that doesn't preclude use of the report in the way that might follow if it hadn't come about in the circumstances that it did and apply to the witnesses that it does.

MR JUSTICE GOSS: Thank you. You'll have the opportunity to respond to Mr Johnson. Thank you very much for dealing with those points and so patiently as I was bombarding you there.

MR MYERS: We understand the concern of the court to look at the various issues that arise with this.

MR JUSTICE GOSS: Exactly.

MR MYERS: It's kind but it's unnecessary to apologise, my Lord. Thank you.

MR JUSTICE GOSS: Yes, Mr Johnson.

Submissions by MR JOHNSON

MR JOHNSON: My Lord, my learned friend keeps returning to the fact that the prosecution have said that in opening that the Countess of Chester Hospital is like any other in the UK. What I actually said, if one looks at the transcript -- and the reference is in my learned friend's argument, but what I said is misquoted -- is this:

"The neonatal unit cares for premature and sick babies. In that sense, it's a hospital like so many others in the UK. But unlike many other hospitals in the UK, and unlike any other neonatal units in the UK, within the neonatal unit at the Countess of Chester a poisoner was at work."

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

There seems to be, we would respectfully submit, a blending of issues here, in that because some of the things that are in the report are in evidence, therefore the report should be in evidence. So taking as an example of that, the BAPM staffing levels and how many nurses should be caring for children of various acuities, that's all in evidence, and it seems to be suggested that because that's a point that's dealt with, albeit it isn't actually directly dealt with in the report, the report should be admissible. And we respectfully submit that that approach is fundamentally wrong. There are some things in the

report that are in evidence, they're in evidence, but that doesn't make the report admissible as evidence.

Your Lordship referred to the acuity issue and, in particular, paragraph 4.5.2. I'll just find that.

I say report -- what the review says is:

"There were several reports that doctors will wait too long before escalating concerns about an infant both from junior to consultant and also to the network and when they do seek tertiary level advice."

That really highlights one of our points: which cases? Are they cases the jury are concerned with? We don't know the answer to that question from this review.

That bears on section 126 of the Criminal Justice Act, which I respectfully invite your Lordship to refer to.

I'm just trying to find it. It's in Archbold at paragraph 11.79. It's page 1734.

MR JUSTICE GOSS: Thank you.

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

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

Tick:

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

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

MR JOHNSON: It is, but one of the points to which we have already referred is this point about the transport issue. How are we to know -- what are the jury to make of that sentence in this review in the context of this case when my learned friend doesn't want to call the maker of the review, or any of them, to give us further details about what they're talking about at

various stages of this review? What weight is the jury to give to that evidence if it is allowed to be evidence?

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

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

MR JUSTICE GOSS: Well, I don't know whether an answer could be provided to that, but I would rather think, because when one reads the terms of reference for this review, that's what they were looking into. They were just looking to see, from a system point of view, were there any aspects that may have had some bearing on the increased mortality rate. That's all it was.

MR JOHNSON: Yes. In fact, the answer to the issue that my learned friend says is so important that arises out of this review is in the review and it's in paragraph 3.8.

This really draws together the point that your Lordship has just made and the point that I'm seeking to make and it's the third sentence of paragraph 3.8:

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

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

MR JUSTICE GOSS: Well, if it doesn't exclude the admissibility of it, it should at least be in evidence if there is the acuity point that is made.

MR JOHNSON: Exactly.

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

MR JOHNSON: Of course.

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

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

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

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

MR JOHNSON: It does. As the editors say:

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

Over to 1960:

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

This is precisely what this information in this review is. And one could argue that it's outside the knowledge of -- or the fact that the hospital was seeking the intervention of the Royal College implies, to a degree at least, that it's outside the knowledge of those that were working within the hospital, that they didn't feel comfortable conducting this sort of review.

So it is specialised information or specialised material and it falls, we would submit, within the bounds of expert opinion evidence and therefore is governed by the rules relating to expert opinion evidence.

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

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

Then skipping a sentence, which refers to several authorities:

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

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

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

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

MR JOHNSON: No.

MR JUSTICE GOSS: Actually, they must have done because there are significant gaps in both medical and nursing rotas, so they must have looked at medical and nursing rotas.

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

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

MR JOHNSON: Exactly.

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

MR JOHNSON: I'm sure there can.

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

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

But my Lord, with the greatest of respect, we suspect that the truth of the defence's anxiety to be able to wave this report under a witness's nose is set out in the final sentence of paragraph 25 of their response sent last night where it says:

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

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

MR JOHNSON: Yes. It can't be used to do that. What my learned friend wants to be able to do, I guess, is to say, "Well, you say this but this review says that".

And that then inevitably invites from the jury: well, can we see the review? And for the reasons that have been expanded on this morning, this review is very double-edged and -- so we come back to section 126 -- to divert this trial into a granular analysis of a review that was undertaken in 2 days by people that actually said, "You want to be looking very carefully at the circumstances in which these children died", which is what the jury are doing and what we are doing, this review is not admissible because it is not -- I stand by this -- it is not actually relevant to the issues in this case.

It fails the admissibility test under section 117 because an individual would not be entitled to give oral evidence about it. It fails the admissibility test under section 114, I think it's (g), because the defence can't point to why you can't bring somebody to give oral evidence about it and allow us, the prosecution, to get into the detail underlying some of these assertions, and it fails because it's expert evidence and the party seeking to admit it can't even identify the expert that can attest to its provenance in effect. They simply say that it's a report by the Royal College, therefore in effect the jury should be taking quasi-judicial notice of its content without

knowing what's underlying a number of the critical factual assertions on which they propose to rely. So it is inherently dangerous and it is designed -- it will have the effect of diverting the trial from the real issues. That's why we submit this is not a permissible process.

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

Mr Myers.

Reply by MR MYERS

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

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

As to --

MR JUSTICE GOSS: Do we know that?

MR MYERS: Well, we have --

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

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

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

We know that there are documents -- it's been said that there were no documents referred to. If we go to page 30 of 31 it sets out the documents that were provided by the trust and there are a large number of them. It includes staffing details, job plans, rotas and training records, as well as a service overview and team structures, and they're all set out there. So there are

documents and a number of them, it's not right to say there weren't.

MR JUSTICE GOSS: And details of neonatal death reviews.

MR MYERS: Yes.

MR JUSTICE GOSS: But nothing saying, well, there was an obvious failing in relation to any particular babies.

That's the difficulty: we don't know which neonatal death reviews have been referred to.

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

The second one, as to which babies are looked at, the prosecution in effect approach that point by looking at paragraph 4.5.2, upon which we wish to rely, which is the paragraph that deals with communications between doctors and consultants before escalating concerns and the relationship with tertiary level advice and the transport team, to which the prosecution said, "Are these the patients that died and collapsed?", rather, as your Lordship asks, as to which are the deaths they're talking about, which brings me back -- and I apologise for the element of circularity to the argument -- to the point that these are matters that the defence seek to rely upon generally because they set the overarching context within which this service was being provided.

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

So once the jury know, if it is admissible, that there is a finding that doctors delay before escalating concerns, they can consider that when, for example, they look at a particular witness who maintains that he acted with standard practice in not engaging a consultant, notwithstanding the situation that he was dealing with.

It may inform them as to that.

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

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

So we submit that satellite litigation or the bar against that is no bar to adducing this material if the court is satisfied it is relevant and admissible.

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

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

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

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

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

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

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

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

MR MYERS: The assertion follows from his evidence, my Lord.

We are entitled to put to a witness that -- we've put it to him that he didn't do what he should have done in the circumstances and that's what we put to him. In fact [Dr C] said it was a matter of regret for her that she hadn't attended earlier than she did in the context of what was taking place on that occasion.

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

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

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

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

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

Then we say this:

"It provides relevant context to the points the defence raise as a necessary part of the defence case and in response to the

prosecution case [that's correct] and we do accept it may be relevant to the credibility or reliability of prosecution witnesses where they have given evidence in response to these matters as put in cross-examination by the defence."

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

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

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

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

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

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

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

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

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

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

MR JUSTICE GOSS: Certainly.

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

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

It says that. Of course the neonatal lead is Dr Jayaram, who at this point is conducting an inquiry into the functioning of his own unit, as it happens.

That passage refers to what he thinks about his unit or what he has said to the writers of the report and it isn't something we seek to rely upon because that isn't in fact a conclusion of the report, it's simply reporting back what Dr Jayaram thinks about his own unit. It's important I identify that because it was portrayed as if that's something that should be included because it reflects a finding in the report and it doesn't.

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

It says:

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

A fair point, if you want that in.

MR MYERS: Yes.

MR JUSTICE GOSS: Then:

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

By whom? It doesn't say.

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

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

This is giving the history of this investigation.

This isn't part of the report dealing with the findings, these are the concerns that were raised prior to the report, and it is dealing with an in-depth analysis, as it is described, described by Dr Jayaram into activity and acuity, but that this did not -- was not significant enough to explain the increase in mortality, and he's actually going to, I suspect, we'll find out, we haven't been told yet, I suspect he will be invited to

give that evidence or be questioned upon it. It's in his statement and it's part of the overarching case.

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

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

MR JUSTICE GOSS: Yes.

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

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

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

We are aware of that and in fact --

MR JUSTICE GOSS: And then:

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

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

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

MR JUSTICE GOSS: Mr Myers, I'm in no way critical of you in any respect in relation to this. What I'm trying to do is to, as

I've used this expression before, drill down into why this evidence is admissible by virtue of being relevant to an issue that the jury have to reach conclusions upon because if it's not relevant, it's not admissible, regardless of its status. Whether it's expert evidence or not, if it's not relevant, it's not admissible.

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

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

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

MR JUSTICE GOSS: Yes, all right.

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

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

MR JUSTICE GOSS: Yes.

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

of the available material by professionals. This is a different thing.

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

Can I be of any further assistance, my Lord?

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

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

MR MYERS: Very well, my Lord.

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

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

MR JOHNSON: Yes.

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

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

judgment that simply says what your Lordship has said in passing judgment now.

MR JUSTICE GOSS: Right. Mr Johnson, would you seek a more formal reasoning for it? I think during the course of this interesting, certainly from lawyers' point of view, discussion about this particular aspect, I think we've covered the ground and identified the points that are the controversial points in the case, which were very helpfully identified in the written materials provided to the court. But as matters presently stand, I'm not inclined -- well, I have ruled that I am not going to permit you just to put discrete sentences as such to witnesses because that then opens up the whole nature of the report and, as Mr Johnson said, it would very possibly provoke in the jury's mind, "Well, can we see this report?" and we all know how juries do ask to see documents that are referred to and it would be clearly inappropriate for the jury then to have this report. It becomes complicated to identify what then in relation to the various matters that are raised, what does become relevant and therefore admissible and what doesn't and then, like that passage that we focused on, there were several reports identifying reports from whom, in relation to which children, was there one saying that the consultant should have been contacted earlier to address a baby's particular needs or the tertiary unit should have been contacted. It's all just general, unspecific...

MR JOHNSON: The point we would make if this ever became an issue would be that there is absolutely nothing to prevent the defence approaching the authors of the report, getting a witness statement from them, clarifying the issues that have been identified this morning, and seeking to call the evidence if they believe it is admissible.

MR JUSTICE GOSS: Exactly. You have that?

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

MR JUSTICE GOSS: Exactly. Well, there we are. That's it.

Thank you very much indeed. I shall keep the papers, obviously, here.

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

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

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

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

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

MR JOHNSON: No.

MR MYERS: No, my Lord.

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

MR MYERS: My Lord, yes.

MR JUSTICE GOSS: As far as the timetable is concerned, thank you again, Mr Driver, for your fourth or fifth version, whatever it is now, in relation to the remaining witnesses to be called. No criticism there, events have overtaken us. But if we are able to proceed with the jury on Monday then I anticipate we will reach the stage that you hoped to reach next week.

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

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

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

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

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

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

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

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

MR JUSTICE GOSS: I know.

MR MYERS: That's entirely a matter for my learned friends.

There are some, of course, for whom we have a good number of questions, but it may be -- it's entirely for the prosecution -- possible to review those currently listed to be called. If they are capable of agreement, that might assist.

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

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

MR MURPHY: Unfortunately not today.

MR JUSTICE GOSS: That's fine.

MR MURPHY: A laptop could be provided.

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

So the case will not be listed tomorrow, though in fact I shall be here until certainly the mid-afternoon.

Not that I'm suggesting any of you need be here, but you'll know that I'm contactable and working.

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

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

(12.23 pm)

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