

10 January 2023 (Day 53)
Housekeeping (2 members of the jury absent)

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Housekeeping

Tuesday, 10 January 2023
(10.15 am)

(In the absence of the jury)

Housekeeping

MR JUSTICE GOSS: The defence application to exclude any further evidence from Dr Dewi Evans is, for reasons set out in writing that will be distributed later today, refused.

The application by the defence to adduce the evidence of the decision on paper of Lord Justice Jackson, which is the subject of part of this application, and which is acceded to by the prosecution, is granted. It will be necessary to identify the way in which this is to be done. It is to be hoped this can be achieved by agreement. If not, I will deal with it as a case management issue.

MR JOHNSON: Thank you, my Lord.

MR JUSTICE GOSS: That deals with it. As I say, the reasons are -- it's not complete yet and I want to check it, but I am quite satisfied that I have considered everything that I need to consider in reaching the conclusions that I have.

MR JOHNSON: Thank you.

MR MYERS: My Lord, thank you.

MR JUSTICE GOSS: As you have been told, and I think others may have been told, we have difficulties this morning with two jurors --

MR JOHNSON: Yes.

MR JUSTICE GOSS: -- which, for good reasons, they are not able to be present today. It is not yet known -- and will not be known, I fear, for some little time, at least today, if not possibly longer -- when they will be available, but we're certainly not going to be able to sit on the trial with the jury today.

MR JOHNSON: No.

MR JUSTICE GOSS: I anticipate that the jury will -- because one of the other jurors has been an informant as to the difficulty with one of the jurors, who's suffered a bereavement literally this morning, that that other juror will have told the other jurors, but I think given that I have not seen the jury for over 3 weeks now I'm going to have the 10 jurors who are present brought into court to explain to them and also put on the record why we are not able to sit today and simply indicate that we will, of course, resume as soon as we possibly can, but I'm not able to say when that will be at the moment.

Further to our discussion yesterday afternoon, I don't know whether there's been -- it has been possible to give some indication -- it is, good. Perhaps we could deal with that now then.

MR JOHNSON: Yes. Who goes first?

I think inevitably it is a very general point of view. We discussed it at some length last night and the best we could do, which is probably what your Lordship has concluded as well, is we think the jury will go out some time in May.

MR JUSTICE GOSS: Some time?

MR JOHNSON: Some time in May, yes.

MR JUSTICE GOSS: Right. One thing I was going to mention -- and this is essentially a case management issue and I appreciate that there is a huge amount of detailed evidence in relation to each of these cases -- is that we are now in a situation, of course, where the jury is familiar with the format of documentation, a lot of the procedures that were gone through, and I was wondering whether it will be possible, rather than going through the sequence of events and the evidence relating to those -- because I have, with all due respect, found sometimes the fact that documents are reproduced time and again, the same document during the sequence of events -- whether there could be curtailment of the way that that is done and focus on the really relevant documents to the incident in question.

I know it's difficult as to --

MR JOHNSON: The problem, my Lord, is one never knows what's going to come up in cross-examination. And to seek to start messing around -- "messing around" is not a great phrase.

MR JUSTICE GOSS: "Messing around" is not the right word, but seeking to short circuit...

MR JOHNSON: No, it was more the -- if we compress things and then documents or the position of something becomes relevant or the chronology becomes relevant, to seek to then reconstitute the -- which is the phrase I'm using -- to seek to reconstitute it during cross-examination will be impossible --

MR JUSTICE GOSS: I was wondering whether there could be agreement between the parties, and the juniors could work on this in particular and obviously seek the approval of the leaders, as to which are the really relevant key documents in relation to each child so that then the prosecution could identify those and then there can be cross-examination in relation to those.

MR JOHNSON: Yes. I think Mr Myers wants to say something.

MR MYERS: What I was going to observe is in fact there isn't really an issue as to that. It sounds like your Lordship's concern was more particularly with the sequence of events, the number of times we go back to the same document, because there isn't really much disagreement about what the key documents are and invariably, as we have learned, it's the key clinical notes that deal with the incident, the nursing notes, some of the prescriptions, the blood gas and any observations --

MR JUSTICE GOSS: (Overspeaking).

MR MYERS: -- and occasionally there is exploration outside that of particular documents.

One thing which we have done to assist, and this has already started and will be completed in the next day or so, is to produce some of the requirements, review them in light of what we have covered so far with those children who are quite substantial, in particular [Baby I] and [Babies O & P]. We have already given reduced requirements with [Baby I] and we are about to give reduced requirements with [Babies O & P], quite significantly, which will assist.

As for the question your Lordship raises about how many times it is necessary to go back to the document, we understand why the prosecution do it the way they do and it's entirely a matter for them, but of course it may well be that having once identified the key documents at the outset of the sequence of events, it might be possible to take at least that a little bit more quickly once we've seen the suite of documents that we tend to go to. But I don't want to trespass on my learned friend's case because I understand he has to keep in mind whatever eventuality he can foresee being a possibility in the case. So it wouldn't be right for me to seek to reduce it.

MR JUSTICE GOSS: I think that is helpful, Mr Myers.

MR JOHNSON: An easier way or a quicker way of going through the sequence of events would be simply not to bother going behind the tiles, just say what there are -- to give the jury the paper copies of the observation charts, for example.

MR JUSTICE GOSS: That's what I was going to come back to, which is another hangover, because we still haven't identified which are the paper documents that are going to go in relation to the earlier cases.

MR JOHNSON: I think we've got that in hand. One of the difficulties with this case is each day poses significant logistical considerations and that takes up most of the time --

MR JUSTICE GOSS: I know.

MR JOHNSON: -- and backfilling, as I've described it previously, becomes a less important priority. One of the things I was going to do today is give the jury the documents in relation to [Baby C].

MR JUSTICE GOSS: We can do that whenever.

MR JOHNSON: That's what I thought. The trouble is I'd got myself into that mindset so far as [Baby C] was concerned, and [Baby D], and it had fallen off the immediate consideration pile.

MR JUSTICE GOSS: You'll have some more time today --

MR JOHNSON: Yes, quite.

MR JUSTICE GOSS: -- which actually may prove to be beneficial.

MR JOHNSON: I think it will. Thank you.

MR JUSTICE GOSS: Good. All right. Well, thank you very much, that's helpful. I anticipated that your assessment, insofar as one can assess where we're likely to be and when, would be as it is because we have the exigencies of this time of year, not least, and the difficulties. In which case what I will do is -- because what I don't want is any juror booking a holiday in particular.

We will have public holidays after Easter. They already know when the Easter break is. But thereafter, I'm afraid it will be a very limited holiday period, basically statutory holidays.

MR JOHNSON: Yes. We may get to various stages in the case where we all would need a bit of time.

MR JUSTICE GOSS: Oh yes. There probably will be days when we have time in any event by reason of other circumstances.

MR JOHNSON: Of course, yes.

MR JUSTICE GOSS: Don't worry, we'll see where we are. I'll remain flexible and understanding.

MR JOHNSON: Thank you.

MR MYERS: Thank you.

MR JOHNSON: One of the considerations plainly is if one automatically says certain days are off then the emphasis isn't on using days like today when we clearly get the time.

MR JUSTICE GOSS: Sorry, I'm just wondering if the usher or someone could just go and tell the jury we can...

(Pause)

Yes. Sorry.

MR JOHNSON: We get days from time to time, like today, where we do get time.

MR JUSTICE GOSS: We're going to come to that time with which we are familiar at the end of the evidence when we're all going to need time then.

MR JOHNSON: Yes.

MR JUSTICE GOSS: That is a long way off. All right, thank you very much. That's very helpful. I'll have the jury, who we can hear are waiting to be brought into court, brought into court. I will explain to them what the current difficulty is, point out to them that this trial will not be completed by Easter/early April and is likely to go on into May and they should be prepared for that.

MR JOHNSON: Yes.

MR JUSTICE GOSS: And not to book any holidays other than on days which are holidays, namely weekends and public holidays, apart from the Easter break that they know about, and I will just keep them informed thereafter as best I can.

MR JOHNSON: Thank you. I'm just struggling to be sure as to what your Lordship has already told them about Easter. My

recollection is it was Maundy Thursday until the week after Good Friday, but I can't remember whether I'm right about that.

MR JUSTICE GOSS: I don't have the documents here, but the questionnaire -- has anyone got the questionnaire to hand? I haven't got my laptop. It'll be on the DCS.

MR JOHNSON: I'd forgotten it was in that document, so there we are.

MR JUSTICE GOSS: I'm sure it is.

MR JOHNSON: That's fine. They may have forgotten as well, actually.

MR JUSTICE GOSS: Actually, before they're brought in, because it's not quite half past, if someone could just see that the laptops are being -- or devices are being looked at.

MR MYERS: The final copy that I have, my Lord, gives the Christmas break, we resume on Monday 9 January, and then this is not sitting between 7 and 14 April. The last sitting day will be Thursday, 6 April, and the trial will resume on Monday, 17 April.

MR JUSTICE GOSS: Yes. So it's Easter week off.

MR MYERS: Yes. That's what I've got on my computer as "Jury questionnaire final". I hope there was no further one, but I don't recall us discussing dates beyond the dates your Lordship identified.

MR JUSTICE GOSS: We didn't, thank you very much. That was my recollection. I thought by then if we were still sitting, they're entitled to a break because it will have been a long run through from now, but we'd have to keep it to the essential minimum. In other words, Maundy Thursday is a not sitting day.

MR MYERS: It says in the questionnaire the last sitting day will be Thursday, 6 April and the trial will resume on Monday, 17 April. That's what I have in parenthesis after saying to them that the break would be the 7th to the 14th.

MR JUSTICE GOSS: Sorry, just say that again: Monday the?

MR MYERS: Returning on Monday, 17 April.

MR JUSTICE GOSS: Right. Thank you very much.

Jury in, please.

(In the presence of the jury)

MR JUSTICE GOSS: Good morning, members of the jury. Welcome back.

As you are aware, two of your number are absent. I think that some, if not all of you, will know about the difficulty that one of the jurors has had. That juror has probably communicated to the rest of you and there's obviously a very good reason for that juror not being able to be present. And so far as your other colleague is concerned, she is, for very good reason, not able to be present. It's simply not possible for me to say when it is likely they are going to be available. You'll certainly understand in relation to the circumstances of one of them and I'm not going to disclose anything in relation to the other. But I hope we will have an update later today as to when she will be available.

So, as you know from your experience last year, unless you're all here we cannot proceed, so we're not able to resume today. I'm sorry we weren't able to resume yesterday, but in fact we would have had this interruption in any event.

It is enabling work to be done, work is being done in relation to the trial, but one of the things that is going to concern you -- you're obviously having difficulty.

JUROR: I'm just having a bit of a hot flush. Could I have a glass of water?

MR JUSTICE GOSS: It is very warm in here. Certainly. Usher, could you provide the juror with some water? You're not going to be in here for very long.

(Pause)

You will obviously be wanting to know how long this trial is likely to last and I've been discussing with counsel how long this trial is likely to last and you will have done your own calculations, I have no doubt, looking at the number of babies whose cases are being considered and the prosecution evidence and how many remain and you'll appreciate we're not halfway through the babies yet, let alone the other evidence about interviews and so on and so forth and other experts, prosecution experts, to whom reference has been made.

So doing the best I can, assuming that apart from the odd day when there may be a difficulty with us sitting by reason of illness or something like that, it is anticipated that this case will run, because we have to factor in your retirement time and deliberations, which are a completely unknown factor, how long

they will be, that you should be prepared to be available until May. All right? I already warned you it could run after Easter, which is the beginning of April.

You know that we are not sitting -- our last sitting day before Easter is Maundy Thursday, we're not sitting Good Friday, which is a public holiday, we're not sitting the following week, which is Easter Week, so there will be over a week's break then, two weekends and Good Friday. We'll then resume the following Monday -- this is in your original questionnaire -- and then we will sit through every day apart from public holidays, bank holidays. So there will be no more holidays. Sorry about this.

So the important thing about that is don't book any holidays and don't make any arrangements, be prepared that you may be here until May. All right? Sorry that may be bad news so far as you're concerned, but I don't suppose it's coming as a huge surprise to you because you're obviously paying very close attention, as I know, to this case and know what is to come.

So that's it for today. I'll try and do what I can about the temperature in here, but as you know, there's very little I can do. What I will do is ask that it be kept cold rather than hot so that you can always wear more clothes rather than suffering the inconvenience of being too hot. But I'm afraid, as I told you last year, it's very difficult to control the heating.

JUROR: Could we possibly get another letter to give our employers?

MR JUSTICE GOSS: Of course. Anything that you need by way of letters to employers --

JUROR: The last letter (inaudible: no microphone).

MR JUSTICE GOSS: Certainly. That can be dealt with and that will be dealt with. As far as when we're going to resume, be it tomorrow or Thursday or even Friday, I just don't know, it'll be the usual thing: keep in touch with the jury officer and you'll be told when to come in. All right? I can do no more than that. Thank you all very much. I will see you, I hope, some time later this week, whenever that may be. Please remember, of course, those instructions that I gave you at the beginning of this trial in October about your responsibilities as jurors: no communication with anyone about anything to do with this case and no research about anything to do with this case. Thank you very much.

(In the absence of the jury)

For the benefit of those in the dock area, I appreciate that when the ventilation is working, in the sense that the cool air is blown in, it's blown in directly to you and you can be uncomfortably cold. So could you please, either you yourselves or your colleagues who are coming later in the week, be prepared to be cold and have outer garments that you could wear if necessary? But I would much rather proceed on a basis of it being too cool in here rather than too hot when it becomes too hot to work and concentrate for the required periods of time.

I apologise on behalf of the Court Service in relation to this, but perhaps in the great scheme of the general problems there are it's a relatively trivial problem and there are other more serious problems. Right, thank you very much.

Unless there's anything else counsel wish to raise, I don't see that there's any need for us to reconvene at any point later today. I will be here working as no doubt you will be working.

MR JOHNSON: Yes.

MR JUSTICE GOSS: But could we please deal with the documents that can be distributed when we resume --

MR JOHNSON: Yes.

MR JUSTICE GOSS: -- with the jury? And you and Mr Myers can, as you have been throughout, and I'm obviously very grateful for it, seek to cooperate as much as you can to focus on the issues.

MR MYERS: My Lord, yes.

MR JUSTICE GOSS: And you'll see from the ruling that I will at the end simply repeat what I said orally about I hope it can be agreed in relation to the evidence of the decision on paper of Lord Justice Jackson, but if not then I'll have to rule on it. But I'll leave it to you because you'll each have views in relation to it and if they don't coincide I'll have to deal with it.

MR JOHNSON: In terms of the general way forward, as I understand the position, it's not intended to deploy that material straightaway.

MR JUSTICE GOSS: I was wondering, in the light of the view to which I came, whether Mr Myers would be in a position to proceed straightaway. I anticipated he would, knowing how prepared he is --

MR MYERS: Yes.

MR JUSTICE GOSS: -- that he would be able to proceed either way.

MR MYERS: Your Lordship's quite right. We would have dealt with Dr Evans today irrespective and then endeavoured to reach agreement in time for the appearance after that and so there need be no delay in the time that we take to resolve this now we know what we're dealing with. Thank you.

MR JUSTICE GOSS: Well, thank you very much. As I say in the written ruling, I'm very grateful for the detailed assistance I received in relation to the application.

MR MYERS: We're obliged, my Lord, thank you.

MR JUSTICE GOSS: Right. Then, Mr Myers, do you wish to go and see the defendant?

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

MR JUSTICE GOSS: The dock officer will accommodate that. Thank you very much.

When completed and checked, the ruling will be emailed to you in the usual way and it will be uploaded to the digital case system. But as soon as it's going to be distributed, I'll have it emailed first and then uploaded. Thank you.

(10.40 am)

(The hearing adjourned until a time and date to be determined)