

9 January 2023

Application from the Defence to exclude the evidence of Dr Dewi Evans

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Monday, 9 January 2023
(10.30 am)

(Delay in proceedings)

(10.53 am)

(In the absence of the jury)

Housekeeping

MR JUSTICE GOSS: Mr Myers, the court is obviously sitting in open court and this is an open hearing to which members of the public are entitled to come and attend, but of course nothing should be reported in relation to these proceedings. That will be well-known by the media organisations, but I'm just emphasising that, as is well-known, only that which is given in evidence in the presence of the jury should be reported. Thank you very much.

I'm conscious of the fact that you were suggesting that there be a further delay in relation to the commencement of this hearing. I'm not saying there won't be a further delay, but I just want to see where we're going to go in relation to this at this stage so we can perhaps deal with that and then we'll decide what we're going to do. Thank you very much.

MR MYERS: Thank you, my Lord.

MR JUSTICE GOSS: May I just say that I'm very grateful for all the documents and the submissions, written submissions, that have been sent to me in terms of the application. I can't say I've read all the documents because I only got some late last night and I have been working on them. I'm not in any way being critical but don't assume that I have read everything, that's the important thing. So in due course any particular matters which anyone wishes to emphasise or rely on or draw to my

attention should do just that, emphasise or draw it to my attention.

MR MYERS: Thank you, my Lord. I will just confirm that your Lordship will have an application to -- in fact, before I do that, there is one preliminary matter.

MR JUSTICE GOSS: Yes, certainly.

MR MYERS: I was just going to confirm that the two chief prosecution experts were not in court during the course of this application but I'm told they are not.

MR JUSTICE GOSS: They are not.

MR MYERS: Or in the court next door.

MR JUSTICE GOSS: So they are not aware of what is being said in this?

MR MYERS: No, and we respectfully submit they shouldn't be.

MR JUSTICE GOSS: No, I agree.

MR MYERS: Thank you. Your Lordship will have an application to exclude the evidence of Dewi Evans and an application to introduce evidence of bad character from the defence. There are two bundles that support that and I'm grateful that they've been prepared and provided to your Lordship.

One of the bundles contains a number of transcripts.

I should say that each transcript is behind a different tab. Your Lordship will see in fact the tabs are not chronological, we apologise for that. It's easy to find which one is which from the index, but they are not chronological.

Your Lordship will also have a response by the prosecution and a bundle of documents, that may be served electronically, to which they have made reference.

We have been provided this morning with a bundle of disclosure relating to the early involvement of Dr Evans with the investigators in this case and it looks like a hard copy might have just been presented to your Lordship.

MR JUSTICE GOSS: Yes.

MR MYERS: It's about 25 pages.

MR JUSTICE GOSS: Yes. It is 25 pages exactly because I've paginated my bundle because I could foresee, if there's going to be reference to it, it would need to be done.

But that's something that can be done.

MR MYERS: We've just received it, but we're grateful that we have received it now and there will be reference to it in due course.

The only other matter, and the reason why I raised the issue of whether we will be able to proceed immediately or not, is this: there are a number of questions the prosecution have put together to raise with Dr Evans relating to the decision of Lord Justice Jackson and what lies behind his involvement in that report.

That's something that the prosecution have wanted to do. The defence were not in favour of that but certainly could not stop it, but we haven't participated in putting together the questions because it's not an exercise that we wish to follow.

However, Dr Evans is currently answering those questions. What he says, goodness knows, we won't know until we get the answer, but it occurs to me that if I begin to make submissions upon this material, including the decision of Lord Justice Jackson, and then either when I have finished, or at some later point, or once I've commenced, we receive material that makes any material difference to that, and material your Lordship should have when listening to my submissions, that would be disadvantageous.

I can't imagine it can lead to a very great delay because apparently he started answering these questions at 10 o'clock, so we should get our answers fairly soon.

That's where we are --

MR JUSTICE GOSS: Sorry to interrupt you, but I understand exactly what you're saying. It's going to prompt me to interrupt you to enquire whether we have any idea when it is likely that these questions will be answered.

What sort of delay are we talking about? That's why I came into court rather than just putting the matter off.

MR MYERS: Thank you.

MR JOHNSON: I wouldn't anticipate any great delay. I've shown my learned friend the questions this morning, the issues that are going to be raised with the witness. So far as speaking to him about it is concerned, it's actually covered in the Practice

Direction or at least on our reading of the Practice Direction because paragraph 19A.8 says that:

"Where an expert has been criticised without a full investigation, for example by adverse comment in the course of a judgment, it would be reasonable to expect those criticised to supply information about the conduct and conclusions of any independent investigations into the incident to explain what steps, if any, have been taken to address the criticism."

So the essence of -- it's not on all fours with the instant situation but the essence is that some sort of explanation as to the circumstances of what has gone on is required as part of the disclosure process. We can only get that from Dr Evans. So that's why we have undertaken the enquiry.

MR JUSTICE GOSS: Yes, I understand that. Well, what is your view, Mr Johnson, about Mr Myers' proposal to delay the hearing entirely at this stage until the answers have been provided?

MR JOHNSON: I can see the force in the suggestion, my Lord, because the whole basis of the way the arguments may be presented may be influenced by the answers. So we've deliberately not interrupted the process, which isn't taking place within this building. The police have other accommodation in the city centre which is a couple of minutes' walk away. So I can make an enquiry. I'd be very surprised if we haven't got something within about half an hour, about 11.30.

MR JUSTICE GOSS: And then of course that has to be considered and disclosed?

MR JOHNSON: Yes.

MR JUSTICE GOSS: So realistically, are we looking at about midday?

MR JOHNSON: Possibly. If we can get it sorted out sooner than that, there's nothing to prevent us starting sooner than that.

MR MYERS: That seems sensible, my Lord.

MR JOHNSON: It gives your Lordship a chance to read more, so it's not wasted time.

MR JUSTICE GOSS: I can see that's a sensible way forward, so we will do that. There will come a time at some stage today when I hope I'll be in a position to not deliver a reasoned judgment in relation to the application but to indicate what my conclusions are in relation to the application. At that point I will then want to discuss the future timetable of the trial.

I'm just putting you both on notice in relation to that so that we can -- because the jury, as was suggested, I agreed, should not be here today, so they're not here today but they will be here tomorrow and for all sorts of reasons obviously I want to try to get some sort of indication of where we're going to be going in this New Year of 2023.

MR JOHNSON: Yes.

MR JUSTICE GOSS: All right. So we'll deal with that at the end of the court day. Thank you very much. Anything else, Mr Myers, you want to say at this stage?

MR MYERS: No, thank you, my Lord, nothing else.

MR JUSTICE GOSS: I will adjourn. I will say when the parties indicate to me that we're ready to proceed, the court will sit again. If it's going to be after midday, can I be informed as to when it is likely to be that the parties are going to be ready and if there are any difficulties. And if the court should sit at any time before midday, obviously send a message through. I'll just be continuing to read material.

MR MYERS: Thank you.

MR JUSTICE GOSS: Thank you.

To the defendant, this is going to be more than a 10-minute break, obviously, so the defendant should go back downstairs, please. Thank you very much.

(11.03 am)

(Adjournment)

(12.05 pm)

APPLICATION Submissions by MR MYERS

MR JUSTICE GOSS: Mr Myers.

MR MYERS: My Lord, we're grateful for the time we were given and there was additional material received, which we did need to consider and to which we will make reference.

MR JUSTICE GOSS: Yes.

MR MYERS: I understand your Lordship will have been provided with a copy of that material.

MR JUSTICE GOSS: I have, thank you.

MR MYERS: Thank you.

This is an application, my Lord, that is twofold.

The principal application is to exclude evidence from Dewi Evans, who is the consultant paediatrician relied upon by the prosecution as one of the experts in this case. Secondary to that, in the event of that application not succeeding, it is an application to introduce evidence of bad character or otherwise introduce the evidence that comes from the decision of Lord Justice Jackson.

The first part of the application, and the principal application we make, is on the basis, we say, that Dr Evans has failed to act with the independence, impartiality and objectivity required of a witness whose evidence is admitted on the basis of their expert status. So we say it fails to meet the necessary standard to be admissible.

Alternatively, but still on the question of admissibility, we say that considered in total, the effect of that evidence has or would have such an adverse effect on the fairness of the proceedings that it should not be admitted. We put that at our paragraph 4 at the start of our submission and we rely upon section 78 of the Police and Criminal Evidence Act.

We recognise that in both those situations, under either of them, exclusion of evidence would have to be accompanied by a direction to the jury to disregard the evidence that Dr Evans has already given. We submit that can be done.

There are three ways, and we summarise them at our paragraph 6, in which we say that Dr Evans has stepped well outside the boundaries of expert evidence, but in putting these before the court we say, as we say elsewhere in our argument, that we are trying to apply a categorisation to what is in fact the generality of his evidence and its totality.

But trying to apply a categorisation for ease of analysis, we say that he has constructed theories that are designed to support allegations on the indictment rather than to form and present independent opinion on the basis of facts. He has, secondly, given evidence in a manner that is improperly subjective, emotive, dogmatic and biased and, finally but closely connected to that and the first point, he has acted as an investigator or as someone who has directed this investigation. And we add, as I will develop when we come to this, that has or is part of a whole in which the lack of

objectivity is plain and he has stepped outside any proper boundary of being an objective, independent expert witness.

These are matters, my Lord, that have put to Dr Evans variously in the course of his evidence in the trial.

MR JUSTICE GOSS: And vigorously.

MR MYERS: And vigorously but, we submit, quite properly --

MR JUSTICE GOSS: Yes.

MR MYERS: -- and I'll deal with that in due course. But lest there be any doubt, his evidence has been extraordinary. Anybody watching it, reading it or listening to it would be astonished that an expert like that behaves as he does. I will deal with the personal criticism made in the course of the prosecution response in due course. But this should not be, we respectfully submit, an exercise in sanitising the behaviour of someone who's stepped far outside the proper bounds of expert evidence, both in his conduct generally in the investigation and in his conduct in evidence.

So, yes, if there has been vigorous challenge, there has had to be with a witness like this.

MR JUSTICE GOSS: I wasn't being critical of you, Mr Myers.

MR MYERS: Well, my Lord --

MR JUSTICE GOSS: I was simply indicating that at each stage you were challenging, and did quite very properly challenge, so it wasn't just a superficial challenge.

MR MYERS: No, it wasn't, my Lord. I won't take that as criticism in that situation --

MR JUSTICE GOSS: No.

MR MYERS: -- but when I come to deal with the prosecution response your Lordship will see why I'm attuned to that line of response to the submissions that I make.

On 9 December the defence set out a disclosure request setting out requests for material based upon the evidence and behaviour of Dr Evans and that is based upon not just material pre-trial but importantly the way his evidence has developed and been presented in the course of the trial. We have had some disclosures and we are grateful for those. We received some more this morning to which I shall make reference. There remain requests outstanding.

On 15 December, the defence were provided with a decision of Lord Justice Jackson in the Court of Appeal Civil Division relating to an application for permission to appeal in which a report by Dr Evans was submitted to the court as further evidence in support of the applicant's case. Your Lordship has that, of course, and I have put the references in the bundle.

We have also received the report to which that related.

I'll turn in due course to what Dr Evans has said about that. Your Lordship has that. But it is important now just to be clear and set out what Lord Justice Jackson says in the final paragraph of his decision. We cite this at paragraph 14 of our application.

He says this:

"Finally, and of greatest concern, Dr Evans makes no effort to provide a balanced opinion. He either knows what his professional colleagues have concluded and disregards it, or he has not taken steps to inform himself of their views. Either approach amounts to a breach of proper professional conduct. No attempt has been made to engage with the full range of medical information or the powerful contradictory indicators. Instead the report has the hallmarks of an exercise in working out an explanation that exculpates the applicants. It ends with tendentious and partisan expressions of opinion that are outside Dr Evans' professional competence and have no place in a reputable expert report."

That's paragraph 6 of Lord Justice Jackson's decision. We'll turn, with your Lordship's leave, to what Dewi Evans says in response to that shortly.

It is important, I emphasise, that the application made to your Lordship is not made because of the receipt of that decision. The defence case concerning Dr Evans has been mounted throughout the trial in the disclosure requests submitted in advance of receiving that material. So we say that whilst the appellate decision constitutes material of grave concern in itself, it is consistent with the position of the defence to date.

MR JUSTICE GOSS: Yes. It's what you would submit is further evidence of the complaints that you make in relation to Dr Evans' evidence.

MR MYERS: It is, my Lord, and it (inaudible) its purpose but as it happens, coincidentally, we would say it is consistent with the actual nature of those complaints.

We just observe this, just before I move to the relevant law: we are focusing in this submission on Dr Evans' independence and impartiality. We make no concession as to his expertise and, in fact, in various ways that has been challenged and remains a live issue.

Similarly, we make no concession to the independence or impartiality of Dr Sandie Bohin, who is instructed as peer reviewer of Dr Evans, and they remain live issues, but at this stage we're focusing upon Dr Evans.

MR JUSTICE GOSS: Yes.

MR MYERS: To assist my Lord we set out the law at page 4 of our application. The prosecution set out what they would add to that or where they diverge starting at their paragraph 3.

Most significantly, Rule 19 of the Criminal Procedure Rules 2020 sets out the requirements for evidence to be admitted as expert evidence, and that's included at the defence bundle, starting at page 2 in fact. There is an index at page 1 of the first defence bundle.

Amongst those provisions at Rule 19.2, sub-paragraph (1)(a)(i), makes it plain that an expert opinion must be objective and unbiased. That is important. That is a precondition for expert evidence.

MR JUSTICE GOSS: Well, it's part of the duty of an expert who is not a witness on behalf of a party but owes a duty to the court -- is a witness on behalf of a party but the primary duty is to the court, not to the party.

MR MYERS: Yes.

MR JUSTICE GOSS: That's why they have to be objective and unbiased, as you say, and that is unequivocally set out at 19.2(1)(a)(i).

MR MYERS: It is.

MR JUSTICE GOSS: Sorry, I've taken you off track.

MR MYERS: Not at all, my Lord. Further assistance, or rather direction, is given under the Criminal Practice Direction 5, "Evidence: expert evidence", which begins at page 8 of that bundle. And this states that it is dealing at 19A.1 with, in effect, the admissibility of expert evidence in criminal proceedings at common law.

It sets out it would be admissible if -- and there are three items:

"It is relevant to a matter in issue in the proceedings."

Secondly:

"It is needed to provide the court with information likely to be outside the court's own knowledge and experience."

And thirdly -- and this is perhaps the most important aspect for this submission:

"The witness is competent to give that opinion."

The question of what's meant by that competence and how it engages with admissibility, we submit, is something that the direction assists with if we move through paragraphs 19A.4 to 19A.7. 19A.4, which is on the same page, cites an authority and makes reference to the Law Commission report, which I therefore refer to because the prosecution make reference to this, and says:

"Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility and courts are encouraged actively to enquire into such factors."

I'll return to that shortly, but then, to assist, at paragraphs 19A.5, 19A.6 and indeed 19A.7, various factors are then set out and these bear upon admissibility and we've identified some of potentially particular relevance -- this list may not be exhaustive -- at our paragraph 25, including:

"How safe the basis for opinion is when based upon inference."

Secondly:

"Whether the expert's methods follow established practice in their field."

3:

"Whether the hypothesis withstands scrutiny."

4:

"Unjustifiable assumptions."

We've cited the reference to the Practice Direction alongside. 5:

"A method or process that is not appropriate for a particular case... inferences or conclusions not properly reached."

We say that is important -- all of these are to what we're looking at here. And 6:

"Matters capable of undermining reliability or detracting from credibility or impartiality."

That is at 19A.7. That's in the actual paragraph at the start of that section. Importantly, incorporating questions of reliability, credibility and impartiality into the exercise of considering admissibility, not just weight. This is to do with admissibility.

And various factors are identified. One of them -- that's at 19A.7(c) -- is adverse judicial comment. But of course your Lordship will see in the paragraph that precedes that list these are examples of matters. It cannot be exhaustive. But what matters for the purpose of our submission is there comes a point when matters of credibility or impartiality become matters of admissibility, not just matters of weight.

The prosecution, in their paragraphs 8 and 11, seek to counter that by reference to the Law Commission report and the authority of *Factorame*. Of course, the Law Commission report, which is cited in these directions, was a review with proposals. These rules under the Criminal Procedure Rules and the Criminal Practice Direction acknowledge the report but they set out the position and these are the rules that govern admissibility subject to the court's assessment.

Likewise, *Factorame*, we submit, is of relatively limited assistance here. The prosecution refer to paragraph 70 and highlight that. I will just take your Lordship to that, if I may, in their bundle.

MR JUSTICE GOSS: Yes, certainly.

MR MYERS: They refer to it at paragraph 8 of their response.

MR JUSTICE GOSS: It's appendix 5, isn't it?

MR MYERS: Yes, thank you, it is. I'll just turn to that now. Paragraph 70 is the paragraph which reliance is placed upon. It arises out of a consideration of the relationship existing between the expert and the party planning to call the expert and

the question to which or the extent to which that might affect admissibility of opinion.

What the court said at paragraph 70 was:

"This passage seems to us to be applying to an expert witness the same test of apparent bias that would be applicable to the tribunal. We do not believe that this approach is correct. It would inevitably exclude an employee from giving expert evidence on behalf of an employer. Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded having regard to the overriding objective."

We submit with regard to that that, first of all, in no way does that remove the question of objectivity or credibility or independence from weighing up the question of admissibility. Far from it, it leaves it firmly in that territory.

Secondly, on the facts, what the court was dealing with in Factortame was a far more limited situation and criticism than what we're dealing with in this case and we submit that it is entirely conceivable that the court may be faced with an expert whose evidence, when viewed in the round, and whose behaviour, takes it into a territory that is unfair or unsafe.

Of course, Factortame pre-dates both the Law Commission report and the Criminal Procedure Rules and the Criminal Procedure Direction, which set out admissibility. It also pre-dates the bulk of the authorities that we rely upon which assist the courts in the approach to how an expert should undertake her or his task. We set those out in paragraphs 28 to 32.

I don't propose simply to recite everything that's set out there, my Lord, because it's set out in some detail, but the key points that we refer to are as follows. I'll give your Lordship the paragraph numbers these come from.

Paragraph 29, we refer to the case of Kennedy v Cordia Services LLP in which the court, the Supreme Court, identified the need to look at a number of features when assessing admissibility of

expert evidence. Amongst those -- this is at paragraph 44, item 3 -- is whether the witness is impartial in his or her presentation and assessment of the evidence.

Developing that at paragraph 48 -- and this is in our paragraph 30, my Lord -- at (ii) and (iii), the court went on to say that:

"An expert must explain the basis of his or her evidence when it is not personal observation or sensation. Mere assertion or bare ipse dixit which is in effect 'it's this because I say it', is worthless."

And the court cautioned against assertion without proof or, importantly, "dogmatic expressions of opinion". That's important because an expert is in a particular position in these courts and have a particular potency and for the proceedings to be fair that expert must not abuse the position that he or she is in and that may sometimes be subtle, it may sometimes be blatant. We say in the case of Dr Dewi Evans it's both.

The authorities of *Cannings*, which we cite at paragraph 31, is more than just a cautionary tale, which is the way the prosecution describe it. It is a most salutary warning against the dangers of an overdogmatic approach and the court was clear in its proscription of that. It did say at paragraph 22:

"Dogmatising should be met with an answering challenge."

It might be said from your Lordship's observations that that had taken place to some extent in this case.

But these are matters of degree. It is not unusual to have an expert who may in the moment step outside his or her's purview as an expert. It is, we submit, extraordinary to have one who has behaved across the breadth of the investigation and in evidence as Dr Evans has done.

In the case of *Harris*, my Lord, which we cite at paragraph 32, there are two particular observations from paragraphs 271 that we cite at page 7. They are particularly pertinent. First:

"Expert evidence presented to the court should be and be seen to be the independent product of the expert, uninfluenced as to formal content by the exigencies of litigation."

Of course one of the challenges for me in making this submission, a logistical challenge, is these matters being held in mind as one comes to assess the points that we come to later on as illustrations of this. But time and time again, we submit, Dr Evans has stepped well outside these.

For example, his evidence on [Baby C], where out of nowhere he proposed air being forced down the nasogastric tube -- I'll come to this -- and when pressed on that, for which there was no evidence that he could cite, he reacts by then positing that cause of death could have been air embolus. That come out of nowhere, unsupported by anything, never formed part of the prosecution case. That's a very clear example when one puts this into the mix, with all the other material, of an expert providing opinion, first of all in a partisan and biased fashion, but also influenced by the exigencies of the litigation, which is consistent with aspects of the criticism of Lord Justice Jackson.

The second matter from Harris that we refer to is that:

"An expert witness should provide independent assistance to the court by way of objective and unbiased opinion in relation to matters within his expertise and should never assume the role of advocate."

And, we submit -- I'll return to this shortly -- that if one considers what your Lordship has seen in the course of this case and heard, looks at the transcripts, perhaps to reacquaint oneself with the type of evidence that was given, there most definitely has been advocacy performed by Dr Evans.

It might be said there's been advocacy performed by me, but that's less surprising since I'm an advocate.

So these are the principles against which admissibility, in my submission, has to be considered.

The case of Bates, which is cited in Archbold, in fact, and I refer to it at paragraph 36 of our submission, suggests that the discrediting of a witness goes to weight rather than admissibility. I've dealt with this. It is of limited application. It's a judicial review relating to a search warrant where one of the claimants was a forensic examiner of computers, and his status as that was in issue. That is what the court was dealing with. It is a very, very far cry from the extent and detail that we're dealing with in this case, which is why we say that whilst there may be cases where credibility does not step into the area of admissibility, it may, and that's clear from the Criminal Practice Direction and from the authorities.

We say it's important in this case because, at our paragraph 35, there isn't just one distinct issue of credibility here, there are very many different issues and examples, far too many to put into this one argument. There is criticism made by the prosecution that some of the sections we've identified should be further particularised, but it's possible for all who have been

involved to refresh ourselves from those parts of the transcript and to recall the flow of the evidence. To try to particularise every comment or shot delivered by Dr Evans would be very difficult to do because there are so many.

They are repeated, they are spread across the allegations and, importantly in his case, they are, we submit, fundamental to the character of his evidence and many of them go to the way in which he has reached his opinions and expressed them.

That, my Lord, is what we say about the background and the law relating to this. We turn from that to examples of the evidence and conduct of Dr Evans, and they are merely examples.

It is necessary for me to deal with some of the matters raised by the prosecution in their response.

Paragraph 13 of the prosecution response is critical of what they say is defence emphasis of some of this material, that it exaggerates alleged shortcomings or says the emphasis may be wrong:

"... as happens when a proofread document is produced at home in a calm atmosphere."

I don't recognise what that applies to. Any one of these criticisms is a serious concern. The evidence, we submit, from Dr Evans has been emotive, evasive, obstructive and designed to argue an opinion and a position.

I'm going to turn to the first example in a moment, but before doing that, a general point is this. Part the prosecution response -- it's in their paragraph 3, in fact -- is to seek to judge Dr Evans' evidence against other evidence in the case. It's at paragraph 3 on page 1 of their report. It's a general point that bears dealing with before I turn to the examples.

In the second part of that paragraph starting on that page your Lordship will see that the prosecution seek to gain some support for Dr Evans' position by reference to other evidence in the case and the overall strength of the case. And in particular, they pick out what I've described as the insulin charges. We observe, respectfully, an approach like that is misconceived because two entirely separate issues are being conflated.

On the one hand there is the question of the strength of the evidence in this case or the weakness and the prosecution have cited a variety of areas where they would maintain there is evidence that is supportive or strongly supportive of their case. That's one issue.

The issue of the objectivity or independence of an expert as to whether their opinion can be admissible is an entirely different issue. If an expert is biased or not objective or partisan or acting as an investigator in various respects rather than a pure expert, that affects admissibility irrespective of the strength of the evidence elsewhere.

If that wasn't the case then an expert could behave in any way that he or she saw fit, stepping well outside the bounds of admissibility, and that could be met with the argument, "Well, it's a very strong case it doesn't matter", which is really what that reduces to in the sense that the prosecution seek to shore up his credibility in effect by saying, "Well, look how this might match other parts of the evidence".

But they are two different issues. They presuppose that evidence is strong. They do not deal with the situation of what happens when an expert like Dr Evans starts hypothesising where evidence may not be as clear.

For example, returning to the incidence of [Baby C], it's all well and good if Dr Evans has things to say about insulin that may or may not be clear on the evidence, putting aside the question of who would be responsible if that happened. But to have an expert who creates opinions from an impartial basis becomes increasingly dangerous when the evidence may not be so clear or where there are more acute questions to be dealt with that engage with causation. And it isn't enough in that situation to look at the generality of the case and pick out one or two incidences where his evidence may be consistent with the prosecution theory based upon their evidence. Indeed, in certain respects the defence would say, given the criticisms we make of Dr Evans, it's not surprising that at certain points his evidence may be consistent with the prosecution allegation.

So we submit one cannot assess the admissibility of expert evidence by reference to the strength or otherwise of the prosecution case and, in any event, what's said in that paragraph presupposes a great deal about what the evidence means and what it goes to prove in most of the incidences cited.

The first criticism or category the defence raise -- again emphasising it's with a degree of convenience that we do this because it's impossible to encapsulate in one sentence everything that can be said about Dr Evans.

But at page 9 of our argument, paragraph 41, we deal with the first category, which is the construction of theories to support the allegation rather than to form and present an independent opinion on the basis of the facts.

We've given examples. They are only examples.

Your Lordship has seen the evidence. Some of them require no further explanation, some maybe a little more. We've given examples of the way in which, in the case of [Baby A], Dr Evans hypothesised the use of potassium chloride when there was no basis for that.

And when cross-examined about it said he did so to give the police ideas which we submit -- that may seem -- we wouldn't say it's innocuous, but it may seem minor.

Only minor by reference to the rest of his evidence and the enormity of that.

We say, just pausing there -- and I am not going to go into this detail on everything -- to have an expert who says "I've given that suggestion to give the police ideas" is extraordinary. That's not the expert's role.

Nasal prongs being intentionally removed from [Baby B]. He also, in fact, in his report suggested smothering, but stepped away from that in evidence. A clear example of this, which we put at our (iii), is in the case of [Baby C]. I will just dwell upon this for a moment because it reveals so much of this expert's evidence.

Dr Evans had produced at least five reports in that case and participated in the joint report. At no time did he advance any opinion as to how harm was caused to [Baby C] or a mechanism of deliberate harm and he did not identify a cause of death. It matters not what other experts may have said in reports elsewhere, he never did.

However, in evidence-in-chief, and without prior notice, he stated death was caused by air being forced down the nasogastric tube. We've put the reference to that should your Lordship wish to remind yourself. It's the transcript for 1 November, page 107, line 7, but we summarise it here.

Putting to one side, though it's a big enough deal in itself, the fact that none of this complied with the rules on expert evidence, what is extraordinary is that a mechanism like that should be suggested for the first time in evidence-in-chief without any basis for it whatsoever or any precursor.

When he was asked in cross-examination as to the basis for this fresh theory he could give none. This is at page 10, (iv). None. We submit that evidence was not properly argued, it was not objective. It was biased and was designed to come up with a

theory to support the allegation rather than to reflect the known facts and it is a blatant example of that, my Lord.

MR JUSTICE GOSS: It's (v), actually.

MR MYERS: Sorry.

MR JUSTICE GOSS: Don't apologise, I just wanted it to be right. That's the passage and you just referred to that?

MR MYERS: I referred to it at (iv) as well, but it's across both of these.

MR JUSTICE GOSS: You say:

"This was something that Dr Evans [two-thirds of the way down (v)] came up with when pressed to explain his assertion that air had been forced down the nasogastric tube. There was no evidential basis for it, it had never appeared in any of his many reports."

And then:

"It appears to be a hostile and partisan response by a witness who had nothing else to say and could not justify an opinion that had been given without notice and without supporting evidence or reasoning."

MR MYERS: My Lord, that's correct. It's beyond doubt it hadn't featured in his evidence before that point.

MR JUSTICE GOSS: No.

MR MYERS: There is no dispute as to that.

MR JUSTICE GOSS: No, exactly.

MR MYERS: It's a significant matter and not something that was novel, it appears in other cases.

We say it is a reaction to what's described elsewhere by Lord Justice Jackson as "the exigencies of the litigation" in that moment, but it became worse because when pressed in cross-examination for the evidential basis for his evidence regarding the nasogastric tube, he reacted in fact by not giving any evidence of that but proposing suddenly that it could be air embolus that had caused death. This is at page 145 and it runs through to page 152.

It's of limited assistance for me to simply read the section out, but it is of assistance, if your Lordship finds it so, to

refresh your mind from the way that this went because it is, I don't want to overuse the word, quite extraordinary.

In fact, if one looks at the top of page 145, behind tab 1 in the transcripts bundle -- tab 1 has the evidence for 1 November, page --

MR JUSTICE GOSS: Page?

MR MYERS: 145. Having been established this is the nasogastric tube was not something that had featured in any report, 145, Dr Evans, line 3, was asked:

"Question: What's the evidence you rely upon for the NGT?"

To which he said:

"Answer: I'm going to leave interpretation of the autopsy to Dr Marnerides."

Your Lordship knows there's plenty of evidence elsewhere that Dr Evans says he relies upon when dealing with this. I asked at line 7:

"Question: What's the evidence? I'm not asking you to repeat Dr Marnerides' opinion. What's the evidence you rely upon to tell the jury the diaphragm was splinted? What's the evidence?"

"Answer: Baby collapsed, died."

That's not evidence. I asked:

"Question: And a baby may collapse for any number of reasons. What's the evidence that supports your assertion made today that it is because of air going down the NGT?"

"Answer: Baby collapsed and died."

"Question: Do you rely upon one image of that?"

Because of course your Lordship knows we have images elsewhere where we see air in the abdomen and the provenance may be in dispute but at least we have the images:

"Answer: This baby collapsed and died."

So again, where a criticism of a question is being repeated at times, but we submit it has been necessary, he was asked:

"Question: What evidence is there that you can point to that you rely upon that indicates air has been forced down the NGT?"

To which we get:

"Answer: Right. To answer this more clearly..."

Then he begins to talk about differential diagnosis.

That doesn't talk about evidence for the NGT. And moving down to 146, line 5:

"Answer: This baby collapsed and died. This baby collapsed and died. And I have on the top of my list, and this is the result of what we have discussed. Is there a differential diagnosis? The answer to that is yes. This baby could have collapsed as a result of air being injected in his circulation intravenously.

"Question: I beg your pardon. Can you repeat that?

"Answer: You asked me and I'm going to answer, all right? Let me finish please."

And he went on to develop that. Not evidence of anything to do with a nasogastric tube. Not dealt with in the prosecution response, in fact, this bit of what Dr Evans did. Out of nowhere, very unfair, not at all objective, very partisan, we say, unsubstantiated by any evidence and directly against the type of evidence that should be given as described in the authorities. And, we submit, it is a hostile and partisan response by a witness who had nothing else to say and could not justify an opinion he had just given without notice and without supporting evidence.

At our (vi) we refer to the case of [Baby D] and Dr Evans was asked to explain, given the air embolus theory, that in general it is fatal, how she was resuscitated twice but on the third occasion it was fatal. Dr Evans gave a lengthy answer in effect concluding by saying that it was right because that was his view, which we submit is a good illustration of what was said about ipse dixit. That is at page 147 behind tab 2, my Lord.

The question began at line 11 on page 147 where in effect he was being asked how is it there are two occasions when she deteriorated and there was no death but there was then unsuccessful resuscitation on the third. He gave an account about volumes of air given and the rate at which it is given. The prosecution say that's his answer to a question that I asked, that's right. There's nothing to support that, it's just the answer that he gave.

The reason we cite it is having just said that, if we go over the page to 148, having said it just depends upon how much air

she got and how it went into her circulation, at line 8 on page 148 he concludes by saying:

"Answer: The next time, as I keep saying, the air that she suffered that was infused into her circulation was sufficient to kill her. That's it. Okay? That's my medical opinion, Mr Myers. Right?"

Again, taken on its own, that reference to other matters or the generality of his evidence, that might seem to be some way from any complaint about admissibility, we recognise that. It's just one example of many things that he has said. We cannot possibly put down every time he said things like that in this submission, but it goes on and on.

With regard to [Baby G], he concludes that he's very happy with his opinion, very satisfied, when there's a similar line of questioning. The prosecution are critical of this and they talk about the length of the questioning and about the pitch of the questioning.

Well, the court has the transcripts and has seen the evidence. I submit, because it relates to me, that there has been terrific restraint shown with a witness who has been, at times, rude and very often obfuscating in his evidence and advancing arguments that go way beyond the questions that he has been asked.

When it is said that in the case of [Baby G] he concludes by saying he's very happy with his opinion, very satisfied with it, and the prosecution say in their response that was at the end of 18 pages of questioning.

Yes, it's at the end of a lengthy section but it's 18 pages long because that's dealing with the issue of what's in [Baby G]'s stomach and some of that is reacquainting Dr Evans with the evidence on which it is based. It's necessary because that's the evidence that was key to what he was deal with. It's not 18 pages of repetition.

Finally, again, as an example, it relates to [Baby E]. My Lord, this is at (vii) on our page 11.

Your Lordship will recall, sadly, tragically in the case of count 5, we deal with [Baby E], who died after a profuse gastrointestinal haemorrhage.

In his third report, Dr Evans had suggested that maybe the bleed had been caused by the thrust of a nasogastric tube. This is an expert who has emphasised in various ways and places his 30 years of experience.

Nobody seriously suggests that the thrust of a nasogastric tube can have done this. And in fact, that unrealistic suggestion was abandoned by him in due course, but it is significant. This is something not just in his evidence but that was in his reports.

But then, having abandoned that, Dr Evans produced a report on 13 September 2022 in which he had considered whether injury to [Baby E] could have been caused by the use of an introducer, which is a stiff but flexible wire used for intubation. What he said -- and we take directly from his statement at page 5400 and this was put to him in cross-examination -- was as follows. And of course, this must be measured against the guidance in the appellate authorities and the Criminal Practice Direction:

"I have not seen any statement noting the presence of an introducer, therefore my opinion regarding a potential cause of his trauma must remain speculative. I believe it is reasonable to contemplate the possibility. If a member of staff recalls that a redundant introducer was present around at the time of the [Baby E]'s haemorrhage, I believe it is an option that is worth exploring."

We submit not only is that, in a number of ways, objectionable, it is reliant on speculation, it's suggestions to explore possibilities for which there's no basis whatsoever. Not only is that objectionable in itself but it is consistent with Dr Evans' inappropriate approach to his role as an expert and the evidence in general. This chimes with what we say elsewhere when we look at how he has become involved as either an investigator or a directing mind of the investigation, which places him automatically in a very partisan position.

And however investigators may have to conduct their duties, it comes from a witness who said he suggested potassium chloride to give the police ideas and has run with various theories, dispensing with them and adopting new ones, we say, in the consequence of the exigencies of the litigation.

But plainly here, my Lord, it does speak for itself and it amounts to looking for a way of furthering an investigation which currently has hit a blank because there was no post-mortem and the nasogastric tube theory doesn't bear scrutiny, furthering the investigation with speculative enquiries that, we submit, no impartial expert acting objectively should consider. Those are just examples of the construction of allegations.

The next section that we deal with is the nature of his evidence and to some extent that's been touched upon already and these matters do overlap.

MR JUSTICE GOSS: I'm just looking at paragraph 42. You say these are merely examples of this type of evidence.

MR MYERS: Yes.

MR JUSTICE GOSS: Dr Evans has yet to give evidence on a further 14 counts of further attempted murder. You're saying that by reason of the evidence that he has given thus far and the other material that you have, he should be prevented therefore on this basis --

MR MYERS: On this material alone.

MR JUSTICE GOSS: -- on expressing any further opinion in relation to any other child?

MR MYERS: Yes, we do, because he's gone well beyond the acceptable limits of expert opinion and he hasn't based that upon the evidence.

MR JUSTICE GOSS: I'm just understanding that is the basis on which you're making the application.

MR MYERS: Yes.

MR JUSTICE GOSS: Right, thank you.

MR MYERS: We observe what we have clocked up and how much further we have yet to go.

As to the nature in which he has given his evidence, this is, one may consider, a more textured area and one from which an impression is formed by the way the evidence has come out before the court. Again, we've sought to provide examples.

There were some very lengthy commentaries from Dr Evans at the outset when dealing with [Baby A] and [Baby B] as to his role in the investigation and to the way in which he reached his conclusions. And we have cited passages in the transcripts to assist the court's recollection, though we go on to pick out some particular examples.

In response to this, and it's on page 10 of the prosecution response, dealing with issue 2, a number of matters are raised. The first is there should be more precision to the criticisms we make in these passages.

Well, they are lengthy and your Lordship has seen the evidence in this way and will understand or not accept the submission we make as to the general way in which Dr Evans has presented himself. And we have picked out specific examples. This could go

on for a very long time if we were to try and pick out every one of them.

In fact, curiously, one instance which is included in that section, an exchange between your Lordship and me, comes from -- I'll take your Lordship to it -- behind tab 5.

There was questioning that had taken place. The section cited begins at section 115, which is the page we had taken it from. I don't propose to go from 115 to 129, but a variety of aspects of the evidence relating to the readings in the case of [Baby A] were put to Dr Evans, who answered in his way. Some of the answers are long. Some of the answers don't deal with the question that's asked and we submit this is an illustration of that.

At page 128, Dr Evans is being asked about the increase in respirations for [Baby A] and your Lordship is familiar with the charts and how we see the markings with the yellow bands, the upper and lower limits of what is acceptable for the various features of respiration, temperature and heart rate. At this stage of the case, of course, this is relatively new to the jury.

What we were seeking to establish in cross-examination was that once respiration markings enter the yellow area, that is a matter potentially of concern and the fact it is yellow is relevant for that reason. It's a simple proposition. At page 128 Dr Evans is asked to consider the position and at line 9:

"Question: If you look at the respirations first of all, please, these are not extremely stable, are they?"

He disagreed and having disagreed, as is his wont, then began to enlarge upon the matter in different ways.

It may be said he is entitled to do that and sometimes he did that with more or less accuracy to the question.

If you go over the page to page 129, he's asked:

"Question: It was escalating in the afternoon, isn't it?"

He said:

"Answer: It's higher than it was, a perfectly good explanation. It's all stable.

"Question: It's all in the yellow patch, isn't it?

"Answer: Yes.

"Question: Why is it yellow that bit?

"Answer: There's a perfectly good reason for that.

"Question: Well, what is it?

"Answer: The doctors have been fiddling around with him, putting umbilical catheters in.

"Question: Why is that section yellow? Your Lordship, taking what he'd said about it had gone up to there by interfering with the catheters, said:

"I think he gave a perfectly good explanation."

I, courteous as ever, said:

"I apologise."

But in fact, if one looks at this, there was no answer to the actual question, which is, "Why is that section yellow?" That's the point.

Then we move on from there. I only deal with that because it's something that the prosecution -- out of all of these pages, that's the one example they give at page 10. And we submit --

MR JUSTICE GOSS: The point is the question is -- yes, well, I don't attach any significance to it whatsoever.

MR MYERS: I only deal with it because it was raised there.

MR JUSTICE GOSS: Well, you've dealt with it.

MR MYERS: Thank you.

MR JUSTICE GOSS: There's no criticism, justifiable criticism there.

MR MYERS: The prosecution then say this -- and I have to deal with it and it explains my interest in dealing with what your Lordship said when we raised the question of vigorous cross-examination and this is why I'm wanting to deal with that --

MR JUSTICE GOSS: No, I introduced the word "vigorous"

because you said, and I was just emphasising the point, that you were not making -- you know what I mean.

MR MYERS: Yes, I do.

MR JUSTICE GOSS: You're bound as an advocate to challenge certain things and sometimes things are just challenged in a peremptory sort of way. You were very properly investigating and drilling down in the challenging and therefore vigorously challenging.

MR MYERS: Well, I --

MR JUSTICE GOSS: I repeat, Mr Myers, I was not being critical.

MR MYERS: Well, I'm grateful for that, but perhaps your Lordship will understand why I was anxious to deal with that.

MR JUSTICE GOSS: Well, you said --

MR MYERS: -- because there's a criticism made here.

MR JUSTICE GOSS: -- understandably sensitive, yes.

MR MYERS: It says:

"This may add to the impression that some may have gained..."

I'm not sure that there's been a survey conducted or not.

"... that there has been a personality clash between counsel and the witness driving some of these difficulties. I absolutely do not accept that and we say with respect to my learned friends it's really unfair to try to deal with what's going on with Dr Evans to say this is a personality clash. It isn't. There may well be a clash, but it has absolutely nothing to do with personalities. Inventing explanations, as we say happened, about [Baby C] on the hoof has nothing to do with personalities. Suggesting to the police how they may speculate and find new ways that [Baby E] sustained a gastrointestinal haemorrhage again is nothing to do with personalities. And unless the extension of personality is to be taken to the Court of Appeal, what Lord Justice Jackson said about Dewi Evans has nothing to do with personalities. A clash properly in evidence in the course of cross-examination -- there are times when there has been, exactly as your Lordship has identified, vigorous challenge to things that he has said, but that is inevitable, we submit, with an expert who has given evidence in the way that he has. And since this is said, I simply observe this, that over months of dealing with this witness, in my submission, I have demonstrated remarkable restraint and remained courteous with him throughout. I may have had to take a firm tone at times, but what has had to be dealt with in cross-examination has been extraordinary. I say no more about it than that. Not because there isn't more to say but because that's the point we submit

that the word "clash" is used. I wouldn't use that word, it has nothing to do with personalities and everything to do with the manner of Dr Evans' evidence.

And really, given what has happened with this witness, we submit there should be no attempt to try to sanitise or explain or justify his behaviour by personalising criticism of me from the course of cross-examination.

I'll move on with the nature of what we say about his evidence. We've given examples as we go through here in the way in which he has set himself up to behave in particular ways. At point 3, page 12, we've just given two examples where he gave his own commentary of what he thought of the evidence relating to [Baby A] and at one point the way we have dealt with it -- passed comment on how much emotion there had been in the questioning of Dr Jayaram and whether or not there had been. It's not a matter for him to start holding judgment on that.

Your Lordship may recall when he dealt with Dr Lambie, he said how he was impressed by it and I asked him, "What, as a witness?" And we submit, not surprisingly, that was something that would surprise your Lordship and your Lordship intervened to confirm that he wasn't talking about her as a witness, and he said, "No, as a doctor". But actually, what he had said -- and we have the transcript to look at it now -- is:

"What she described was very convincing."

No position for him to stand there telling us all what he thinks about other witnesses' evidence and he has done that on a number of occasions. We say that's -- whatever else it is, it enters the area of advocacy.

I'm going to move, if I may, to (v), which is the re-examination of [Baby B] as another illustration of how he behaves. Your Lordship, I'm sure, would recall the question of "pink and active" when talking about a rash. The clinical notes describe the discolouration full stop, "pink and active". We'd had evidence shortly beforehand from [Dr B] and Dr Evans, who paid such close attention to the evidence, would surely have heard that.

We can see what happened at the transcript that I anticipate will be open, it's behind tab 5. I'll just conclude at this point before lunch if I may.

MR JUSTICE GOSS: I was going to say, you choose a good moment.

MR MYERS: Thank you, my Lord.

MR JUSTICE GOSS: I still have tab 5.

MR MYERS: Page 187, if I could ask your Lordship to go there, line 7. Mr Johnson took Dr Evans to [Dr B]'s notes on the screen and it was suggested that what [Dr B] had noticed was inconsistent with the article.

That is the Lee & Tanswell article where she had simply said "purple blotchiness", and it was said:

"Question: The only part that was read to you was 'On my arrival, purple blotching or blotchiness'.

"Answer: Yes.

"Question: But in the next line it says 'Right mid-abdomen and right hand, pink and active'. Do you see that? Or right hand, pink and active. Do you see that? [Dr B] interpreted her own handwriting for us this morning. That 'pink and active' wasn't read to you."

I pause to say it wasn't read because, of course, it didn't relate to the rash, but anyway.

"Question: Do you see that?

"Answer: Yes, yes.

"Question: Is that consistent or inconsistent with the Lee & Tanswell?"

And the answer says so much about Dr Evans, we submit:

"Answer: It's a good point, actually."

MR JUSTICE GOSS: Well, I remember this very vividly. It was as though it was a sort of light bulb moment.

He was thinking, "Ooh, this is a good point, yes, that I hadn't thought of" -- was my implication.

MR MYERS: Yes. That's exactly how it was. Of course, having asked Dr Bohin about this, and we'll see it in the evidence elsewhere, "pink and active" is how babies are described, not rashes. Again, this is an expert who has been at pains to explain his decades of experience. There's a full stop and then the words "pink and active", and [Dr B] had explained in evidence before this "pink and active" was the baby.

There is no way, we submit, that any expert acting impartially could have thought that. But his response, "It's a good point,

actually" on the hoof, seizing on something that could support his position, is deeply unattractive and not what an expert acting independently and impartially should do.

MR JUSTICE GOSS: Mr Johnson has conceded, or it has been conceded by the prosecution, this was a mistake and purports to put forward an explanation.

MR MYERS: Yes. It's said that counsel and the witness were fatigued. Well, I can't speak for Mr Johnson, but there's nothing from the witness to say he was fatigued and we submit it isn't fatigue that lay behind that.

That was him seizing something that looked helpful to what he wanted to say.

MR JUSTICE GOSS: Again, I'm not critical of the fact that the point that you rely on in all this is his reaction to this mistake, essentially adopting this particular point, and that's what you say is the relevance of that.

MR MYERS: That's exactly it. Mr Johnson is entirely entitled to say, "What do you say that means?"

MR JUSTICE GOSS: Yes.

MR MYERS: And Dr Evans could have said, "No, that's a reference to the baby". It's Dr Evans' response that we seize upon. I'll leave it at that point, if I may, my Lord.

MR JUSTICE GOSS: Yes, certainly.

MR MYERS: In terms of timing, I anticipate I'll be about another 40 minutes.

MR JUSTICE GOSS: Right. Mr Johnson, I don't know how long you're likely to be, but we're going to be most of the afternoon, aren't we?

MR JOHNSON: It really depends. I don't think, as a matter of fact, there's an awful lot that I can add to what's in writing. If your Lordship's had time to read it or will read it before reflecting on your Lordship's decision then I probably won't actually be very long.

MR JUSTICE GOSS: All right. Can we say 2.05 then? One hour. Is that sufficient time for the prison staff?

Thank you very much.

(1.05 pm)

(The short adjournment)

(2.05 pm)

MR JUSTICE GOSS: Yes, Mr Myers.

MR MYERS: My Lord, the remaining examples in this section, which dealt with the way in which Dr Evans gave evidence, which are at points 6 through to 11, are simply just that, examples. They are cited with the necessary references, but it probably isn't the most helpful process for me to simply read out what is said there, although they're examples of the type of comment that is made.

But probably of more assistance is to turn to a different and the third area, which is what we describe loosely as acting as an investigator or, it might be added, a directing mind to the investigation.

We submit that this is a particular feature of this case and it's particularly significant because whilst the two areas we've already identified are, we submit respectfully, objectionable in themselves, this aspect of Dr Evans' involvement is both objectionable in itself but it really closes the circle on what has gone on with the other two areas. It stands separate from them but also as a part of what his position is and why we say he is plainly not independent of this investigation or this case and doesn't have the level of objectivity that should be there for an expert's evidence to be safe and, we respectfully submit, admissible.

Dr Evans displayed an awareness, in fact, of this area of limiting what he should give evidence upon and his role, as we've identified at our paragraph 44, where at various points, and the references are there, he was at pains early in his evidence to emphasise that -- and we put a small (i):

"My reports are based on investigating a clinical condition and my reports are clinical conditions. I am not there investigating crimes; the police do that."

(ii):

"My state of mind is very clear, which is why I think I am still in demand as an independent medical witness."

And he goes on to describe that he's looking at the collapses, nothing to do with crimes or anything like that, you know, just specific collapses. He reiterated that at point (iii):

"I wasn't looking for harm, I'm looking for a cause."

We submit that doesn't properly characterise his role, and his activity has in fact, if not as an investigator, been to get extraordinarily close to this investigation from the earliest stage and work alongside the police and, we submit importantly, that undermines his objectivity and has put him, right from the outset, in a highly partisan position, which we submit is coterminous with his approach to the case, which has been to, at certain points at the very least, construct theories designed to meet the allegation rather than reflect the underlying facts.

Again, we have sought to identify examples from the available material. He described in evidence his early contact with the National Crime Agency and with the police. That's an area to which the defence had awaited some disclosure and in fact we received some disclosure this morning that bears upon that and it is illuminating. Your Lordship was handed a bundle of 25 pages.

MR JUSTICE GOSS: Yes.

MR MYERS: We received it shortly before your Lordship did, but we've had a look at that and there are one or two areas of it that I identify to illustrate the position.

In fact, a light is shone upon Dr Evans' approach to this on the very first page, which is an email on 21 May. In fact, the police involvement with this case began at the beginning of May 2017, so this is very early on.

Dewi Evans is sending a message to the National Injuries Database, which we understand, we'll be corrected, is linked to the NCA. He was plainly, looking at the first part of this message, involved in another matter, a different operation. But he says this:

"Incidentally, I have read about the high death rate for babies in Chester and that the police are investigating. Do they have a paediatric neonatal contact? I was involved in neonatal medicine for 30 years, including leading the intensive care set-up in Swansea. I have also prepared numerous neonatal cases where clinical negligence was alleged. If the Chester Police have no one in mind, I'd be interested to help. Sounds like my kind of case. I understand the Royal College has been involved, but from my experience the police are far better at investigating this sort of problem. Best wishes, Dewi Evans."

A number of matters come straight out of that.

First of all, he's involving himself with the investigation very early on. Secondly, this is touting for business. Acting as an expert witness is how Dewi Evans has conducted himself, it's a legitimate occupation and it's what he has done largely for the 13 years since he retired. But this is touting for work to become the expert in a very large case and seeking to gain the favour of the investigators. That's the starting point for Dewi Evans.

In fact, there was reference to how he came to be involved in the investigation in the course of his examination-in-chief and cross-examination. What he says here does not sit well with that. I wonder, my Lord, if you would kindly turn to tab 5 in the transcripts bundle and, within that, page 104. That relates to 25 October, page 104. I'm just going to the question at line 13. There'd already been reference to contact between him and the National Crime Agency and he was asked:

"Question: When you were asked to review the cases and asked for your involvement in this investigation you told us the NCA were the agency that contacted you. That's the National Crime Agency.

"Answer: Yes.

"Question: Did they provide you with the theory that deliberate harm had been done?

"Answer: No. By the time -- the NCA got me involved in this case."

And he goes on to talk about things there and that was the tenor of what he had to say about the topic.

Now, the NCA, we submit, based on the material we've received today, did not get him involved in this case and the way that it was presented was that somehow he was contacted because he's an authority on these matters. He, it appears, went out of his way to offer his services to the police at an early stage of this investigation, saying, "Sounds like my kind of case, I'd be interested to help". That's important because that sets, in effect, a mindset on Dr Evans that he wants to get involved in this, he's not approaching this independently. It's not right when he says that he was approached -- actually, that's not right when he said that in evidence -- and he has touted for this work.

In the pages that follow -- I'm not going to go through all the detail in all of them -- we see the picture developing of the information with which he was provided. There's reference made to him receiving a case summary. But what is apparent, as one reads through it, is how close he was to designing the

parameters of this investigation and terms of reference for experts and the way in which this would be conducted at the earliest stage.

I'll simply give your Lordship some examples. The material is here. But we submit right at the outset it's one thing, for example, for the police to go to an authority to assist them in designing an investigation, conceivably, and then maybe, after that, instructing experts to independently and objectively review the investigation. But for somebody to offer their services with some enthusiasm like this at the beginning because they want to get involved and to then direct the inquiry and take an interest in it from the earliest stage and the shape of it goes way beyond, we submit, what any expert who's going to act independently and objectively should do.

The entirety of the information with which he was provided we don't have, but on pages 7 through to 9 there's an email that contains a lot of material. It appears to have been sent by one of the officers investigating this, plainly, it seems, with Dr Evans in mind because at the foot of page 8 -- and my electronic references I think dovetail with your Lordship's -- there's reference to:

"... instructing a neonatal paediatrician, Dr Dewi Evans, to review the babies", and so on.

Over the page, looking at comments on whether this is in keeping with the version of events provided by the nominal or the witnesses:

"This expert would also be willing to assist with the interview process."

Just pausing there, we don't suggest that means he would be present there, but plainly being involved in a way that is being directed in terms of enquiries to be made of the defendant. And this is a very inappropriate process, we submit, because if that's right then he is becoming involved with the shape and direction of the police enquiry and questioning, even conceivably before he has written any reports on what has happened.

It appears that he does receive a case summary of some sort, we don't have the full detail of that yet.

On page 16, at the foot, 30 June 2017, an email from Dewi Evans again to the National Injuries Database having received initial material. We see the content over the page. Talking about arrangements for an initial meeting and actually saying in the second paragraph:

"I'm sure we can arrange an initial meeting without any costings."

And we'll move on shortly to see what that means, that it will be free.

Again, this has to be looked at in terms of his relationship with the investigators, his approach to them to be taken on to do this, now offering free consultation to make himself more attractive. So when we come to say in due course as a result of answers that he gives in evidence or the contents of his reports that he has been partisan or biased or seeking to meet the allegations rather than the facts or, to use the language employed by Lord Justice Jackson, "constructing an explanation to meet the exigencies of the litigation", this is of a piece with that.

When we come to page 18, there's an email from an officer, I lose her surname, it's Sonya, Sonya Baylis, an officer involved in this. Halfway down page 18, she is setting out arrangements concerning Dr Evans. This is somebody who's meant to be an independent expert who the prosecution are going or would go in due course for assistance in court, not an investigator. She sets out arrangements to DS Adam Bulger(?) about the venue, turns to Dr Evans, and that:

"[He] has proposed for the meeting we start with a briefing on the current situation and background to the case, even though he has been given a copy of the current situation, stop for lunch for an hour and a half, followed by a final meeting to discuss his terms of reference and his proposed way or working."

We just question there, more than question, we identify that, again, as being far too involved in what he is doing to maintain objectivity afterwards. It talks about his logistical arrangements. The next paragraph talks about:

"He has agreed for this preliminary meeting to be free apart, from travel expenses."

Then in the next paragraph it's apparent he is going to take a lead role in discussing additional experts that may be required by the team, either using theirs or those suggested by Dr Evans. And we submit it is entirely inappropriate for somebody, when one puts all of this into the mix, to be involved in approaching them, the police or the NCA, discussing the terms of their instruction, in effect, their terms of reference, the way the interviews would be conducted, what other experts should be brought into this, where that leaves questions of objectivity one doesn't know, and whatever the consequence of these, it's

what it shows about the attitude of Dr Evans and his involvement that is a real concern and undermines objectivity.

By the time we get to the final -- these are just snippets from the document -- page of this bundle which we received today, page 25, an email of 11 July, summarising where this last got to in terms of Dr Evans and the meeting that was held in Chester Police Station on 10 July.

Dr Evans, I'll return to this shortly, has met with the police officers. One of his actions, your Lordship will see, from the centre of that central paragraph is:

"To draft terms of reference between the investigation team and Dr Evans."

This seems to come out of the meeting that he went to.

We submit an expert would not be involved in drafting, for example, their instructions in a case, they receive them, he or she does. If the terms of reference don't relate to his instructions as an expert then they must relate to the investigation and that is inappropriate, inappropriate insofar as he then comes here to give evidence. So it's little surprise, the defence observe, that he is so partisan in what he says and so close to the investigation that we submit he cannot step back with sufficient independence to provide objective opinion.

That's material we didn't have at the time of drafting paragraph 46. We're grateful to have it now, but it supports the submissions that we made and set out in (iii) through to (vii) where we give examples of things Dr Evans has done, which show how close he is to the investigation.

I'll just, if I may, take your Lordship to them briefly, a couple of them.

In bundle 1 at page 138 there is a summary of the meeting of the 11th and 12 July between Dr Evans and the police. This seems to touch upon the meeting out of which that last email I referred to came, or so it would appear. If your Lordship were to go to page 138 in bundle 1, your Lordship will see that the meeting begins, perhaps conventionally enough, with reference to various children with whom the investigators were concerned.

But if we go to the conclusion, the last page of the notes, which is page 145, it's got general questions for each baby. I submit we're moving a very long way from Dr Evans' position in evidence that he wasn't looking for harm, just cause, just clinical conditions, because at this meeting the general questions are:

"Which room is the baby at the time the nurse was on shift? What other babies were in that room? What medical staff were in the room for the duration of the shift?"

These aren't clinical questions:

"After the baby had collapsed, did anyone stay with him or her? What did he or she do after each crash? What did other staff do? Are the cots numbered? Are the rooms given names? Medical staff should be given a chance to view files before statement taken."

We don't know which of those, if any, emanate from Dr Evans or not, but he is plainly a party to discussions on the way in which this investigation will be conducted. This is nothing to do with cause: this is to do with who was where, what people have to say, it comes on top of what's been said about him potentially assisting with interviews and identifying other experts.

There's an email chain from the 15th to 20 September. It's at page 148 and I will just summarise it, my Lord. You'll see when you look at that, at page 149, Dewi Evans is talking to the police about the plans of the unit, shift arrangements and asking for photographs of various parts of the unit.

It's at pages 148 and 149.

Again, it's unnecessary to go through every point we make, but I'll just conclude what I say about this by coming back to what we said about the investigation relating to [Baby E].

But all of those are things which are to do with the investigation of a crime. They don't assist with air down an NGT, or NEC, or infection. They are not related to that. This is giving advice on how to investigate this case. This is making him an investigator or directing it. He cannot, we submit, possibly impartially be giving evidence on a case in which he has been so involved with as part of the investigatory team.

It is with that in mind then that we see he considered the evidence of [Baby E] and his speculations upon the use of an introducer and whether it might be followed by the police as a potential line of inquiry as to the cause of harm, if there was any, to [Baby E] in the absence of a post-mortem. That bit of that statement is just a snapshot, we submit, of the type of involvement Dr Evans has had in this investigation from the point that he first touted to be involved in it.

I turn from that, my Lord, to the decision of Lord Justice Jackson. The decision is set out from page 154 in defence bundle 1. There is a careful analysis of the report provided by Dr

Evans, but the conclusion or the nub of the conclusion is at paragraph 6 of Lord Justice Jackson's decision. There are three principal criticisms and, we submit, it is powerful adverse judicial criticism.

First, that:

"Dr Evans makes no effort to provide a balanced opinion."

Second -- and this is in the third line from the bottom -- that:

"His report has all the hallmarks of an exercise in working out an explanation."

And, third, that:

"The report ends with tendentious and partisan expressions of opinion that are outside Dr Evans' professional competence and have no place in a reputable expert report."

And:

"The report itself contains emotive language and isolated facts that are used to build up a theory supportive of the party instructing him and presented as partisan argument."

And Lord Justice Jackson's comments in the decision speak for themselves and they chime, we submit, with what has happened here, save that here we also have a very clear picture of a witness who has sought to engage himself and enmesh himself in this investigation from the outset.

Your Lordship knows there was a short delay this morning as we waited for Dr Evans to answer the questions that were presented to him. I'll deal briefly with that, but can I just confirm that your Lordship has the document that we received this morning that says, "Plan of meeting: Dr Evans"? I will check that your Lordship has that before I --

MR JUSTICE GOSS: Yes, I do. Just give me a moment.

(Pause)

Yes.

MR MYERS: Thank you. I'm going to just look at a couple of matters that come from that. If your Lordship still has defence bundle 1 open, I will be making reference to a couple of entries in the report that Dr Evans wrote, so it'll help if your Lordship has that too. That's from page 159 in defence bundle 1. I'm going to look at those two items.

MR JUSTICE GOSS: Yes, thank you.

MR MYERS: I'm not proposing to read out the whole plan of the meeting. There are a number of comments made by Dr Evans in answer to the questions that we identify for your Lordship and then we shall say what we wish to about that.

Item 3:

"Did he write the email as an expert report?"

That seems to be a reference to the consultant paediatrician report we have. To which he wrote:

"No, I wrote it as a paediatrician."

Item 6:

"Why did you write it? Parents asked me to write it as a paediatrician."

7:

"Where did you think the report was going to? Did you get informed? Answer: To the parents. I said to them to get a new solicitor."

And he refers to the solicitors involved.

Item 9:

"Did you understand the audience of your report? Answer: Only meant to be parents and solicitor. I expected to be asked for a professional structured report if they wanted to take it further. I wouldn't expect it to be forwarded as it was."

Item 11:

"Have you been informed of the judge's finding? Answer: Saw a very brief report from the local authority saying they didn't agree with me. I didn't respond to the local authority disagreeing with my opinion. I didn't think there was anything I could do about it and I didn't follow it up."

Upon reading the email from judge, Dr Evans states he knew nothing about it and had never seen it before or had been made aware of the document:

"If Jackson LJ [this is what he says] thinks my report is worthless that's his opinion. I can't argue with that."

He says he wasn't aware it had been sent to the court. Then he said this:

"If I had received it [this is the judge's decision] I'm not sure I would have told you about it because I didn't think it was an adverse judgment."

Pausing there, of course, there is a duty on experts to bring to the court's attention and those instructing them adverse material. Dr Evans says he's not sure he would have brought this to anyone's attention.

Over the page:

"I stand by my report. Whether this was a miscarriage of justice is a matter for the court, but I think they got it wrong in my opinion and by implication Lord Justice Jackson got it wrong too."

Item 14:

"When, if at all would you intend to inform us?"

And this interesting answer:

"I would have if I had an adverse finding but I haven't."

16:

"Were you acting as an expert witness in the case presented to you? Answer: No, I was acting as a paediatrician."

We submit the point to make upon all of this -- there is more there than this -- taking those, we submit these answers verge from the disingenuous -- somewhere between disingenuous and dishonest. This is plainly written as an expert report. We know that. We know that it's written with that and we know it's written with a view to further proceedings. And the reason we know that is going through a number of items in the report.

In paragraph 1, he makes it plain the parents have come to him and asked for a review of injuries sustained to a particular child. He knows the background to this.

Paragraph 4 of the report:

"Having reviewed all the data carefully, I believe there are reasons for revisiting this case."

Pausing there, well, what does he expect is about to happen with an expert witness of this degree of experience, with a long background in family courts, he tells us?

"I believe there are reasons for revisiting this case, both in regard to the probable cause of the various (inaudible: coughing) and to review the decision in relation to the placement of two children."

So he knows what this relates to.

He goes on to say:

"Currently there appears to be some kind of life sentence in relation to the placement of two children and the contact. This is completely unreasonable and has the potential to cause far greater long-term harm to the children than anything that occurred during infancy."

Paragraph 6:

"In preparing this report I declare a number of interests..."

Pausing there, a strange thing to do if this is just a report from a paediatrician rather than expert. This is plainly envisaged to be an expert report:

"I declare a number of interests..."

And he sets out his position as a consultant paediatrician, how he knows local paediatricians, his acquaintance with independent clinicians, and says that:

"In relation to the numerous reports [he has] prepared he has been the lead for children with diabetes and paediatric endocrinology and also in relation to numerous reports I have prepared as expert witness for courts across England, Wales, Scotland and Northern Ireland."

If your Lordship turns to page 3, of course I identify this to set against his apparent surprise this should have been treated as an expert report and ignorance as to its purpose. He sets out his professional background at the bottom of page 3 and when your Lordship turns to page 4, which is 162 of the bundle, he sets out his experience in preparing reports for:

"... with safeguarding issues for over 20 years [which is what this is]."

How he's given evidence in the various courts, his recent reports, including over 100 reports for various

participants -- that will be in court proceedings -- describing what he does and plainly, therefore, introducing this to set out his credentials as an expert witness, which is what this is about. It is, at the most charitable, thoroughly disingenuous for him to suggest this is just a passing report as a consultant paediatrician. This is not how consultant paediatricians who are not experts would provide a report.

That's something that Lord Justice Jackson comments upon -- or rather doesn't comment upon, includes in his decision at paragraph 2 where he said:

"Although Dr Evans appears to have been instructed by solicitors, he makes much of his experience as an expert witness. His report does not begin to satisfy the requirements of an expert report in family proceedings or civil proceedings."

And he says:

"There is a complete lack of transparency, he doesn't set out his instructions, no letter of instruction is provided, it's impossible to know what material he has seen, he gives only the most minimal account of his discussion with the parents, but it is quite apparent from the way he sets it out with his experience as an expert witness that that is what this is."

Paragraph 47, lest there be any doubt as to what he thought was the purpose of this report, and we submit there can't have been, but at paragraph 47 in any event Dr Evans says:

"I would be pleased to support Mr and Mrs [the names are redacted]'s application to seek a new hearing. I would be pleased to support the application to seek a new hearing where the court can benefit from access to crucial information and additional information contained in this report. I believe that there are compelling grounds for supporting their request for increased contact with their children with the aim of allowing both to return to the parents' care full time."

There is absolutely no question that he knew what the purpose of this was for. That's the only way of understanding that final paragraph. And he even sees this report as being something that can assist the court in reconsidering that earlier decision, a legal court.

It's utterly misleading for him to suggest this is some type of paediatric report and that he was not acting as an expert and that he didn't know what the purpose of this was.

So he knew this was an expert report and he's sought to mask that from the court. He knows what it was going to be used for,

my Lord. He sought to hide that. He's thoroughly acquainted with the proper procedure. And in any event, the criticisms by Lord Justice Jackson in paragraph 6 of his report would apply whatever the position in fact, but obviously with greater force when it is an expert report that is being provided, which this is.

And given Dr Evans' extraordinary view that he doesn't think this is an adverse judgment or adverse, naturally that bears upon his credibility in a very basic way as an expert witness and would leave anybody looking at this to wonder what else is not disclosed.

We can have little assurance that he is frank if he says this is not an adverse comment that he would be obliged to disclose and that's what he says in answer to these questions. It is appalling, we respectfully submit -- the respect is to your Lordship.

We submit that it should be a matter, respectfully, of grave concern to the court that an expert has behaved like this. We submit that were the decision of Lord Justice Jackson to stand alone, had it just been that that was disclosed to us and these responses, in the absence of all the rest of the material in this trial, it would still be sufficient to undermine Dr Evans' competence to a very great extent as an expert witness, but it most certainly does not stand alone. We submit it could certainly bear upon the view to be taken but it doesn't stand alone, it is consistent with the other matters we have raised by way of example.

Dr Evans' response to it, given to us this morning, is disturbing. It is therefore, we submit, that there comes a point on the question of expert evidence, its admissibility, on the basis of objectivity and credibility and independence, when, in accordance with the Criminal Procedure Direction, the court can take the step of regarding it as inadmissible because it doesn't satisfy the basic requirement of objectivity and impartiality, and we submit that, looking at the wealth of material before the court, Dr Evans does not satisfy those basic requirements and he does not satisfy them by a very long measure.

So we submit, in the first instance, on admissibility, that he falls outside the basic requirements for an expert witness and the court is able, were it to regard this as a properly made submission, to exclude any further evidence from him and to deal, as it sees fit, with that evidence the jury have received already because he is not objective, he's not impartial, he is utterly partisan, and is very much a central part of this investigation.

Were we to be wrong on the question of admissibility, and we submit respectfully we are not insofar as it is a matter your Lordship can rule upon, it is not just a question of weight in this situation, but in any event there always remains the exclusionary discretion under section 78 of the Police and Criminal Evidence Act, which is included in the defence bundle at page 15, the court will be very familiar with, but for the sake of completeness, I just make reference to it:

"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

And we submit that even were it the case that, as a matter of admissibility of expert evidence your Lordship's discretion could not be engaged -- we submit it can be, but were it not able to be this provision can still apply and when one considers the evidence and, most particularly, the circumstances in which it was obtained, it is, we submit, unfair and can properly be excluded. So under either of those heads we apply to the court for the exclusion of Dr Evans' evidence.

We have a secondary submission, very much a secondary one, which is that if the court does not accede to the submission on admissibility then, in addition to whatever the defence have to say about other material before the court, the decision and the judicial comments of Lord Justice Jackson may go before the jury, and we ask for it to go before the jury as evidence of bad character or relevant evidence in any event, one or other of those.

But we do submit it is capable of constituting evidence of bad character under section 98 of the Criminal Justice Act because, of course, the test for that is reprehensible behaviour and that necessarily would be judged against the witness to whom it applies.

We submit that this is at a reprehensible level, the way in which that report was written, and therefore it can fall under the provisions of section 100 of the Criminal Justice Act 2003, which is at 13 of the defence bundle:

"To be admissible as non-defendant bad character, that would apply if and only if..."

And there are a number of provisions, but at subsection 1(b):

"It has substantial probative value in relation to a matter which is a matter of issue in the proceedings and is of substantial importance in the context of the case as a whole."

We submit that, very clearly, Dr Evans' independence and impartiality and the quality of his expert opinion are issues of substantial importance in this trial and they have been made so, and made plain, from the outset, the submission that Dr Evans is biased and not independent and has failed to provide balanced opinion.

The decision of Lord Justice Jackson is clear and direct and those comments have substantial probative value when applied to the issues concerning Dr Evans.

We note in particular what Lord Justice Jackson says about Dr Evans being engaged in an exercise of "working out an explanation", which we submit is exactly the criticism, albeit phrased differently, that we have made, amongst others, of Dr Evans.

We note also the judicial comment in that decision that ends with Dr Evans being described as someone who's presented "tendentious and partisan expressions of opinion". We submit that also applies to this matter and it shows a propensity when one considers this or supports the contention there is propensity to behave in a partisan fashion and construct theories based upon who he is representing and their requirements rather than the pure facts.

Our submission, my Lord, is that therefore is evidence of bad character and can go before the jury and that is significant because there's a particular way in which that can be used and it characterised the evidence accurately.

Even were that not to be the case and the requirements of evidence is bad character, in terms of the bad character provisions themselves, were not satisfied -- we submit they are but if they are not -- we would say in any event it is still relevant to the question of weight and, by means of appropriately drafted agreed facts, the necessary material can be presented to the jury and, to the extent that it's necessary, Dr Evans can be cross-examined upon that.

So that is the submission we make, my Lord. We submit that it is an extraordinary situation with this witness and that in the first instance the court's discretion to consider the question of admissibility is engaged and that, respectfully, the court is in a position -- and, we submit, should -- to come to the conclusion, when looking at all of this material, Dr Evans is not objective, he is not impartial and his explanations are

very, very bound to be part of an investigation that he is supporting, and that taints the whole of his evidence fundamentally.

That's our submission, my Lord.

MR JUSTICE GOSS: Thank you. Mr Myers, just so that I have it clearly in mind, if I came to the conclusion in relation to that last matter, then you say that he is not an expert witness whose evidence is admissible?

MR MYERS: Yes.

MR JUSTICE GOSS: The jury have heard that evidence. They should be told to disregard the evidence that he has given thus far?

MR MYERS: Yes.

MR JUSTICE GOSS: And he should obviously be prevented from giving any further evidence. What would you propose the jury is told as to why that is happening, if anything?

MR MYERS: I respectfully propose that they would need some explanation, something would be required.

MR JUSTICE GOSS: Well, yes, exactly. What would you suggest? I'm not asking for a definitive answer now, but how, in the sheer mechanics of the trial, would that be done? Would they be told that I had made the decision that his evidence that they have heard is not actually admissible evidence and they should never have heard it or what?

MR MYERS: I'll answer that. The key issue, first of all, is the admissibility of his evidence because if it isn't admissible -- and I respectfully urge upon the court that is the question first of all to address.

MR JUSTICE GOSS: That's right, the point you last made, and that's why I said on that last basis. So how do I deal with that in relation to the trial if I came to that conclusion?

MR MYERS: The jury would have to be directed to disregard the evidence they have heard. They would require some explanation and the precise terminology of that is something I would like to consider in a little more detail maybe than just advancing something now, which may in some way be considered inappropriate or doesn't deal with all exigencies.

But there's no doubt the court is at a stage of the proceedings when it has been able to take stock of the evidence currently before it. We know, of course, that the court has received

additional information. But regarding the material the court has and all material at its disposal, I respectfully suggest the jury be ready to follow directions from your Lordship that, in having reached a point at which the court has reviewed that, it has come to a decision and that decision is that that evidence cannot feature in the case and they can then be directed to disregard it.

So long as your Lordship does that in a way, as your Lordship would, that is very clear as to the importance of them following that direction, one can have confidence the jury would, particularly if they are given at least a little explanation in a way that bears in mind the interests of both parties, we recognise that, and doesn't do more than necessary to direct them away from the evidence of Dr Evans.

So there has to be a way of dealing with it if it's found the evidence is not admissible and we have to work on the basis, as we always do, that the jury will follow the directions given to them, and powerful directions.

But it seems to us, respectfully, there is no impediment to the jury receiving that direction and indeed one may well expect that a trial judge will consider the evidence throughout a case, there may be particular points when that arises, but at any point a situation like this might arise and a trial judge thereby has to direct the jury accordingly. It doesn't seem to us to present any type of insurmountable problem.

MR JUSTICE GOSS: Just so I'm clear in my mind, you're not suggesting the jury be discharged?

MR MYERS: I'm not asking for that, my Lord, no.

MR JUSTICE GOSS: Thank you.

Mr Johnson.

Submissions by MR JOHNSON

MR JOHNSON: If I can deal with that last point first, please, my Lord. The question that your Lordship has just posed had occurred to me. What hadn't occurred to me is what I just thought of, which is the statutory provisions in the Criminal Justice Act 2003 that deal with the wrongful admission of hearsay evidence.

MR JUSTICE GOSS: Well, that was going through my mind.

Section 125, is it?

MR JOHNSON: I can't remember. If I'd thought of it earlier, I'd have looked it up.

MR JUSTICE GOSS: Perhaps we can put that to one side for the moment, but it is something that may have to be considered.

MR JOHNSON: Yes.

MR JUSTICE GOSS: Can we deal with the substance of the application?

MR JOHNSON: Certainly. Lest I forget, my Lord, can I just not leave it quite yet? Because there is an added complication to this case in this particular respect which, we would submit, bears very closely on what the remedy is if Dr Evans' evidence is excluded. Because as we said in our response that we served yesterday, in pretty much every respect -- pretty much, not every single but pretty much every significant respect -- Dr Evans' evidence is corroborated, and I use that word deliberately, by at least one other expert.

MR JUSTICE GOSS: Particularly Dr Bohin. She did disagree with one or two conclusions, but it's a maximum of a handful.

MR JOHNSON: Yes. There's not much.

MR JUSTICE GOSS: There's very little.

MR JOHNSON: The important opinions, other than in the case of [Baby C] of course, the important opinions are all in effect corroborated by Dr Bohin. Dr Bohin doesn't add the extra parts of which my learned friend complains, taking as an example the introducer, that sort of thing, so she doesn't go that far in that sense.

But one can well imagine that when the jury, if we got to that stage and if your Lordship acceded to my learned friend's submission and in due course, or whenever, probably sooner and later, directed the jury to disregard Dr Evans' evidence, the jury would inevitably ask, well, these witnesses say the same thing. And I was just thinking whether in those circumstances, really, the statutory consequences of the "wrongful" admission of evidence, albeit they don't apply to this situation directly. Clearly the thinking behind the statutory provisions applies by direct analogy to this situation, so that was a thought that occurred to me. But perhaps I can give that a bit more thought when I've... As ever, I get a lot of help from behind.

Your Lordship was right, it is section 125. It's section 125(1), which reads in full:

"If on a defendant's trial before a judge and a jury for an offence the court is satisfied at any time after the close of the case for the prosecution that (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings [so that's the hearsay point that I adverted to] and (b) the evidence provided by the statement is so unconvincing [in this situation read 'inadmissible'] that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe, the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury."

It's that second --

MR JUSTICE GOSS: That's almost like a submission of no case, isn't it, really? It's saying that that evidence was so important that no conviction could be safe.

MR JOHNSON: Well, it isn't quite the same, my Lord, because it's --

MR JUSTICE GOSS: It's not quite the same, but it's tending to pause there. In any event, this isn't a hearsay situation.

MR JOHNSON: No, it isn't. But the point is that it's a situation where, if my learned friend were to succeed in persuading your Lordship, that the jury would have heard evidence that they shouldn't have heard.

MR JUSTICE GOSS: A lot of evidence.

MR JOHNSON: Well, absolutely, yes. For that reason we would -- if your Lordship did come to that conclusion we would invite you to consider that the appropriate way of dealing with this issue would be to discharge the jury.

MR JUSTICE GOSS: I'll hear what Mr Myers says, obviously, in relation to that.

MR JOHNSON: As I said a moment ago, we did serve in writing a fairly long document on the court, which, as always, is available to be read by any interested party and we wonder how much of it is necessary to run through with your Lordship.

MR JUSTICE GOSS: If you could highlight the essential points.

For example, you correctly identify in paragraph 2 the nature of the applications.

MR JOHNSON: Yes. Can I run through the bullet points, my Lord?

MR JUSTICE GOSS: Yes. I think that would be helpful.

MR JOHNSON: Yes. If further elucidation is required by the court then of course I'll provide it.

The way we saw it, the way we interpreted the applications that were being made, was we put them in this order deliberately: the first to exclude any further evidence to be given by Dr Evans; the second for the court to direct the jury to disregard such evidence as he has given up to this stage. They were the two parts of the primary submission, or the secondary submission, as just referred to by my learned friend, either to permit the use of Lord Justice Jackson's decision on paper in cross-examination as being "relevant evidence going to the weight of Dr Evans' opinion" or to permit the use of the decision on paper via the gateway in section 100 of the Criminal Justice Act as non-defendant's bad character.

We make it clear that so far as using the material is concerned, we don't oppose that in the context of the trial. Clearly, the material is admissible evidence as being relevant to the weight of Dr Evans' opinion, although we refer to the fact, or to the suggestion at least, that your Lordship may wish to manage the mechanics of how it is used.

We note my learned friend's suggestion that at least part of it can be done through agreed facts. Well, in that sense the ball is in my learned friend's court to make a proposal to us and we'll have to see how we work that out.

Plainly, one way or another, the material would have to be agreed as having emanated from the source from which it did. But plainly, to a degree, given the answers provided by Dr Evans in writing this morning, there is a potentially time-consuming problem.

MR JUSTICE GOSS: Yes. In terms of the cross-examination at length, which would necessarily have to involve descending into the details of the decision and that case.

MR JOHNSON: Exactly.

MR JUSTICE GOSS: It's a form of satellite litigation.

MR JOHNSON: It is. The management of satellite -- it's an important satellite issue because it goes to credibility of a very important prosecution witness.

MR JUSTICE GOSS: Yes, of course it is.

MR JOHNSON: So I'm in no way underestimating that, but equally, we would submit that it would have to be kept within proper bounds if we went down that particular road.

MR JUSTICE GOSS: Yes. There are two issues, really.

You're conceding that, if we get to that stage, you would not oppose its admission in evidence?

MR JOHNSON: Correct.

MR JUSTICE GOSS: There are then two issues that arise.

First, the nature of the direction given to the jury as to the use to which they may and may not put that evidence.

MR JOHNSON: Yes.

MR JUSTICE GOSS: And secondly, the management of the presentation of that evidence --

MR JOHNSON: Yes.

MR JUSTICE GOSS: -- and the exploration of it in the trial process.

MR JOHNSON: Yes.

MR JUSTICE GOSS: So those would have to be addressed.

MR JOHNSON: Yes. We can all see from the recording, the written recording of the answers to the issues as they were raised, the way it's likely to unfold.

MR JUSTICE GOSS: Well, exactly. And we have experience of Dr Evans as a witness.

MR JOHNSON: Yes. So.

They are the headlines. Our primary submission is that we accept the admissibility of the material and that once that material is admitted into evidence, the jury will be able to make their own judgement as to the critical issue on which the material sheds light, namely the credibility of the witness. So we submit that the alleged unfairness, whether it's under section 78 or any other consideration, can be dealt with in the context of the trial process, so cross-examination of the witness will, we submit, solve the "problem".

MR JUSTICE GOSS: Yes, but Mr Myers' point is we shouldn't get to that stage because his primary submission is that the evidence

that has been given is inadmissible, should not have been given, and he's therefore saying because it is inadmissible and should not have been given, we are now faced with it and we should put a stop to any further evidence and the jury should be told to disregard it.

MR JOHNSON: Yes.

MR JUSTICE GOSS: But your argument, because I've obviously read your response, is saying, no, it's not a question of admissibility, that his evidence is admissible as an expert witness.

MR JOHNSON: Yes.

MR JUSTICE GOSS: Whether it is flawed, to use perhaps an appropriate way of describing the criticism, one appropriate way of describing the criticism of Dr Evans' evidence, flawed by reason of the fact that he is not sufficiently independent, he has acted as an investigator, he has assisted in the ways that have been referred to in relation to the evidence-gathering process, those are matters that can be relevant to the question of credibility of his evidence and the reliability of his evidence, which should not be a bar to the admission of his evidence and the admission of further evidence from him.

MR JOHNSON: Correct. One can think immediately of all sorts of examples which the courts up and down the land accept as expert evidence: the evidence of a police officer who interprets a tick list in a drugs case is employed by the police.

MR JUSTICE GOSS: Yes. We can all think of examples. Even in the medical context one will often have pathologists who will make suggestions about other enquiries that can be made and should be made in order to assist them in reaching their final opinion in relation to...

MR JOHNSON: Of course. Pathologists all the time say, "This wound is consistent with a single-bladed knife, a double-bladed knife", all... which is the criticism, or one of the criticisms, in effect laid at Dr Evans' door, that he's made suggestions as to how things may have happened, that that somehow is going outside his field of expertise. But that's a relatively -- it's one of the more minor criticisms perhaps so I don't want to focus --

MR JUSTICE GOSS: All right. I'm sorry, I've taken you off track, but I thought it was important to go back because you sort of jumped over the first stage.

MR JOHNSON: Yes, sorry. I was going to come to it.

MR JUSTICE GOSS: You were going to come back to it, all right.

MR JOHNSON: Yes. Because one of the key issues underlying the decisions of the courts on experts underlying the important provisions of the Criminal Procedure Rules and of the Consolidated Criminal Practice Direction is what the court wants, what the court needs, is accurate expert opinion and that the perception, justifiably, the perception is that if an expert has their own interests to serve, they are likely not to be providing the court with an accurate, reliable opinion, to quote from my learned friend, who in turn was quoting from Lord Justice Jackson, "an opinion influenced by the exigencies of the litigation", and that is why we submit at the beginning of our response that fact that Dr Evans' opinion is in almost every significant regard, taking away the stylistic criticisms, when one drills down to the opinions he actually reaches, they are corroborated by other experts. That is why we have taken the position which, we submit, is confirmed by the decisions of the Court of Appeal that this is an issue that goes to credibility rather than admissibility.

There is another elephant in the room, if you like.

Your Lordship raised one at the end with my learned friend. The other elephant in the room is the one that we deal with at the conclusion of paragraph 3 of our response, which is given that the whole nature of the attack on Dr Bohin is she's not independent and that she goes along with whatever Dr Evans says, how can one demonstrate that point to the jury without introducing the very evidence that you're saying that they shouldn't be hearing from the witness? That may be another reason why, if your Lordship were persuaded of the defence primary submission, the retrial route is a much more attractive proposition.

MR JUSTICE GOSS: Or appropriate.

MR JOHNSON: Sorry, that's what I meant. I used the wrong word.

MR JUSTICE GOSS: Appropriate proposition.

MR JOHNSON: Shows how easy it is to do. Yes, exactly.

MR JUSTICE GOSS: All right.

MR JOHNSON: So my Lord, the next stage of our response really just sets out the statutory background, which is really setting out what's in the Practice Direction in any event, and I don't think, with respect, I need to deal with that.

We set out what we submit are the four heads that have to be satisfied for the admission of expert evidence. They appear in all sorts of different authorities. They are most easily or conveniently set out either in the Kennedy case, the Supreme Court case, which of course was a Scottish case, or we set them out in effect as they appear or largely appear in the Law Commission's 2011 report on expert evidence.

One of the interesting and perhaps more involved points that emerges from the authorities at least is the point about impartiality and objectivity because at least, so far as the Law Commission's summary of the law as it was in 2011 -- it seemed to bend towards the position that that was really a reference to whether the particular witness, if I can use a phrase, had really had a dog in the fight. It was in that context that we quoted the decision in *R v Factortame* against the Secretary of State for Transport because when the Law Commission was proposing the codification of expert evidence it was providing for the situation in which a court had the power, the statutory power, as it was being proposed, to admit what was objectively biased evidence. So certainly so far as the Commission was concerned at least it didn't see bias as necessarily being the final --

MR JUSTICE GOSS: Yes. It's an interesting point, but I think coming back to it, we are -- what has to be applied is the common law as the essential principles, which you have set out, and are not controversial between and you Mr Myers --

MR JOHNSON: No.

MR JUSTICE GOSS: -- and secondly, the Criminal Practice Direction and the Criminal Procedure Rules. Basically, those are the guiding stars.

MR JOHNSON: Yes, thank you.

MR JUSTICE GOSS: So that's what has to be applied and will be applied.

MR JOHNSON: Yes. We turn next to what, we submit, is the correct interpretation of the several authorities to which my learned friend has already referred, and I'm sure that it's not going to profit those listening or indeed your Lordship for me simply to repeat what we've set out there.

Turning to the specific heads of complaint -- I specifically didn't use the word "complaint" in the written response because I didn't want to antagonise anybody. The alleged construction of theories, first of all. Well, your Lordship can see what we say in paragraph 13. There is, there always is, we would submit,

more than one way of looking at a lot of this material and we accept that it's probably your Lordship's overall impression that is really going to count so far as this is concerned rather than the consideration of any detailed analysis of specific areas of concern, if I can use that more neutral phrase. I'm well aware that pretty much whatever I say, therefore, in that respect is unlikely to make a significant degree of difference.

But can I deal with the points one by one so at least those listening know what the points are that we have invited your Lordship to bear in mind.

The first concerned the case of [Baby A] and the submission of the -- the suggestion of the possibility that potassium chloride had been administered to him. That's something which appeared in Dr Evans' sift report. One of the things that my Lord will have noticed, and which won't be readily apparent to everybody listening, is that Dr Evans produced a great number of sift reports in what, to most of us, appears to be an extraordinarily short period of time because it's clear, and it was obvious from the evidence and it will be obvious to the court having read around the material in the case. There was a huge number of cases that needed to be considered and it needed to be seen in effect whether they could just be sifted out as cases which had an obvious non-criminal background to the collapse or death.

MR JUSTICE GOSS: Well, some form of identifiable medical cause --

MR JOHNSON: Exactly.

MR JUSTICE GOSS: -- or some obvious act of negligence, for example medical negligence. But it was really the unexplained, the number, nature and the absence of apparent explanations for these collapses and deaths.

MR JOHNSON: Exactly. That's a very important context to this whole argument because one of the issues that's raised as being a basis for the exclusion of this evidence is the allegation that in some way Dr Evans has driven the inquiry. But this case has taken an extraordinarily long time to come to court.

Lucy Letby's last shift was after the death of [Baby Q] in June 2016. And by the time -- if this trial runs its course, by the time the jury returns its verdicts it will be nearly 7 years after then.

There's no getting away from the fact, and it's obvious from the statements made by the treating consultants, that from that time in June 2016 Lucy Letby was a suspect or was the suspect so far as the doctors at the Countess of Chester were concerned.

There's a very good reason why this case has taken so long to get to court and it's because somebody had to review an awful lot of cases, and the idea that the police could simply be left to their own devices without seeking some sort of assistance from an expert, and without at least looking for some sort of idea as to what they needed to be doing, is, we would respectfully submit, naive.

So one has to bear that in mind when considering the nature of the issues that are now raised as being an impediment to Dr Evans acting as an objective expert.

So just going back to the position with [Baby A] therefore and his suggestion in the sift that on 8 June 2015 [Baby A] was given an intravenous bolus of air or, alternatively, may have received a noxious substance such as potassium chloride, when in particular that was not repeated in, I'll use the word, proper -- your Lordship knows what I mean -- in the proper report, in other words in the more considered and detailed report in 2018, is not a basis, we would submit, for criticising Dr Evans at all.

So far as [Baby B]'s case is concerned, the issue that was raised in writing and orally this morning was that Dr Evans had said that the nasal prongs -- well, the suggestion is that he said nasal prongs had been removed intentionally. That isn't quite what he said. What he said was her CPAP prongs may have been removed intentionally. This is where we respectfully submit, without wishing to offend in any way Mr Myers, sometimes an emphasis can make a difference and it's very easy, and I do it all the time, it's very easy to use slightly the wrong word or the wrong phrase.

Again, my Lord, one of the very reasons why an expert sits in and listens to the evidence is so that they can recalibrate their opinions if required. So again, that didn't feature as part of the evidence-in-chief so far as Dr Evans was concerned. It was set up to be knocked down for the completely legitimate forensic point that was sought to be made that the doctor was raising things for which it was alleged there was no basis. Well, the jury will make of it what they will, but again, my Lord, as a head of issue, to use a more neutral phrase, we submit there is really no complaint to be made about the nasal prongs point so far as [Baby B] was concerned.

The [Baby C] point, of course, was of a wholly different character, we accept that unreservedly. If Dr Evans intended to say what he said in the witness box, he should have put it in a report. So we concede that point completely.

[Baby D]. An issue was raised as to Dr Evans' explanation for how it could be that [Baby D] collapsed three times. Dr Evans' opinion was that the reasons for each collapse or the reason for each collapse was the same, namely the intravenous administration of air, yet she didn't die the first two times, it was only on the third time. The point of the questioning, of course, was: how can it be an intravenous bolus of air when your case, Dr Evans, is that that would kill somebody and yet [Baby D] recovered twice? And the answer that was given by Dr Evans, of course, was, well, it all depends on the quantity of air and the speed with which the air is delivered. And the issue now has become, "Well, that wasn't in a report".

Well, with the greatest of respect, it was evidence that had already been given in the case, in the case of [Baby B]. It was in that report and it may be that with some reflection my learned friend probably knew precisely what the answer was going to be in the light of what the doctor had said in relation to [Baby B]. So again, we would respectfully submit that that as an issue which goes to the admissibility of Dr Evans' evidence is not one of my learned friend's best points.

[Baby E]. My learned friend says that in his third report the suggestion by Dr Evans that "maybe the bleed had been caused by a thrust of the nasogastric tube" is wholly unrealistic. Well, Dr Evans accepted that when he'd had the opportunity to look at the tube in question and he made it clear before he was asked any questions by my learned friend that that wasn't a point that he thought was viable. Again, to use that as the factual basis for a submission that his evidence is therefore biased or inadmissible, we again would respectfully submit that simply doesn't come anywhere close to the sort of level of material that my learned friend needs to make out his objection.

Turning on to -- I'll quote directly from the defence's argument:

"It is alleged that Dr Evans has consistently given evidence in a manner that's subjective, emotive, dogmatic and biased."

Accepting that what my learned friend says is, well, you have to look at everything, all we can do is deal with the specifics that are raised.

Starting with the first issue, that was in the context of [Baby A] and [Baby B]'s cases.

What's described by the defence as a lengthy commentary on the nature of the investigation, the case is considered, which is alleged to be self-supporting as well as designed to be supportive of the investigation and the prosecution case.

It's difficult, my Lord. What the witness told the jury between pages 35 to 38 of the 25 October transcript was the terms of his engagement and in that connection I pause for a second to refer to an issue that my learned friend has raised this afternoon, which relates to the NCA. I think it's in the transcript of 25 October. If your Lordship were to look at that particular transcript, please. It was suggested this morning that Dr Evans in some way had misled the jury.

It may be my learned friend has overlooked -- it's almost impossible to find all the references in this case, there's so much material, but if one starts at page 35, line 19, when I was asking the questions:

"Question: What had you been asked to do by the police?"

And what he said is:

"Answer: I became involved with this case in July 2017 via the NCA -- that's the National Crime Agency -- and they provide links between people from my kind of background who prepare work, prepare reports for the police authorities. And as a result of discussions between myself and the NCA I visited Cheshire..."

And so it goes on.

What was referred to a little earlier in the context of the emails that are contained as one of the appendices to the application was the section at page 104. So if there's any fault here, it's mine, it's not Dr Evans'. This is the best part of 70 pages later in the transcript and it's my question:

"Question: When you were asked to review the cases and asked for your involvement in this investigation, you told us the NCA were the agency that contacted you."

MR JUSTICE GOSS: That's the National Crime Agency.

MR JOHNSON: Yes, exactly.

MR JUSTICE GOSS: So in fact there are two questions in one.

MR JOHNSON: Yes. And he just said "yes" and we move on because --

MR JUSTICE GOSS: Yes. Then he says:

"Answer: No, by the time that I had -- the NCA got me involved in this case. I had prepared nearly 50 reports for police authorities on other issues..."

MR JOHNSON: Yes.

MR JUSTICE GOSS: Yes. It's not...

MR JOHNSON: It's not clear-cut.

MR JUSTICE GOSS: Well, for the purpose of this application, I'm prepared to say it doesn't appear to me to be obviously misleading of what the situation was.

MR JOHNSON: I'm sure that skilful submissions by my learned friend and cross-examination can serve to illustrate the point he seeks to make. This is the problem with a lot of this material: one can look at it, put one point of view, one can look at it and put a different point of view. That's what juries are for.

Anyway, moving on. The second issue -- and this is the -- this relates to what's alleged to be lengthy expositions that were often advanced regardless of questions put and the allegation that Dr Evans has not been seeking to assist by answering questions but seeking to support the prosecution case, his own position and the investigation generally, irrespective of cross-examination and the suggestion that that's advocacy, not expert evidence.

Well, again, sometimes it's a good idea just to take a step back, but any expert called -- if one party calls an expert, one might reasonably expect that they are being called to support that party's case on the basis of the fact that they've written a report that gives valuable evidence for the party calling the witness. So it follows that, by and large, one might reasonably expect a prosecution expert to support the prosecution case, his or her own position and the investigation generally. That's the nature of litigation.

But dealing with the specific point relating to air embolus, this is a point, I think, in respect of which your Lordship and my learned friend had an exchange this morning. It relates to the allegation being made that Dr Evans doesn't answer a straight question with a straight answer. Well, some people -- on one interpretation he'd given an answer. That's -- perhaps I can leave it like that. Your Lordship has the point.

MR JUSTICE GOSS: Well, I have the point and I can recall some of the exchanges. There was a persistence of questioning -- I'm not

being critical, but there was a persistence of questioning and there became a sort of standard mantra response that came out, "It's a question" -- it's not for me to decide --

MR JOHNSON: No.

MR JUSTICE GOSS: -- and it's often seen in the courtroom.

If I'd felt there was anything inappropriate, I would have intervened.

MR JOHNSON: Yes, and I would have complained, but at the end of the day there has to be a latitude to every cross-examiner.

MR JUSTICE GOSS: Exactly.

MR JOHNSON: I, on behalf of the Crown, don't want to be seen to be seeking to muzzle my learned friend.

Dr Evans is well capable of looking after himself, but there does come a stage at which, inevitably, unless the two parties are going to agree, which they're plainly not going to agree, there comes a sort of stand-off, which is the position we've encountered on several occasions, and the jury will decide ultimately.

There is a degree of artificiality, we would submit, about criticising a witness who ends up saying, in particular, "Look, I've given you my point of view, I've justified it insofar as I can, you're not accepting what I say", and then we get to this unsatisfactory position of the same question being asked and the same answer being given more than once.

The Dr Jayaram point and the immersion point. Well, it's a throwaway line in itself. I'm sure my learned friend wouldn't base the submission on that.

Your Lordship can see the answer, the short answer we have provided. I don't think it merits -- I doubt whether that's going to bear greatly on your Lordship's decision.

As for Dr Lambie, same point, really. These are all, or most of them are, lines in long cross-examinations. I completely understand my learned friend's point that you have to look at it compendiously, but he has provided examples and all we can -- just as he doesn't engage in a compendious analysis of the complaints, it's not going to assist the court's decision for us to start to analyse particular material in respect of which specific complaints are not made, so I've resisted that temptation.

Issue 4, that:

"[Dr Evans] has volunteered comment designed to support his own opinion in a way that's advocacy rather than expert opinion."

Which, it is suggested, demonstrates an interest in arguing a case and winning an argument rather than behaving as an expert. And a specific passage is referred to by the defence on 25 October at page 162.

My Lord, so far as our answer to that is concerned, we submit that that has to be looked at in the context of a long and emotionally charged cross-examination.

This is a very hot room and your Lordship will recall at the beginning I complained about it and I said that if the physical temperature wasn't reduced, people will get grumpy. That was the exact phrase I used. If I only had that much success in making other predictions in life, but it was always going to happen, I'm afraid.

MR JUSTICE GOSS: Well, the way in which Dr Evans gives evidence, it is clearly his natural way, that he is -- some witnesses you can ask a simple question -- like anyone in life, you can ask a simple question and you get a short, simple, direct answer. Others, you get an answer that sometimes isn't really even an answer to the question.

MR JOHNSON: Yes.

MR JUSTICE GOSS: And he is certainly on the discursive side, putting it neutrally, in terms of the way he answers questions and he did -- that example that is cited here is an example of where he's trying to explain why he reached the conclusion that he did reach in relation to that. It's partly stylistic, partly a characteristic of his way of dealing with things, and as you say, ultimately, if it goes before the jury, it's for them to decide.

MR JOHNSON: Yes: is he being evasive or is he just talking the way he talks?

MR JUSTICE GOSS: All right.

MR JOHNSON: This is a case where, if it proceeds as presently billed, the jury are going to get plenty of opportunity to draw a conclusion, make a judgment.

MR JUSTICE GOSS: All right.

MR JOHNSON: Issue 5 --

MR JUSTICE GOSS: Issue 5 is conceded.

MR JOHNSON: Yes, absolutely. Issue 6 wasn't raised as a matter of fact in oral argument by my learned friend.

I'm not suggesting for a moment that he's abandoned it, but given that he's not raised it directly, I won't answer it directly. Your Lordship has the competing points of view.

MR JUSTICE GOSS: Well, it was sort of part of his hyperbolic style at times, "The best place on the planet", "The safest place in the world". He's not meaning literally in a cocooned bunker, so to speak, but what he is saying is if you are a particularly premature baby, the best place to be is on a neonatal unit where there are people there with expertise to care for you and look after you and address medical issues as and when they arise. Anyway, there we are.

MR JOHNSON: Yes. Issue 7, the alleged refusing to give answers in cross-examination or obfuscating. Well, your Lordship sees what we say about that.

Issue 8, the bloodstained secretions. This is another one I think that my learned friend didn't deal with specifically in his submissions, so I'll skate over that. Your Lordship has the competing points of view --

MR JUSTICE GOSS: I have that, yes.

MR JOHNSON: -- as in relation to issue 9.

Moving on to the next basis for the application, the alleged stepping outside his role. Well, we've dealt partially with that. In some respects or in a considerable respect, in fact, this is now dealt with in the disclosure that was received this morning.

We have a 25-page -- sorry, we have 25 pages of emails, which my learned friend has analysed in some detail.

One of the significant parts of the discussion between -- I'll use "the police" as a homogenised unit to include the NCA in this context. But one point that I'm sure your Lordship has, but which wasn't referred to, is at page 22 of the 25-page document. It's an email from Dr Evans to Sonya Baylis of 5 July 2017.

He says this:

"Thanks for the message and for the summary, which I've read. It's all rather unusual. I think that the best -- possibly the

only -- way to look at the issues, is to start from scratch and look at the clinical notes. I mean no disrespect to previous reviews, it's just better this way. One needs to avoid groupthink. Before looking for suspicious matters one needs to see if the clinical trends in the hours and days prior to death followed a recognised clinical pattern. I suspect not, which is why the paediatricians have flagged it up."

Then he sets out the point that has been made several times in this case, that the decline of premature babies is a fairly predictable process that's predictable in the sense that there are various flags along the way that one expects to see, which appear to be absent in this case, which is the very reason why Lucy Letby was suspended in the first place and it bears or it bore directly on the concern expressed by the medics at the Countess of Chester Hospital.

So far as the situation or the possibility or the allegation, I should say, that Dr Evans touted for business, there aren't -- your Lordship will remember from private practice, I am sure, receiving communications, whether they were electronic or in an envelope on paper, from many different forensic service providers, offering their services. This is a feature of the modern world and the idea that an expert witness is incapable of providing an objective opinion just because they have suggested to somebody, in what appears to be relatively informal correspondence, that that's an interesting case, we submit doesn't really advance my learned friend's application.

Otherwise, my learned friend refers to a summary of the meeting on the 11th and 12 July. He's referred to that today. It contains those "general questions" for each baby at the end. That's page 145, I think, of the defence bundle. That is used as a suggestion that -- or it's used as a basis for making the suggestion that Dr Evans is directing the investigation. Well, in an absolute sense he's giving the investigators guidance on what they need to be looking for or where they need to look, but that in no way, we would submit, begins to compromise his independence and in no way invalidates any expert opinion that he may give.

It's interesting always to go back to basics, my Lord, and remember that we're all under a duty, including experts, to deal with cases expeditiously, efficiently and at the least cost to the public purse.

I would submit that Dr Evans, in effect, would be failing in his duty if he allowed or if he didn't give some sort of direction in a case like this. We're back to the original context point that I made, that here the police potentially were looking at

hundreds of different cases and seeking to find the wood in -- find the trees in the wood.

The next point made refers to the letter of 18 July.

It's the defence bundle, page 146, and really the same point applies and I think I refer there to the groupthink point, which is a point that I've already reminded your Lordship of at the beginning of these submissions.

We also remind your Lordship of the consolidated criminal practice direction 19A.5(f).

The next point is the email chain between the 15th and 20 September, page 148 of the defence bundle. And again, we submit that all that email does is to ask the police to gather material which might be relevant to his, Dr Evans', opinion. And it is notable, we submit, that Dr Hall, who's one of the defence paediatricians, incorporates some of that material in his report. And to suggest that asking the police for the material in some way demonstrates a desire or a capability to be directing the investigation -- and when I use that phrase, I'm using it in the sense of in an impartial way -- is, we would submit, misguided.

A visit to the neonatal unit is relied on in an effort to undermine Dr Evans as an expert witness. It was not dealt with specifically today, so I won't respond to it directly, but your Lordship has both the claim and the counterclaim.

The [Baby E] point, the introducer. This is a point I've already made, really, in response to your Lordship's introduction of forensic pathologists.

A perfectly reasonable thing to say and, we would submit, no basis at all for excluding expert evidence and we give your Lordship a specific reference in paragraph 40 of the Supreme Court's decision in Kennedy, where their Lordships made the point that an expert witness is entitled to give factual evidence as well as opinion evidence. So it's perfectly within the purview of Dr Evans that he would be entitled to say: well, in units there are things like this lying around or in the cupboards and that's just the sort of thing that could have been used to cause this injury. It's certainly not directing a police investigation in such a way that would indicate the sort of impartiality or bias for which my learned friend contends.

The decision on paper. Well, your Lordship has the defence's submissions. The document really speaks for itself. I'm not seeking to defend it -- I'm getting my ideas absolutely confused. I'm not seeking to defend Dr Evans' report or whatever

it was. We know what Dr Evans says about it. I haven't spoken to Dr Evans about it. I don't know what, if any, gloss he would put on the material that your Lordship has seen this morning, which is a note of a conversation that the police had with him this morning.

One thing of note is that the Family Procedure Rules are different to both the Criminal and Civil Procedure Rules in one important respect and that is the obligation to notify an expert that a report has been served on a court, so I don't know whether that's relevant or not.

I don't know whether there are any other specific issues you'd like me to deal with, my Lord. I think either I have said what we need to say or our responses are in writing. Are there any overarching or specific details that you'd like me to address?

MR JUSTICE GOSS: No, thank you, not at the moment.

Mr Myers?

Reply submissions by MR MYERS

MR MYERS: Just two matters in response to what's been said.

MR JUSTICE GOSS: Certainly.

MR MYERS: The first as to the frequency with which experts might be involved with investigations. The example was given of a pathologist with types of knife and reference was made to the [Baby E] statement where Dr Evans speculates upon other means.

Of course, a pathologist would not speculate as to the use of a knife if there's no evidence of a knife and wouldn't be directing investigation outside that. The example was given of how they may consider the type of a knife. That bears no resemblance to the breadth and extent of Dr Evans' involvement in this investigation.

There's absolutely no defence of his position to be taken from the fact that other experts, in particular Home Office pathologists, might be approached by the police. They keep their opinions within a very tight remit. Your Lordship will have, I anticipate, vast experience of them and never will have encountered anything like this with any one of them.

That's important because it's been said that the defence said -- that our submission is that Dr Evans has driven the inquiry. We don't say he has driven the inquiry, we say either he has acted as an investigator at various points or directed aspects of it well beyond the clinical features as to which he

is an expert. And that brings him into a situation where he ceases to be objective and he is part of this. There may well have had to be a screening early on, but his involvement has gone well beyond screening and arguably, insofar as it was necessary for any advice to be given to the police, then experts should have been approached but he certainly should not have been directing terms of reference for experts or himself. There is a huge amount of circularity with this and it puts him in a position where he is in no way objective vis-à-vis this investigation and we have all of that.

The second matter was this: it was said that Dr Evans is corroborated by other experts. In fact, there's a good deal of circularity here and in fact if one follows what's happened, that isn't really the way that this has worked in this case. As we go through, and as we've gone through, the opinions of other experts -- and one sees it particularly with Owen Arthurs and Dr Marnerides, who hasn't yet given evidence, but it's in his report -- all of them were provided with Dr Evans' reports before they make their reports and all of them, to varying degrees, rely upon what he has said.

So he has provided material on which they have then relied to form their opinions. To then say that in some way one can bring that round to corroborate what Dr Evans says can't be right. That is entirely circular.

I can give an example from a count we've dealt with already, in the case of [Baby A]. I'll just give your Lordship the reference. Dr Marnerides' report commences at page 760. At page 764 he explains that:

"Dr Evans' report, together with other materials, have been provided to [him]."

He then goes through his reasoning, a large part of which on this report, as with every other one he does, sets out Dr Evans' opinion, which he relies on. He does that in this report at page 768.

Then, in forming his opinion -- and it's at paragraphs C and D on page 771 -- he relies upon:

"The constellation of circumstantial and clinical evidence in the case as outlined in Dr Evans' statement."

He refers to another expert. And relying upon that, in light of everything that he has, then forms his opinions.

That's a process that repeats itself and clearly with Owen Arthurs as well, as to whom with the radiography is often in a

position where he says: well, the radiography can't say, but in light of the clinical opinions with which I have been provided it is possible excessive air via the NGT explains the dilation. But to then take that and say that goes to support what Dr Evans says is not right because they've relied on what Dr Evans says to take their opinion beyond what the evidence relating to their specialty can get to.

One can see that in fact with Owen Arthurs at pages 777 and 778 with regard to [Baby A], where he has relied upon that material.

Because very often, the pathology or the radiology is in itself relatively neutral as to any question of cause or what lies behind what the experts see. Those experts have relied upon clinical findings and opinion by Dr Evans, for example, to reach their conclusion. So it isn't right, in our submission, to try to support Dr Evans' credibility by saying, "There we are, other experts have formed conclusions that are consistent with it", when they have relied on what he said in the first place to reach their opinions.

MR JUSTICE GOSS: To what extent are those matters that they have relied on in the example that you have cited, or the examples that you've cited in respect of those two particular experts, are they matters that are essentially entirely dependent on Dr Evans or there is other evidence that is consistent with what Dr Evans says? In other words, is this they're just relying on Dr Evans and no other evidence?

MR MYERS: No, I wouldn't say that. They look at all the material. But there are occasions, and there are a number of them, where Dr Evans provides material -- his opinion is an important part of the case against the defendant, it stands alone as part of that evidence, and he's reached it in ways, I won't list them again, that we submit are entirely wrong.

To be able to find instances where he may be supported by other experts doesn't assist the position if he's not a safe expert witness in the sense that he is not objective. The fact that there are -- I dealt with, in fact, at an early stage of our submission the fact he may say things that are consistent with expert evidence elsewhere is an entirely separate matter.

That's a question of the strength of the prosecution case generally, but it can't make him objective that on some instances the prosecution can say, well, there we are, he's said something that's consistent with a piece of our evidence in another part of the case.

For example, nobody has said that an air embolus was used or applies in the case of [Baby C] and led to his death. That

doesn't follow any evidence anywhere and that's something he came out with at that point.

Nor has anyone suggested an introducer was used in the case of [Baby E] or anything like that.

And he, of course, in his evidence here gives a very broad gloss on many issues that go beyond just a simple matter of "This is my opinion, that's why I say it" but has a huge impact upon the case generally. So we submit that it cannot be that his objectivity can be vindicated by reference to where he may be on all fours with other bits of the evidence, nor can it be said that just because other experts may say things that are in agreement with him, that makes him objective when we're faced with the wealth of material that we have here.

Thank you, my Lord.

MR JUSTICE GOSS: All right. Thank you very much.

I shall consider these submissions and give my decision in relation to these applications tomorrow morning. I can't do it this afternoon now. I will provide written reasons for my decision, but I will not be -- I probably will not be in a position to provide those reasons, because I would want them to be quite full, whatever basis they sustain by way of conclusion, so that everyone can understand why I have reached whatever decision I reach in relation to these applications. They may not be available first thing, but the decisions themselves will be.

MR MYERS: Thank you.

MR JUSTICE GOSS: Can we just then spend what time remains this afternoon considering if this trial is to proceed -- I didn't actually ask you, Mr Myers, as to whether you wanted to make any submission in relation to that. You've heard Mr Johnson say that if your main applications succeed in that Dr Evans' evidence is essentially inadmissible, should not have been adduced in evidence and the jury should be told to ignore it, whether this the jury should be discharged, whether the defence want it or not.

MR MYERS: That's not an application that we make. We submit that isn't a necessary outcome of a ruling that finds his evidence inadmissible. I can enlarge upon that if necessary and the section 125 point which, as you say, is entirely different and relates to hearsay evidence.

MR JUSTICE GOSS: I don't think section 125 greatly assists because this is a situation that (a) it's not hearsay, (b) in any event it's a factual scenario that's far removed from that.

MR MYERS: Yes, it is. It's not an application we make.

MR JUSTICE GOSS: Right. If this trial is to proceed, could I have some indication if possible as to timetable? One of the questions that may arise is when are we likely to reach the stage -- let's assume that we have the longest case scenario in terms of prosecution evidence that Dr Evans is to continue to give evidence, let's work on that assumption. Has there been any discussion or thought as to when, barring unforeseen circumstances like illnesses, et cetera, et cetera, when the prosecution evidence is likely to be completed?

Mr Johnson, Mr Myers? Do you want to discuss it and come back to it tomorrow?

MR JOHNSON: If you would allow us that time, thank you.

MR JUSTICE GOSS: Yes. I think because I'm confident that one of the questions that I shall be asked sooner or later, probably sooner, is when is this case likely to finish, by the jury. Now that they've had a long break and they're coming back to it and they're resuming the situation, they'll think, well, we're about halfway through, it seems, on paper, in terms of the counts, the prosecution counts, have we got another 2 months of prosecution evidence or more or what?

MR JOHNSON: Yes.

MR JUSTICE GOSS: I'll leave it with you. I'm not asking, because I can't get definitive answers, for definitive answers, but at least some indication, both for the court's purposes, which includes me, and for the jury's purposes. Thank you very much.

Jury for 10.30 tomorrow? It would assist if the court could actually sit a little before that, 10.15 -- I know it's not substantially before -- for me to give my decision and for us to discuss other matters that we need to discuss.

MR JOHNSON: We are always in the building from when it opens at 8.

MR MYERS: 10.15, I'm sure we can deal with matters then, my Lord.

MR JUSTICE GOSS: I think before that you've indicated it's difficult, certainly before 10 o'clock.

MR MYERS: Yes. I bear in mind, particularly when we're dealing with evidence and matters like that, where we may have had to discuss things with the defendant and she needs to be in a

position to deal with that, but 10.15 would be to deal with matters with your Lordship, and then whatever evidence follows at 10.30, if that is the course that we follow. So certainly to assist with tomorrow we can endeavour to deal with it that way.

MR JUSTICE GOSS: Thank you very much. That would be very helpful.

I'll just check with the escorting officers. For 10.15 tomorrow to start in court. Thank you very much indeed.

(4.03 pm)

(The court adjourned until 10.15 am on Tuesday, 10 January 2023)