IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL OF
THE REPUBLIC OF TRINIDAD AND TOBAGO

JCPC **2025/0063**

BETWEEN

DR MARWAN ABDULLA Appellant

and

AEDEN BALWAH
(By Shelly-Ann Balwah His Mother and Next Friend) Respondent

APPELLANT'S CASE

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1. This is the case of the appellant, Dr Marwan Abdulla, in one of two appeals being heard together (the other being appeal number 2025/0065). Dr Abdulla will refer to the parties by the names used in the statement of facts and issues: the respondent in this appeal (and appellant in the other) is Aeden; and the clinic (the respondent and cross-appellant in the other appeal) is Surgi-Med.

Summary

The decisive issue and the judge's finding

2. Aeden's case was that his cerebral palsy was the result of a hypoxic ischaemic brain injury (i.e. an injury caused when the brain is deprived of oxygen and blood flow) during the course of his mother's labour, while she was under the care of Dr Abdulla.

3. A hypoxic ischaemic injury during labour was one of a number of possible causes for Aeden's condition which were presented to the judge. The alternatives included the possibility that Aeden's cerebral palsy had been caused by a virus, or that Aeden had indeed suffered a hypoxic ischaemic injury before birth, but at an earlier time, before his mother's labour.

4. This last possibility was considered clearly more probable by the expert paediatric neurologist instructed by Dr Abdulla, who observed that the findings of clinical examinations of Aeden shortly after birth were not consistent with his having very recently suffered injuries of the kind and magnitude posited by the case put on his behalf.

5. Further, for Aeden's case to be proven, the judge would have to make a finding as to the mechanism by which negligence on the part of Dr Abdulla caused Aeden's injuries.

6. The judge found that Dr Abdulla had been negligent in one respect only: by administering a dose of misoprostol (a drug used to stimulate labour) that was excessive by the standard applicable in Trinidad and Tobago. An excess of misoprostol might in some cases cause excessive uterine contractions (tachysystole) or hyperstimulation, which in turn could create a risk of foetal injury. There was no evidence of tachysystole or hyperstimulation in the medical records in this case.

7. In the event, however, the trial judge did not determine the cause of Aeden's injuries. Instead, he resolved the issues by a finding which excluded hypoxic ischaemic injury during labour and thus excluded Dr Abdulla's negligence as a possible cause of injury. His reasons for doing so were as follows.

8. It was common ground, in light of the expert evidence, that for Aeden's condition to have been caused by a hypoxic ischaemic injury during labour, the period of hypoxia would have to have lasted for over 60 minutes. It was common ground also that during a period of hypoxia Aeden's heart rate would have been elevated, showing signs of distress. The contemporaneous notes of when Aeden's foetal heart rate was monitored all recorded a normal heart rate. Therefore, Aeden's case depended on the existence of a period during labour when Aeden's heart rate was *not monitored*, lasting for over 60 minutes.

9. The candidate for such a period during labour was the period after failed attempts at vaginal delivery (which lasted for one hour) and before Aeden's delivery by caesarean section at 6:15 a.m. There are no medical notes of foetal heart rate during this period.

10. The one hour period of attempted vaginal delivery was also described as the "second stage" or the "active second stage" of labour. Aeden's case at trial was that this stage ended at 5:00 a.m., resulting in a potential unmonitored period of 75 minutes until 6:15 a.m., long enough for a hypoxic ischaemic injury. The defendants' case at trial was that it ended at 5:30 a.m., resulting in a potential unmonitored period of 45 minutes, *not* long enough for a hypoxic ischaemic injury.

11. These considerations explain the judge's finding, at paragraph 146 [**82**], that the parties agreed that if attempts at vaginal delivery began at 4:30 and ended at 5:30, then *"the event which caused [Aeden's] condition could not have occurred during the intrapartum period and therefore, could not have been caused by the breach of the duty of care by [the defendants]"*.

12. The judge found, on the basis of the medical notes and of inferences drawn from them in light of expert evidence, that the attempts at vaginal delivery did indeed begin at 4:30 a.m. and end at 5:30 a.m., with the result that the subsequent potential unmonitored period lasted only 45 minutes; accordingly, he dismissed Aeden's case.

13. The judge went on to make it clear that he was making no other findings as to causation. Had he found, contrary to the above, that the potential unmonitored period lasted for 75 minutes, so that Aeden *could have* suffered a hypoxic ischaemic injury during that period, it would have been necessary for him to make further findings as to the nature and causation of Aeden's injuries, in order to establish (i) whether Aeden did suffer a hypoxic ischaemic injury and (ii) whether that was caused by negligence on the part of Dr Abdulla. He did not determine those questions.

The Court of Appeal's principal errors in summary

14. First, the Court of Appeal erred in law by overturning the judge's finding that attempts at vaginal delivery began at 4:30 a.m, and substituting its own finding of 4:00 a.m. It gave three reasons for doing so, all of which were erroneous:

    1) It held that the judge was not qualified to infer from the fact that Mrs Balwah's cervix was measured as fully dilated at 4:30 a.m. that the active stage of labour

had not yet begun at that point. That was wrong, because the judge's inference was supported by expert evidence.

2) It held that the judge was wrong not to take into account a doctor's note referring Aeden to hospital the next morning, which stated that Aeden was delivered after "prolonged" second stage labour. That was wrong, because the doctor concerned had not been present during labour and had not given evidence as to what he had meant; and on any case it would have been incorrect to describe the labour as "prolonged" in the accepted medical sense.

3) It held that the judge was wrong not to hold Dr Abdulla to his defence, which had admitted Aeden's pleaded claim that attempts at vaginal delivery began at 4:00 a.m.; this was an error because:

   i. Surgi-Med had pleaded that the one hour of attempts ended at 5:30 a.m. with the result that it was open to the judge to find as a fact that it began at 4:30 a.m.; he ought not have been bound to make an inconsistent finding against Dr Abdulla.

   ii. Dr Abdulla's defence was not an unequivocal statement that the attempts began at 4:00 a.m.; he made other assertions in his defence which necessarily implied that they began at 4:30 a.m.

   iii. The pleadings did not identify the question of the time of the attempts at vaginal delivery as a critical issue. The understanding that this question could be decisive developed later. For Dr Abdulla to give evidence that the attempts began at 4:30 a.m. and not at 4:00 a.m. was therefore not a departure from his case on the pleaded issues as to liability.

15. Second, the Court of Appeal erred in law by proceeding to find that the case was proven against Dr Abdulla once it was established that attempts at vaginal delivery began at 4:00 a.m.: it misunderstood the material issue as to causation; and found a new breach by Dr Abdulla that was not part of the case before the judge. In particular:

    1) It found that second stage labour began at 4:00 a.m. and ended at 5:30 a.m., and that it was agreed by the parties this period (of 90 minutes) was long enough for

hypoxia/ischaemia to bring about Aeden's injuries. This was wrong and a complete misunderstanding of the issue as to timing, explained above.

2) It found further that if the active attempts lasted for 90 minutes, then Dr Abdulla had mismanaged the delivery and was in breach. It was wrong to do so: no such allegation was made in the case against Dr Abdulla.

The question of timing

16. On the evening of 18 May 2002, Aeden's mother Mrs Balwah presented herself at Surgi-Med's clinic for an induced birth. She had decided to do so on the advice of Dr Abdulla, who had attended her during her pregnancy. At around 8:00 p.m., at the clinic, Dr Abdulla administered a 200 microgram dose of misoprostol to induce labour [**437**].

17. According to Dr Abdulla, he left instructions with the clinic that Aeden's heart rate be monitored every 30 minutes thereafter. According to Surgi-Med, it did not begin heart rate monitoring until 12:30 a.m., because Mrs Balwah did not go into labour until then. According to its notes, the first record of mild to moderate contractions is at 12:30 a.m [**437**].

18. According to the notes, Mrs Balwah's membranes ruptured at 3:30 a.m. in the early hours of 19 May 2002; at this time her cervix was 4cm dilated; and she was experiencing moderate contractions every 10 minutes. Aeden's heart rate was recorded as regular at 3:00 a.m. and 3:30 a.m. (see "FH" column [**437**]).

19. At 4:00 a.m., moderate contractions were occurring every 5 minutes and Aeden's heart rate was regular [**437**]. At 4:30 a.m., the final entry in the clinic's notes recorded that contractions were moderate to strong and occurring every 3 minutes, Aeden's heart rate was regular, and the cervix was fully dilated [**439**].

20. The time at which Dr Abdulla arrived and the active, second stage of labour began was in dispute. According to Mrs Balwah, Dr Abdulla arrived at 4:00 a.m. and the attempt to deliver her baby by vaginal birth took place from 4:00 a.m. to 5:00 a.m.

21. Shortly after the conclusion of those attempts, Dr Abdulla made a manuscript note which said as follows [**441**]:

19.5.02 4AM Called out to see patient who is fully dilated.
Vaginal delivery attempted for one hour without any progress.
Foetal head descended up to level of spines. Caput ++ _ No MSL FH Regular
Episiotomy given to facilitate delivery

And immediately over the page, the note continued [**442**]:
No progress – POP transverse
5:30 AM for LSCS

In these notes: *"No MSL"* means no meconium-stained liquor; *"FH Regular"* means foetal heart rate was regular; and *"LSCS"* means lower section caesarean section.

22. In light of these notes, and the clinic's note stating that the claimant's mother's cervix was fully dilated at 4:30 a.m., Dr Abdulla said that the hour of attempts at vaginal delivery took place from 4:30 a.m. to 5:30 a.m., at which time the decision was made to resort to caesarean section. He said that *"4AM"* in his note referred to the time when the midwife called him, and he arrived at the clinic at around 4:30 a.m.; that attempts at vaginal delivery began when the cervix was fully dilated, i.e. at 4:30 a.m.; and that his note recorded 5:30 a.m. as the time of the decision to perform a caesarean section.

Pleadings as to timing

23. Aeden's amended particulars of claim dated 26 February 2016, at paragraph 18, pleaded as follows with respect to the material timeline [**227**]:
    1) (Subparagraph g) At approximately 4:00 a.m. Dr Abdulla arrived and Mrs Balwah was taken to the delivery room.
    2) (Subparagraph h) Between the hours of 4:00 a.m. and 5:00 a.m. vaginal delivery was attempted without any progress.

3) (Subparagraph j) At 6:15 a.m. an emergency caesarean section was performed by Dr Abdulla.
4) (Subparagraph k) The claimant was born at approximately 6:15 a.m.
5) (Subparagraph m) Between 4:30 a.m. and the time when the claimant was delivered there was no monitoring of the foetal heart rate.

24. Further, the particulars of negligence at paragraph 19 alleged:
    1) Against Surgi-Med, at (iv), that it had failed to monitor the foetal heart rate in the hours prior to delivery [**231**].
    2) Against Dr Abdulla, at (viii), that he had failed to monitor the foetal heart rate continuously or at all; that during the 105 minutes before delivery at 6:15 a.m. no foetal monitoring was carried out; and that if Dr Abdulla had assessed this as a low risk delivery he nevertheless should have carried out foetal heart rate measurements at 15 to 30 minute intervals in the first stage of labour and at 5 minute intervals in the second stage [**235-6**].

25. By an amended defence dated 31 March 2016, Surgi-Med at paragraph 15 responded to the alleged timings as follows [**260**]:
    1) It admitted paragraphs 18(g) and (h).
    2) It admitted paragraph 18(j).
    3) It put the claimant to proof of paragraph 18(k).
    4) It denied paragraph 18(m).

26. Further, it denied particular of negligence 19(iv) against it, averring that staff monitored the foetal heart rate until the arrival of Dr Abdulla, who then took over the monitoring [**267**].

27. By an amended defence dated 4 April 2016, Dr Abdulla responded to the alleged timings as follows:
    1) At paragraph 22, he admitted paragraphs 18(g) and (h) [**278**].

2) At paragraphs 24 and 25 he admitted the 6:15 a.m. time of birth by caesarean section.
3) At paragraph 27 he denied paragraph 18(m) and averred that between 4:30 a.m. and the time that the caesarean section was done the midwife monitored the foetal heart rate in his presence every 5 to 10 minutes [**280**].

28. Dr Abdulla pleaded the following further matters relevant to the timing of labour and foetal heart rate monitoring:
    1) In response to particular of negligence 19(viii) against him, he averred that continuous foetal heart rate monitoring had not been required, and that there had been no signs, from intermittent monitoring, of foetal distress [**290**].
    2) In further response to 19(viii) at paragraph 34.16 he averred that the foetal heart rate was monitored every 5 to 10 minutes by the midwife in his presence between 4:30 a.m, and the time of delivery [**291**].
    3) At paragraph 34.21 he averred that contractions were monitored continuously until Mrs Balwah's cervix was fully dilated at 4:30 a.m. [**292**].
    4) At paragraph 34.23 he averred that he was summoned when the contractions were moderate to strong and Mrs Balwah's cervix was fully dilated (in light of paragraph 34.21 above, this is an implied statement that he was summoned at 4:30 a.m.) [**293**].

Dr Abdulla's witness statement

29. In his witness statement, dated 20 September 2016, Dr Abdulla addressed the timings as follows. He said that the midwife had called him at around 4:00 a.m. and that he had arrived at the clinic at 4:30 a.m.; upon arrival he examined Mrs Balwah and found that she was fully dilated; and the attempts at vaginal delivery then took place between 4:30 a.m. to 5:30 p.m., at which time the decision was made to perform a caesarean section because of the failure to progress (Adbulla paras 34 to 37 [**770-1**]). He said that he made his notes referred to above (which documented among other things that the foetal heart rate was regular) at 5:30 a.m., when the decision was made to perform the caesarean section (para 39 [**771**]).

30. After the exchange of witness statements, the claimant made a number of evidential objections, some of which were upheld by the judge and some dismissed. No objection was made to Dr Abdulla's evidence as to as to the time of his arrival at the clinic and the time of the active attempts at vaginal delivery.

The pleadings at trial

31. The trial took place during March 2019. On 21 March 2019, during the course of the trial, Surgi-Med applied to re-amend its defence. In response to paragraph 18(g) and (h) in respect of the time of Dr Abdulla's arrival and the attempt at vaginal delivery, it pleaded as follows at a re-amended paragraph 15 [**338-9**]:

> *(i) It is admitted that the Second Defendant arrived shortly after 4:00am and that thereafter Mrs. Balwah was taken to the delivery room.*
> *(ii) It is admitted that a vaginal delivery was attempted for an hour before 5:30am but save as aforesaid, (h) is not admitted.*

32. Aeden's counsel informed the court that he did not object to these amendments (line 3 [**1729**]; and see also lines 5 to 11 [**1731**]); and the court gave permission to re-amend. In the course of the same discussion, the judge raised with to Dr Abdulla's counsel the same admission in his pleading (i.e. that attempts at vaginal delivery took place from 4:00 a.m. to 5:00 a.m.). Dr Abdulla's counsel replied that Dr Abdulla did not admit that, and that she proposed to deal with re-amendments after Dr Abdulla's evidence as to the timing (lines 12 to 30 [**1731**]).

33. In the course of cross-examination Dr Abdulla was questioned about his defence admitting subparagraph 18(h) of the particulars of claim. Counsel for Dr Abdulla intervened to object, reminding the judge that she had indicated that she may wish to amend her pleading once the evidence had been ascertained [**2174**]. There followed a discussion between counsel and the judge, which concluded with the following exchange between counsel for Aeden and the judge [**2178**]:

"Counsel: My Lord, I respectfully submit, I am entitled to suggest to him that he has changed the mind he had in 2013, changed the mind with different lawyers he had in 2016 and now wants to put forward a different timing. Which, if I were to use Ms O'Rourke's term, would be to favour the case. But I don't put it quite like that. I simply put it on the basis that this witness has been inconsistent in respect of the times that he has put down. I can deal with it simply by suggesting it to him and he can accept it or not. And we can leave it to submissions.
The Court: I think it is best to leave it to submissions, Dr Powers.
Counsel: Very well.
The Court: I take on board what you said.
Counsel: Yes
The Court: Having the read the pleadings and the witness statements, unfortunately all the pleadings, I have a fair idea of what has altered slightly or not so slightly in all the parties' cases since this matter has been filed."

The judge's findings as to breach and causation

34. Against Dr Abdulla, the judge found that he had been negligent in administering a dose of 200 micrograms, because according to the standards applying in Trinidad at the time, the recommended safe dose would have been understood to be 50 micrograms (para 132-133 [**75-76**])

35. Turning to causation, the judge identified a number of issues which he left, in the end, unresolved. For example, he recounted in some detail the evidence of the expert paediatric neurologist Dr Wilkerson (instructed by Dr Abdulla) that the clinical presentation of Aeden after birth was not consistent with the case that he had suffered a hypoxic ischaemic injury immediately before birth (paras 91 to 101 [**60-64**]).

36. Further, he noted that if, as Dr Wilkerson suggested, if the event which caused Aeden's injuries had occurred *before* labour, then a subsequent excessive dose of misoprostol could not have caused it (para 136 [**77**]). And (relevant to the question whether the misoprostol had had any adverse effect) he noted that there was nothing in the hospital

notes, in the period from dosage to delivery, to suggest that there was any foetal distress (para 136.c [**78**]).

37. In order to decide the question of causation, the judge noted that the time of arrival of Dr Abdulla (and thus of the start of active attempts at delivery) was of paramount importance. He said that the half hour difference between the parties was critical as to whether enough time, an hour or more, would have elapsed to have caused a hypoxic ischaemic injury (what was called PPHI - partial prolonged hypoxia ischaemia) during the course of labour (para 139 [**79**]).

The judge's finding on timing

38. The judge first addressed the question whether Dr Abdulla should be held to his pleaded admission that he arrived at the clinic at 4:00 a.m. He held that if there was clear evidence to the contrary, Dr Abdulla would not be bound by his admission (para 120 [**70**]).

39. Addressing the evidence as to the time of Dr Abdulla's arrival, the judge found (paras 140 to 145 [**79-81**]) that:
    1) The evidence of Mrs Balwah was not reliable on this question;
    2) Dr Abdulla had admitted that his recollection was based on his notes;
    3) Dr Abdulla's reference in his note to being called out at *"4AM"* was not helpful in determining what it was that happened at 4:00 a.m.;
    4) The clinic's note, recording that Mrs Balwah's cervix was fully dilated at 4:30 a.m., was contemporaneous and reliable;
    5) It was unlikely that this would have been measured or recorded in the middle of an hour-long attempt at vaginal delivery;
    6) It was probable therefore that Dr Abdulla's assertion, that the attempt began at 4:30 a.m., was correct.

40. Having made this finding, the judge found that the claimant's case must fail, for the reasons set out above (para 146 [**82**]).

Court of Appeal's judgment

41. The Court of Appeal made the following material decisions and findings.

42. It dismissed Aeden's appeal against the judge's decision to allow Surgi-Med to re-amend its pleadings at trial. It found that the trial judge could not be faulted, having proceeded on the basis of a clear statement by Aeden that there was no objection to the amendment (paras 130 to 135 [**118**]).

43. It upheld two findings by the trial judge, as to causation:
    1) It upheld the finding that the failure by the clinic to monitor foetal heart rate between 8:00 p.m. and 12:30 a.m. had not been shown to have caused Aeden's cerebral palsy (para 165 and 167 [**125**]); and
    2) It upheld the finding that the claimant's injury was not the result of overdose of the drug misoprostol (para 166 and 167 [**125]**).

44. The Court of Appeal, however, held that there was another allegation of negligence against Dr Abdulla, being general mismanagement of the labour and delivery, which the judge had decided by determining the time of Dr Abdulla's arrival (para 167 and 168 [**125**]). It found that the judge had determined this on the basis of an agreement between the parties that the time of Dr Abdulla's arrival would determine whether Mrs Balwah had suffered "prolonged second stage labour" (para 169 [**125-6]**).

45. Turning to the question of the time of Dr Abdulla's arrival, the Court of Appeal found that the judge had been plainly wrong to find that Dr Abdulla had arrived at the clinic at 4:30 a.m., for three reasons in particular:
    1) The judge had been wrong to infer from the fact that Mrs Balwah's cervix was measured as fully dilated, and her contractions measured, at 4:30 a.m. that second stage labour (i.e. the attempt at vaginal delivery) did not begin until 4:30 a.m.; this was a matter for expert evidence; the judge was not qualified to make that inference (para 179 [**128**]).

2) The judge had failed to take into account the note referring Aeden to hospital written by the clinic's paediatrician Dr Aguilar, who wrote that second stage labour was prolonged. It was a material error not to take it into account (para 180 and 184 [**128-9**]).
3) The judge was wrong not to hold Dr Abdulla to his pleaded case. There was no clear evidence to the contrary and the judge was left with only the pleaded admission that Dr Abdulla arrived at the clinic at 4:00 a.m.; the judge should have found that this was the time of arrival (para 181 to 183 [**129**]).

46. Having set aside the judge's finding, the Court of Appeal found that Dr Abdulla arrived at the clinic at 4:00 a.m., with the result that, as agreed between the parties, the second stage of labour lasted from 4:00 a.m. to 5:30 a.m., which was long enough for PPHI to cause Aeden's brain damage (para 183 [**129**]). The inescapable conclusion was that Aeden should have succeeded in establishing causation (para 186 [**130**]).

47. The above reasoning discloses a number of material errors.

Court of Appeal's errors

Court of Appeal misunderstood the issues

48. First, the Court of Appeal misunderstood the issues as to breach and causation, and the case before the judge. It found:
    1) That there was an allegation of breach of duty against Dr Abdulla under the head "general mismanagement of the labour and delivery";
    2) That the parties had agreed that this could be decided by determining the time of Dr Abdulla's arrival; and
    3) That it would be proven if Dr Abdulla arrived at 4:00 a.m., with the result that the active attempt at delivery lasted from 4:00 a.m. to 5:30 a.m., thus subjecting Mrs Balwah to prolonged second stage labour.

49. All of those propositions were erroneous. The judge was not considering a case that Dr Abdulla had generally mismanaged the labour and delivery; and it was not part of

Aeden's case that if the active attempt at delivery lasted for 90 minutes then it followed that labour had been negligently mismanaged by Dr Abdulla in breach of his duty of care.

50. The issue between the parties, on the question of timing, was as set out at the start of this written case. The arrival time of Dr Abdulla was relevant to the question whether the one hour of active attempts ended at 5:00 a.m. (Aeden's case), or ended at 5:30 a.m. (the defendants' case). The time period in dispute was the period *after* the active attempts and before delivery by caesarean section: whether it lasted for 75 minutes from 5:00 a.m. to 6:15 a.m. (Aeden's case); or 45 minutes from 5:30 a.m. to 6:15 a.m. (the defendants' case).

51. In treating the dispute between the parties as whether the active attempts lasted for one hour (4:30 a.m. to 5:30 a.m.) or ninety minutes (4:00 a.m. to 5:30 a.m.), the Court of Appeal misunderstood the material issue completely.

Court of Appeal erred in setting aside the judge's finding of fact

52. Second, the Court of Appeal erred in setting aside the judge's finding that Dr Abdulla had arrived, and the active second stage of labour had begun, at 4:30 a.m.

53. The judge was entitled to find that the active attempts at vaginal delivery took place from 4:30 a.m. to 5:30 a.m., considering these telling pieces of evidence:
    1) The clinic's notes show that Mrs Balwah was measured as fully dilated at 4:30 a.m. [**439**];
    2) Dilation would not be measured after active attempts at delivery had started (the expert evidence to this effect is referred to below);
    3) Dr Abdulla's note records that he attempted vaginal delivery for one hour [**441**];
    4) And it records that the decision to resort to caesarean section was taken at 5:30 a.m. [**442**], which would indicate that attempts at vaginal delivery ended at the same time;

5) The claimant's expert obstetrician Dr Jaiyesimi agreed that the medical notes showed that the second stage of labour took place from 4:30 a.m. to 5:30 a.m. (line 13 to 28 [**1549**]).

54. Each of the Court of Appeal's reasons for saying that the judge had gone wrong was erroneous.

55. It erred in saying that the judge had not been permitted to infer, from the notes saying that Mrs Balwah's cervix was measured as fully dilated at 4:30 a.m., that attempts at delivery did not begin until that point. The judge so inferred by finding that it was unlikely that the cervix would be measured during active labour. The Court of Appeal was wrong to say that the judge was not qualified to make that inference without expert evidence, because the judge was in fact relying on expert evidence given to him. On 21 March 2019 in the course of his cross-examination, the consultant obstetrician Dr Rotimi Jaiyesimi told the judge that one would not measure dilation of the cervix during the attempts at vaginal birth because the cervix would already have been fully dilated (i.e. because attempts at vaginal delivery do not begin until the cervix is fully dilated) (see line 32 [**1723**] to 7 [**1724**]).

56. The Court of Appeal further erred in saying that the trial judge had ignored material evidence in the form of Dr Aguilar's note referring Aeden to hospital, which described a "prolonged second stage" of labour [**471**]. Dr Aguilar was not present during the labour. Further, he did not give evidence and so what he had meant by "prolonged" was not known. The expert evidence as to what is understood as a "prolonged second stage" was that, for women giving birth for the first time, a second stage is prolonged if over 3 hours (of which two hours are active labour, and one hour passive) [**808**]. If that was what Dr Aguilar meant then, on any version of events, he was incorrect because: on Aidan's case the second stage began at 4:00 a.m. and ended at 6:15 a.m.; and on Dr Abdulla's case it had started half an hour later and finished at the same time. Therefore, the inferences which the Court of Appeal would draw from Dr Aguilar's letter are incorrect.

57. Finally, the Court of Appeal erred in finding that the judge was bound to hold Dr Abdulla to his pleading and finding that the active stage of labour had begun at 4:00 a.m., for the following reasons:

    1) The judge had allowed the other defendant, Surgi-Med, to amend its pleadings, the effect of which was to make the timing of Dr Abdulla's arrival an issue of fact, on the pleadings, in any event. The Court of Appeal, rightly, dismissed Aeden's appeal against the decision to permit that amendment because Aeden's counsel had said there was no objection to it. It was open to the judge, on Surgi-Med's pleadings, to find that Dr Abdulla had arrived at about 4:30 a.m. and that the hour of attempts at vaginal birth lasted from 4:30 a.m. to 5:30 a.m. If the judge was entitled to make that finding, it would be wrong to insist that he make an inconsistent finding on the case against Dr Abdulla. Therefore, it was open to the judge, even if such a finding was inconsistent with Dr Abdulla's pleadings, to find that he had arrived at 4:30 a.m.
    2) In any event, such a finding was not inconsistent with Dr Abdulla's pleadings, taken as a whole, because they did not amount to an unequivocal statement that the hour of attempts at vaginal delivery took place between 4:00 a.m. and 5:00 a.m. It is true that his defence admitted paragraphs 18 (g) and (h) of the particulars of claim. But elsewhere in his defence Dr Abdulla averred that the time of full cervical dilation was at 4:30 a.m. (para 34.21 [**292**]) and he was summoned when Mrs Balwah's contractions were moderate to strong and her cervix was fully dilated (para 34.23 [**293**]), which implies that he arrived at 4:30 a.m.
    3) Further, although Aeden's statement of case pleaded the times at paragraph 18(g) and (h) which led to his argument that Dr Abdulla should be held to his admission, it did not plead the case as to causation which he pursued at trial (and which only arose as the issues became clear after evidence). As explained above, at trial the case depended in particular upon the significance of a period of 75 minutes after the alleged end of active labour at 5:00 a.m. until delivery at 6:15 a.m., when Aeden claimed there was no foetal heart rate monitoring. But his statement of case did not make that case: it pleaded that there was no monitoring

between 4:30 a.m. and the time of delivery at 6:15 a.m. (para 18(m) [**228**]) and did not plead that the time of the end of active attempts was relevant to this question. (The averment that monitoring stopped at 4:30 a.m. was based on the time of the last occasion when foetal heart rate was recorded in the clinic's notes, ignoring Dr Abdulla's own note at the end of the active attempts). Notably, in response, Dr Abdulla pleaded that foetal heart rate was monitored by the midwife in his presence every 5 to 10 minutes after 4:30 a.m. (para 34.16 [**291**]): among other things, this averment is a further implied statement that active attempts began at 4:30 a.m.

4) Finally, Dr Abdulla's witness statement, in which he gave a detailed account of the relevant notes and said that he had arrived at around 4:30 a.m., was filed and served on 20 September 2016 [**763**]. After the exchange of witness statements, the trial judge heard evidential objections, and gave interlocutory decisions on those objections, but no objections were made to Dr Abdulla's evidence as to the time of his arrival at the clinic and the time of the active attempts at vaginal delivery. At trial, in March 2019, the question of the time of Dr Abdulla's arrival and the start of active labour was treated as live issue; and Dr Abdulla was cross-examined as to those times.

58. In the circumstances, it was well within the trial judge's discretion to allow Dr Abdulla to give evidence as to the actual period of the active attempts at vaginal delivery; it is respectfully submitted that the Court of Appeal erred in law in holding otherwise.

59. The purposes of the rule that parties are bound by their pleadings include: avoiding prejudice by ensuring that parties know the case they have to meet and the issues upon which they must adduce evidence; and ensuring an orderly and judicial resolution of the issues in the case. Those purposes were not undermined by allowing Dr Abdulla to give evidence that active attempts at delivery began at 4:30 a.m.:

1) Dr Abdulla was not departing from his case on the pleaded issues as to liability, because the particular issue to which the change was relevant did not arise on the pleadings;

2) He was not taking the parties by surprise because his evidence had been known for two and half years before trail; and
3) All the available evidence as to the chronology was before the court (Aeden's appeal submissions on this question did not point to any evidential prejudice suffered [**2350-2354**]).

60. Where the court is confronted with evidence which demonstrates that a factual admission is incorrect, the judge's task is to decide whether, having regard to all material matters, it would be right to permit the facts admitted to be put in issue: Loveridge v Healey [2004] EWCA Civ 173 at [24] **[JBA/Tab 8/Page 102]**. In the present case, in addition to the material considerations set out in the paragraph above, the most material factor was that the admitted fact *in any event was in issue*, by reason of Surgi-Med's re-amendment and withdrawal of its admission of the same fact.

Court of Appeal wrong to find causation inevitably proven

61. Third, the Court of Appeal erred in finding, once it was established that Dr Abdulla had arrived at 4:00 a.m., that causation was inevitably proven, for two principal reasons.

62. First, as set out above, it had misunderstood the case as to causation. It was wrong to find that the parties had agreed that if the active stage of labour lasted for 90 minutes then hypoxic ischaemic injury would result. That was not the case of any party before the judge and not the agreement upon which the judge proceeded.

63. Second, the judge made no finding that causation was established if Dr Abdulla arrived at 4:00 a.m.. To the contrary, as is set out above, he said that there was no need to consider the causative link between the breaches he had found and a possible hypoxic ischaemic injury in the relevant period, because he found that the relevant period was too short in any event. Accordingly, he did not resolve the disputed evidence as to the mechanism of causation, or the disputes as to whether there were indications in the clinical findings that Aeden had suffered injury at the time claimed and in the way claimed. Apart from his

finding that the injury could not have resulted from the defendant's breaches, he did not make any finding as to causation.

Conclusion

64. For the reasons above, Dr Abdulla accordingly asks the Board to allow his appeal, set aside the orders of the Court of Appeal, and restore the orders of the trial judge dismissing Aeden's claim against him.

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14 May 2026