JCPC: 2025/0063

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

DR MARWAN ABDULLA

Appellant

- v -

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

First-Respondent

FIRST RESPONDENT'S (AEDEN BALWAH'S) REPLY SUBMISSIONS

==========

References to the Electronic Bundle are in the form [EB/*page number/ paragraph number*]

References to the judgments below and the Statement of Facts and Issues are in the form (HC/COA/SFI)

GROUND 1 - TIMING - [EB/2696/1]

INTRODUCTION

1. Dr Abdulla brings Ground 1 of his appeal on the basis that the Court of Appeal impermissibly interfered with the trial judge's factual determination as to competing chronologies. We submit that the primary issue was whether the trial judge was entitled, consistently with established procedural principle and the history of these very proceedings, to permit Dr Abdulla to depart from his own twice-certified pleaded admissions[1] and advance a materially contradictory factual case without amendment.

2. The subsidiary issue, if he was so entitled, is whether on the evidence before the Court, the trial judge erred in *this* case by doing so. Unless those issues are resolved in Dr Abdulla's favour, his reliance upon appellate restraint does not arise, as findings of fact reached through procedural unfairness, legal error, or reliance upon a case not properly open on the pleadings do not, we submit, attract appellate deference.

3. The Court of Appeal did not merely substitute its own view of the competing oral evidence but corrected a chronology finding reached on the pleading rules, the evidence and the trial judge's unchallenged finding that there

[1] Joint Defence Filed 25th September 2013, with Attorneys Harrikissoon and Co. **[EB/199]**, and Amended Defence of the Second Defendant Filed 4th April 2016, with Attorneys Freedom Law Chambers **[EB/297]**.

was *"no such clear evidence"* that contradicted the pleaded case **(COA: [EB/129/181])**.

4. The Court of Appeal identified multiple errors which infected the trial judge's chronology finding, including his:

   4.1 treatment of Dr Abdulla's pleaded admissions **(COA: [EB/119–120/137–140])**;

   4.2 permission to admit a contradictory factual case without amendment **(COA: [EB/129/181–182]);**

   4.3 wrongful restriction of cross-examination on that contradiction **(COA: [EB/120–122/141–152])**;

   4.4 failure to consider relevant contemporaneous evidence **(COA: [EB/128–129/180, 184])**; and

   4.5 inferential reasoning unsupported by sufficiently reliable evidential foundations **(COA: [EB/126–128/171–179])**.

5. Dr Abdulla's Ground 1 accordingly raises a number of related questions, including: whether Dr Abdulla remained bound by his pleaded admissions as to timing; whether Surgi-Med's re-amendment or Dr Abdulla's witness evidence made timing a live issue as against Dr Abdulla; whether any

sufficiently clear evidential basis existed to justify departure[2] in any event; and whether the Court of Appeal's intervention was proper.

DR ABDULLA REMAINED BOUND BY HIS PLEADED ADMISSIONS

6. The starting point is uncontroversial: parties are bound by their pleaded case. This established principle serves the fundamental requirements of fairness and orderly litigation by defining the issues in dispute, identifying the case to be met, and preventing trial by ambush.

7. The Board has repeatedly reaffirmed the importance of adherence to pleaded cases in modern civil procedure. In Bernard v Seebalack [2010] UKPC 15 (at [15], [31]) **[EB/2904]**, the Board recognised that Part 20.1(3) of the CPR in Trinidad and Tobago established a more inflexible amendment regime than the corresponding provisions of the England and Wales CPR and explained that such rules *"as that in Part 20.1(3) were drafted in an attempt to introduce more discipline into the conduct of civil litigation and defeat the endemic laissez-faire attitude to it".* The Board further observed that it would be wrong to adopt an interpretation of the Rules which would undermine the attempts made by the Rules Committee and the Court of Appeal *"to improve the efficiency of civil litigation in Trinidad and Tobago"*. More recently, in Gulf View Medical Centre Ltd v Tesheira [2022] UKPC 38, **[EB/2931]** the Board reaffirmed that parties remain bound by the cases they choose to plead (at [32], [33], [69]).

[2] Even if there were a basis upon which he could depart from his unamended case

8. The local courts have consistently applied that stricter procedural approach following Bernard. In Civil Appeal P104 of 2016 Estate Management and Business Development Company Ltd v Saiscon Limited **[EB/3065]**, the Court of Appeal recognised that Part 20.1 established a materially stricter amendment regime than the England and Wales CPR and held that at [10] that *"the CPR, 1998 make it increasingly onerous to change a statement of case"*. The Court further explained that Rule 20.1(3) is prohibitive in nature and imposes threshold requirements of *"promptitude"* and a *"good explanation"* before the Court's discretion to permit amendment even arises. The Court concluded at [36] that *"[t]he onus is always on the parties to seek changes to their pleaded cases at the appropriate times, given the regime prescribed by Part 20, CPR, 1998, and to stand the consequences of a failure to do so."*

9. Aeden's pleaded case was clear. He alleged that Dr Abdulla arrived at approximately 04.00, and that attempted vaginal delivery continued between 04.00 and 05.00 without progress **(SFI: [EB/2752/21])**.

10. Dr Abdulla's pleaded response was equally clear. In both the Joint Defence and his subsequent Amended Defence, he expressly admitted that chronology. As the Court of Appeal recorded **(COA: [EB/94–96/27–36])**:

> *"The net effect is that when this matter proceeded to trial, there was, on behalf of* [Dr Abdulla]*, only an Amended Defence, in which he had admitted that on May 19, 2002, he arrived at the Surgi-Med Hospital at 4am."*

11. That admission formed part of the factual foundation upon which Aeden advanced his case. In his Reply to Dr Abdulla's Amended Defence, Aeden expressly relied upon the admitted chronology, pleading that **(Aeden's Reply to the Amended Defence of Dr Abdulla: [EB/319/26])**:

> *"… by the admission of* [Dr Abdulla] *in paragraph 22 of the Amended Defence of the Second Defendant, vaginal delivery was attempted between 4:00 a.m. and 5:00 a.m. without any progress. The decision to do a Caesarean Section was not made until 5:30 a.m., thus incurring an initial delay of thirty (30) minutes…* [Aeden] *was delivered at 6:15 a.m.…* ***the length of time taken to deliver*** **[Aeden]… *has a detrimental effect on his prognosis***.*"* (Emphasis added)

12. No application was ever made by Dr Abdulla under CPR Part 20 to amend, withdraw, qualify, or otherwise seek relief from those admissions. In those circumstances, he remained bound by them. Evidence follows pleadings, not the reverse, and a party may not advance a materially inconsistent factual case without proper amendment.

13. In Naresh Ramlogan v Orangefield Estates HCA No 2572 of 2000 **[EB/2351/19][EB/3093]**, the Court reiterated at [77] that *"*[e]*ach party must plead the material facts on which he means to rely at the trial; otherwise, he is not entitled to give any evidence of them at the trial."* In Jagdeesh Thannoo v Harold Seupaul CV 2013-01517 **[EB/2352/24][EB/3085]**, the Court held at [22], [24] that where a party's evidence *"departs fundamentally from the pleaded case… the only permissible course was …*

permissible course was … to seek leave to amend", and that to permit the new case to proceed would *"effectively be permitting the circumvention of the amendment rule."* Likewise, in Carolyn Patterson v Richards / Richards CV 2012-03888 **[EB/2353/26][EB/3061]**, the Court confirmed at [2g] that *"*[i]*t is plainly obvious that evidence follows pleadings and not the other way around"* because pleadings define *"what case* [the other party] *has to meet."*

THE INTERLOCUTORY HISTORY

14. Dr Abdulla's submission is irreconcilable with the well-established procedural rules on amendments which he sought to rely upon before the Chief Justice at the interlocutory appellate hearing. Shortly before trial, Aeden needed to rely upon new expert evidence concerning the interpretation of the day 19 CT scan (in that, the CT scan had in fact shown abnormal brain activity, which was different from Aeden's pleaded position that accepted the CT scan as normal), and brought applications to amend his pleading and to adduce further expert evidence. The trial judge recognised the governing procedural principle in clear terms, holding **(HC interlocutory ruling: [EB/134/5])**:

> *"At the hearing of the applications,* [Aeden] *briefly sought to submit that it was not strictly necessary to amend the Reply. The Court disagrees with that position. The current state of the pleadings is that* [Aeden] *accepts that the scan showed normal brain activity, and it is*

trite law that a party may not advance evidence which is contrary to his pleadings." (Emphasis added)

15. The trial judge himself expressly recognised that contradictory evidence could not properly be advanced through witness or expert testimony where the pleaded case said otherwise.

16. Aeden's applications were granted by the trial judge. Dr Abdulla appealed. In Abdulla v Balwah Civil Appeal No S302 of 2017 **([EB/147–162])**, the Court of Appeal (Archie CJ presiding) overturned the trial judge's order, with the consequence that Aeden remained bound by his pleaded case and he was prohibited from advancing contradictory evidence at trial.

17. Dr Abdulla's own counsel, Mr Ramlogan SC, articulated the point in uncompromising terms **([EB/154/9–14])**:

"… the case was predicated on the assumption that the scans were normal. And to try to change that now… is to pull the rug from beneath our feet in this case. It alters the very substratum of the case itself. It's a fundamental change…"

18. The Court expressed the same concern. Archie CJ observed **([EB/158/37–41])**:

"… this really flies… in the face of all the principles of Case Management that this Court has repeatedly articulated. Hard cases

sometimes make bad law, but this is… we are being encouraged to make very bad precedent here."

19. The procedural restrictions enforced against Aeden in the interlocutory appeal reflected the same post-Bernard pleading discipline and strict CPR Part 20 amendment regime which Dr Abdulla had himself invoked. Dr Abdulla successfully contended that a party could not advance evidence materially inconsistent with its pleaded case without proper amendment and permission of the Court. The effect of the Court of Appeal's decision was therefore that Aeden remained confined to his pleaded case and prohibited from advancing contradictory evidence notwithstanding the possibility that the existing pleaded position might ultimately prove factually incorrect.

20. Then at trial, Dr Abdulla chose to diverge from *his* pleaded admission on timings rather than to make an application to amend, withdraw, or qualify his admitted chronology[3]. By avoiding such an application to amend, he was freed from having to satisfy even the threshold requirements of a *"good explanation"* and *"promptitude"* under the post-Bernard CPR Part 20 regime.

21. At the commencement of the trial, Dr Abdulla's counsel, the late Mary O'Rourke QC, expressly reminded the trial judge of the Court of Appeal's

[3] Permission to amend pleadings at trial was granted to all parties only where the amendments were consented to and no objection was raised. The Court of Appeal held **(COA: [EB/118/130-135])** that it was not outside the trial judge's discretion to permit such consensual amendments. That position is materially different from the present circumstances, where objection was repeatedly raised and no application to amend was ever made.

ruling and submitted that evidence inconsistent with the pleadings would require to be *"*[struck] *from the record"* **(Trial Transcript: [EB/1097/26–30]).**

22. Moreover, it was procedurally unfair of the trial judge, for Aeden to be bound to his pleaded admission (on the normality of the CT scan) when Dr Abdulla was not subsequently bound to his admissions (on timing).

SURGI-MED'S RE-AMENDMENT DID NOT RELEASE DR ABDULLA FROM HIS OWN PLEADINGS

23. Dr Abdulla submits that Surgi-Med's re-amendment rendered timing a "live issue" in any event, such that the trial judge was entitled to determine chronology as an open factual dispute irrespective of Dr Abdulla's own pleaded position.

24. Surgi-Med's re-amendment altered Surgi-Med's pleaded case. It did not amend Dr Abdulla's Defence. Separate defendants remain bound by their own pleaded positions unless and until properly amended.

25. The Court of Appeal addressed this issue directly. Having reviewed both Surgi-Med's re-amended pleading and the evidence actually led at trial, it held **(COA: [EB/118/136])**:

> *"…* [Surgi-Med] *produced one witness of fact to testify as to the time of arrival of Dr Abdulla… The sole witness was Dr Anirudh Mahabir*

who testified at paragraph 15 of his witness statement that Dr Abdulla arrived at 4:00am… The evidence therefore supported the case for [Aeden]. *So that, notwithstanding the re-amendment, there continued to be discrepancies between the evidence on behalf of* [Surgi-Med] *and its pleaded case."* (Emphasis added)

26. In any event, Surgi-Med's re-amendment (*"(i) It is admitted that* [Dr Abdulla] *arrived shortly after 4.00 a.m. and that thereafter Mrs Balwah was taken to the delivery room"* **(Re-Amended Defence of the First Defendant: [EB/338/15(g)])** did not create any coherent evidential foundation for Dr Abdulla's departure from his pleaded case. Further, Surgi-Med's application to re-amend was done on the 6th day of trial after Aeden's witnesses had already been cross-examined on the unpleaded 04.30 timing chronology.

27. The proper procedural route was expressly recognised at trial by Dr Abdulla's own counsel: if Dr Abdulla persisted in advancing evidence inconsistent with his pleaded case, amendment would be required **(COA: [EB/120/144])**:

"Ms. O'Rourke continued that if Dr Abdulla remained unshaken in his evidence that he arrived at [04.30]*, instead of at* [04.00] *as he had pleaded in his Amended Defence, she would then: '...make the appropriate amendment to the pleading'."*

The Court of Appeal then pointedly observed:

"It is significant that Ms. O'Rourke did not indicate her intention to apply under Part 20 of CPR for permission to amend."

28. That failure to make an application to amend at trial was material. Dr Abdulla chose to avoid the procedural controls of CPR Part 20 and advanced a contradictory case through evidence and cross-examination; a course he was wrongly permitted to do by the trial judge, despite counsel for Aeden's objections.

WITNESS EVIDENCE DID NOT AMEND THE PLEADINGS

29. Dr Abdulla further contends that, because his witness statement set out an alternative chronology, and no objection was taken at the interlocutory stage, timing had by trial become a "live issue" such that his pleaded admissions no longer governed the case.

30. Witness evidence does not amend pleadings. If it did, the procedural discipline governing amendments would be rendered meaningless. It would result in a party pleading one case, later serving witness evidence advancing a contradictory one, and thereby evading the requirements of formal amendment, procedural scrutiny, and case management fairness.

31. Once Dr Abdulla sought to rely upon a contradictory chronology at trial, repeated objection was taken that he was departing from his pleaded

admissions without amendment **(Trial Transcript: [EB/1155, 1408, 1411, 1593-1594, 2170])**.

32. Those objections were neither technical nor isolated. They went directly to the integrity of the trial process. Dr Powers KC objected in terms (**Trial Transcript: [EB/2170/29–32]**):

> *"… there is no purpose in having pleadings if the pleadings are put in such an affirmative way and then we find there is a backtracking on the time."*

33. The Court of Appeal expressly recorded that such objections were repeatedly raised throughout the trial (**COA: [EB/105/83]**):

> *"Dr Powers contended that he had continuously raised objections during the presentation of* [Aeden's] *case as all of his witnesses were cross examined and accused of fabricating evidence on factual timings that were admitted by* [Dr Abdulla and Surgi-Med] *in their pleadings."*

THE CURTAILMENT OF CROSS-EXAMINATION AND RESULTING PREJUDICE

34. The prejudice arising from Dr Abdulla's procedural departure had material forensic consequences at trial. His revised chronology was permitted to alter

the factual landscape of the trial whilst Aeden's ability properly to test that contradiction through cross-examination was curtailed.

35. The Court of Appeal held that the trial judge wrongly exercised his discretion in preventing Dr Powers KC from questioning Dr Abdulla on the contradiction between his pleaded Defence and the chronology advanced in his evidence **(COA: [EB/120–122/141–152])**. This shielded Dr Abdulla from direct forensic challenge on the central contradiction in his revised factual case. The Court of Appeal held **(COA: [EB/122/151–152])**:

> *"The Judge therefore had no ground to uphold the objection and to prevent Dr Powers from extracting an explanation from Dr Abdulla as to the contradictions between his evidence and his Amended Defence. We therefore agree with the submission of Dr Powers that the Judge was wrong to shut out this evidence which may, in the interest of justice, have served to clarify a very obscure part of the case."*

36. Aeden prepared for trial on the footing of Dr Abdulla's certified admissions. A materially different chronology was then advanced at trial to undermine Aeden's factual case, challenge his witnesses, and shrink the available intrapartum window for injury, when Aeden's counsel was prevented from exposing the contradictions through cross-examination. That is precisely the kind of forensic unfairness which pleading discipline exists to prevent.

IN ANY EVENT, THERE WAS NO CLEAR EVIDENTIAL BASIS TO JUSTIFY DEPARTURE

37. Even if, contrary to our foregoing submissions, the trial judge was in principle entitled to permit departure from Dr Abdulla's pleaded admissions without formal amendment, the evidential threshold which the trial judge himself identified was not satisfied. The judge did not proceed on the basis that a pleaded admission could simply be disregarded whenever later evidence suggested an alternative chronology. His reasoning was expressly conditional **(HC: [EB/70/120])**:

> *"In the circumstances, I hold that if there is clear evidence to the contrary,* [Dr Abdulla] *is not bound by his admission that he arrived at 4 o'clock in the morning…"*

38. Later in his judgment however the trial judge characterised the evidential foundation very differently. In addressing the consequence of his causation conclusion, he acknowledged **(HC: [EB/83/150])**:

> *"However, I take note of the fact that* [Aeden] *successfully established that there was a breach, and was stymied at the end of the day by the interpretation of a record which was unclear at best*." (Emphasis added)

39. A record described by the trial judge himself as ***"unclear at best"*** cannot simultaneously constitute the ***"clear evidence"*** necessary to displace a certified pleaded admission.

40. The principal documentary basis for the revised chronology was Nurse Hosten's note, timed at 04.30, recording full cervical dilatation, from which the trial judge inferred that the active second stage of labour could not already have been underway **(HC: [EB/81/145])**.

41. The Court of Appeal identified the difficulty with that reasoning **(COA: [EB/127–128/175–179])**:

> *"The Judge placed heavy reliance on Nurse Hosten's note and correctly reminded himself that Nurse Hosten's note taking competence was flawed. The Judge failed however to recognise that Nurse Hosten's note did not provide information of the time of arrival of* [Dr Abdulla] *at the hospital and more significantly, the note did not provide any information as to the time of the onset of second stage labour. In order to derive such information from the note, it was necessary for the Judge to make an inference."*

42. Surgi-Med twice certified in its pleadings that membrane rupture occurred at 03.00, notwithstanding the nursing record recording that event at 03.30 **(Surgi-Med's Amended Defence [EB/260/15e]; Re-Amended Defence [EB/338/15e])**. That inconsistency further undermines any assumption that the timings recorded by Nurse Hosten were wholly accurate.

43. Surgi-Med's pleaded chronology accepting Aeden's pleaded timing at trial was formulated against the contemporaneous records then available, including Nurse Hosten's notes. Against that evidential uncertainty stood contemporaneous material supporting Aeden's chronology. Dr Abdulla's own note recorded **(COA: [EB/92/18-19])**: *"19.5.02 4AM Called out to see patient who is fully dilated. Vaginal delivery attempted for one hour…"* Experts for Surgi-Med not instructed by Dr Abdulla, interpreted that note as indicating attendance and full dilatation at 04:00[4]. Whilst Dr Abdulla later sought to reinterpret *"called out"* as referring merely to a telephone call, the trial judge found the note to be of no assistance **(HC: [EB/81/143])**. Neither did the judge find he could rely upon any of his oral evidence not supported by the records, as Dr Abdulla admitted that he had no recollection of the events **(HC: [EB: 80/142])**.

44. Dr Aguilar's transfer note recorded prolonged second stage labour, a contemporaneous document created shortly after birth which the Court of Appeal regarded as material and wrongly overlooked by the trial judge **(COA: [EB/128–129/180, 184])**. The contemporaneous evidential matrix at trial included Dr Aguilar's transfer note **(HC: [EB/33/7], COA: [EB/93/20])**. That note was admitted pursuant to a Hearsay Notice **[EB/378/10]**. Neither Dr Abdulla nor Surgi-Med served a counter-notice, challenged its contents, or required Dr Aguilar's attendance. It therefore stood as evidence of the truth of its contents, including the

[4] Surgi-Med's experts: Dr Hemant Persad, though not called at trial, stated in his filed report: *"At 4am… the cervix was fully dilated, which heralds the start of the second stage of labour… Dr Abdulla was physically present…"* **[EB/1075],** Dr Aroon Naraynsingh stated: *"In this case the doctor was on site at four o'clock in the morning…"* **[EB/1072]**

recorded history of prolonged second stage labour. The note was also consistent with the contemporaneous medical records, which recorded the ordering of a *"LSCS STAT"* **[EB/442]**, and recorded the LSCS as an *"emergency"* **(SFI: [EB/2749/12])**, with the fact that Dr Aguilar had been called out and was present at delivery.

45. Taken together, the evidential picture was one of ambiguity, inconsistency, and competing interpretations. That is not *"clear evidence."* Even on the trial judge's own stated test, the threshold for departure from Dr Abdulla's pleaded admissions was not met.

THE COURT OF APPEAL'S INTERVENTION WAS NOT PLAINLY WRONG

46. The Court of Appeal identified material errors in the trial judge's treatment of the pleadings, evidential reasoning, conduct of the trial, and assessment of contemporaneous evidence. Quite properly the Court identified procedural unfairness in the wrongful curtailment of cross-examination on the contradiction between Dr Abdulla's pleaded case and his oral evidence **(COA: [EB/120–122/141–152])**, and the overlooking of relevant contemporaneous material, including Dr Abdulla's pleaded admissions and Dr Aguilar's transfer note referring to prolonged second stage labour **(COA: [EB/128–129/180–184])**.

47. The governing principle is not in dispute. In Beacon Insurance Co Ltd v Maharaj Bookstore Ltd [2014] UKPC 21 (at [12]-[13]) **[EB/2889]**, the

Board reaffirmed that appellate courts must exercise restraint in relation to findings of fact, but equally recognised that intervention is warranted where findings are infected by legal error, misapprehension of the evidence, or conclusions that are plainly wrong.

48. This is such a case. The Court of Appeal corrected a chronology finding reached through procedural irregularity and reliance upon equivocal evidential material and properly held Dr Abdulla to his pleaded admissions.

49. Ground 1 should therefore be dismissed.

GROUND 2 – CAUSATION - [EB/2696/2]

THE MEDICAL CAUSE OF AEDEN'S INJURIES: PPHI

50. Aeden's case was, from the outset, a specific intrapartum hypoxic injury case. The pleaded injury was hypoxic-ischaemic encephalopathy ('HIE'), resulting from a prolonged partial hypoxia-ischaemia ('PPHI') sustained during labour and delivery, allegedly caused by negligent obstetric management including failures of foetal heart rate ('FHR') monitoring in the 105 minutes[5] from 04.30 to birth at 06.15 **(Aeden's Statement of Case: [EB/176-178/18], Aeden's Amended Statement of Case: [EB/230-**

[5] The medical premise advanced was that permanent hypoxic-ischaemic injury of the kind suffered by Aeden required a prolonged period (60 minutes or more) of hypoxia-ischaemia, and would have been detectable with proper FHR monitoring.

238/19]). Dr Abdulla accepts in his Narrative of Facts and Procedural Chronology to the Board **[EB/2700/6(6)]** that even if the unmonitored period were only from 05.00, the period from then until birth at 06.15 was "*long enough for* [Aeden] *to have suffered hypoxic insult from PPHI*".

51. That is consistent with Dr Abdulla's pleaded case expressly accepting that there would have to have been a prolonged period of partial hypoxia-ischaemia **(Dr Abdulla's Amended Defence:** [**EB/295/35.8])**:

> "*An event of hypoxia-ischaemia sufficient to cause the magnitude of the present condition occurring during the course of induction, labour, delivery or post-natal period would have to be significant and prolonged partial hypoxia-ischaemia...*"

52. Dr Abdulla's neurology expert accepted that approximately 45-60 minutes of damaging hypoxia was required before irreversible injury would occur **(HC: [EB/62/94])**. Whilst he maintained viral infection as a possible alternative mechanism, Dr Abdulla's defence was directed principally to timing and attribution: namely, that the injuring event was more consistent with a prepartum event **(Dr Abdulla's Amended Defence: [EB/295/35.9-35.11]).**

53. Dr Abdulla's prepartum case was advanced on three bases:

53.1 First, the assertion that FHR monitoring remained normal during the relevant intrapartum period, thereby excluding the prolonged undetected foetal compromise necessary for intrapartum PPHI;

53.2 Secondly, the then-understood interpretation of a "normal" day 19 CT scan as supporting an earlier, prenatal insult; and

53.3 Thirdly, reliance upon Aeden's neonatal clinical presentation, which was said to be inconsistent with a recent intrapartum hypoxic event.

54. That shared forensic framework was formally reflected in Dr Abdulla's own Statement of Issues **[EB/372/6],** which expressly identified as an issue for determination whether "*the hypoxic event occurred antepartum or intrapartum*".

55. By the time of trial, aspects of that pre-trial defence case had materially narrowed. Dr Abdulla's own neurology expert Dr Wilkerson accepted that "*the possibility that Aeden's problems were caused by any viral infection* [could] *be dismissed*" **(HC: [EB/64/100]**). The pre-trial reliance placed upon the purported normality of the day 19 CT scan had likewise materially weakened once the imaging evidence was revisited and the scan was found, after all, to show the abnormal appearances which were to be expected with an intrapartum timing for the PPHI **(Expert Report of Dr Wilkerson on Dr Abdulla's behalf: [EB/985])**:

"I think that the normality of the CT scan on day 19 is strong evidence that a hypoxic-ischemic event of sufficient magnitude to produce the severe injuries of this case would be most unlikely to have occurred in the intrapartum period. Had an injury sufficient to produce this outcome occurred during the intrapartum interval, neuroimaging signs of that acute process would certainly have lingered to day 19."

56. The central dispute therefore narrowed further: whether the PPHI event advanced by Aeden occurred before labour, as Dr Abdulla contended, or during the intrapartum period.

57. Timing became the central issue. Dr Abdulla's departure at trial from his pleaded admissions reduced the available window for undetected intrapartum deterioration and reinforced the defence experts' contention that an intrapartum PPHI event was unlikely, or could be excluded, because there was insufficient time for it to have occurred.

58. The medical mechanism of the injury was no longer the real issue. The issue was when the PPHI occurred: prepartum or intrapartum.

WHEN DID THE PPHI OCCUR, INTRAPARTUM OR PREPARTUM?

59. Dr Abdulla's Ground 2 submits that, even if the Court of Appeal was correct to restore the pleaded chronology, causation remained unresolved because the trial judge made no positive determination that Aeden's injury was caused by an intrapartum hypoxic event. That submission does not reflect

the case that was litigated, the way in which the trial judge approached causation, or the structure of the judgment of the Court of Appeal now under review by the Board.

60. By the time of trial, the parties' pleadings, expert evidence, statements of issues, cross-examination and submissions proceeded on the footing that the live causation issue was whether Aeden's injury was attributable to PPHI and, if so, whether that injurious process occurred prepartum[6] or intrapartum, when the relevant duties to monitor, detect foetal compromise and intervene were engaged. The analysis of "medical causation"[7] was directed to that question: whether the injury was more likely to have occurred during the intrapartum period than in the antenatal period.

61. The trial judge approached the case on that footing. Having reviewed the competing expert and factual cases, he identified timing as the determinative causation question **(HC: [EB/79/139])**.

62. On the chronology that the trial judge accepted, he concluded (**HC: [EB/82/146]**):

> "*Both parties agree that if this is the case then the event which caused* [Aeden's] *condition could not have occurred during the intrapartum*

[6] In these submissions, the words prepartum, prenatal and antepartum are used interchangeably to mean before labour.
[7] In these submissions, "medical causation" is used as confined to the determination of whether the PPHI was likely to be prepartum or intrapartum.

period and therefore, could not have been caused by the breach of the duty of care by [Dr Abdulla] *and* [Surgi-Med]."

63. We accept that Aeden would lose if there were not enough time - that is, on a 04.30 timing - for the injuring duration of PPHI to have been sufficient to cause permanent injury intrapartum. We also accept that sufficient time for the injury is not the same as proof that the injury probably occurred intrapartum. However, the case was litigated on the footing that the timing dispute was dispositive both ways.

64. The corrected chronology was not merely permissive evidence as whether PPHI occurred intrapartum. It tied together:

64.1 A prolonged second stage;

64.2 Absence of FHR monitoring;

64.3 A weakened prepartum case;

64.4 Dr Abdulla's own submission that the issue was whether the one hour of damage occurred intrapartum or prepartum.

65. The 04.00 timing qualified as prolonged second stage labour, with its attendant risks to Aeden. That was explained in the expert evidence and medical literature before the trial judge, including the increased risks of foetal oxygen deprivation after only 30 minutes in the second stage, neonatal depression requiring resuscitation and low 5-minute Apgar scores, all of which were objectively present in Aeden's case (**Annex 1: [EB/2818]**). This evidential foundation was before the Court of Appeal when it considered the causation consequences of restoring the pleaded chronology of 04.00.

66. The trial judge had already held that Dr Abdulla's duties included taking such steps as competently to deliver Aeden and not to cause avoidable harm **(HC: [EB/75/130])**. He had also recognised that failures of monitoring and management would become causative if the injury occurred intrapartum **(HC: [EB/77/136])**. He then treated 04.00 as giving "*enough time...to have caused the PPHI due to an intrapartum event*" **(HC: [EB/79/139])**.

67. That was also the way in which Dr Abdulla advanced the case before the Court of Appeal. He identified timing as the critical "***qualifying factor in determining if there was negligence or not***" and linked the chronology dispute to the duration of second stage labour, namely whether labour lasted "2 and 1/4 hours"[8] or "1 and 3/4 hours"[9] from full dilatation to delivery **(Dr Abdulla's COA Submissions: [EB/2496/7]**). He further submitted that the half-hour difference was of "***critical significance as to whether the 1 hour of damage occurred intra-partum or pre-partum***" **(Dr Abdulla's COA Submissions: [EB/2497/8]; [COA: EB/109/97])**. The Court of Appeal set out Dr Abdulla's submissions (including his oral submissions) **(COA: [EB/109-111/96-105])** and nowhere in those submissions does Dr Abdulla raise any further matter which Aeden would still have to prove, in the event that the court found in his favour on timing. (See the court's conclusion of Mr Ramlogan SC's submissions on behalf of Dr Abdulla **[EB/111/105])**.

68. It is accepted that the precise mechanism giving rise to the PPHI is unknown. However, that was not the issue the court was required to

[8] A prolonged second stage
[9] Not a prolonged second stage

determine. The sole issue was whether the PPHI occurred prepartum or intrapartum: **when, not how**. The multidisciplinary medical evidence was directed to that question, including whether the neuroimaging, neonatal condition, seizure activity and contemporaneous diagnoses of birth asphyxia, prolonged second stage labour and HIE better fitted an intrapartum or prepartum timing.

69. Likewise, the Court of Appeal recognised that the timing issue arose in relation to the pleaded allegations of negligent intrapartum management and "*general mismanagement of the labour and delivery*" **(COA: [EB/125/168])**. Central to that mismanagement, on a 04.00 timing, was allowing a prolonged second stage of labour, particularly in the absence of FHR monitoring during the 105 minutes from 04.30 to delivery at 06.15. That is why, in our submission, Dr Abdulla saw that Dr Aguilar's diagnosis of prolonged second stage labour could incriminate him on his admitted timings[10].

70. In his written submissions, Dr Abdulla advanced for the first time a residual causation argument **[EB/2523/66]** that "*even if the Court found Dr Abdulla had arrived at* [04.00], [Aeden] *still cannot prove causation despite the expert evidence* [he] *relies on*", before making submissions on the relative merits of the expert evidence. That was not included in the framework upon which the case had been tried. Nor was it the basis upon which the appeal was argued, and no corresponding procedural relief was sought from the

[10] Set out in Aeden's submissions to the Court of Appeal **[EB/2359-2360/41-43]**, see also Dr Abdulla's February 2016 statement **[EB/761]**

Court of Appeal **(Dr Abdulla's Submissions to the COA: [EB/2555/141-143])**.

71. If the Board finds, contrary to our primary submission, that Dr Abdulla was clearly raising a further causation step which Aeden was required to satisfy even if the Court of Appeal restored the 04.00 timing, the question is whether the Court of Appeal was plainly wrong in concluding that liability was established. We submit that it was not.

72. The Court of Appeal had remittal in mind in respect of timing **(COA: [EB/130/185])** and referenced its own powers. It was entitled to conclude any residual causation issue from the agreement and understanding between the parties, from the expert and contemporaneous evidence, and from the acceptance that commencement of the second stage at 04.00 "[allowed] *sufficient time for the brain damage to occur*" (**COA: [EB/130/186]**).

73. It is trite law that, save in an exceptional case which does not apply here, an increased risk of harm is not itself evidence that the same harm was caused by that increased risk. But the Court of Appeal did not need to bridge that evidential gap here. The question throughout was whether, on the entirety of the evidence, PPHI was more likely to have occurred intrapartum than prepartum. If the former were proved, the issues of breach and causation were resolved within the forensic framework adopted at trial.

74. The first question for the Board is therefore whether the Court of Appeal erred in treating the 04.00 timing as dispositive in the light of the way the

case had been advanced to it. If the answer is no, it did not err, Dr Abdulla's appeal should be dismissed. If the answer is yes, the second question is whether the Court of Appeal was plainly wrong to decide, on all the evidence and submissions, that the PPHI probably occurred intrapartum. If the answer to that second question is no, the Court of Appeal was not plainly wrong, the appeal still fails.

75. The practical consequence of Dr Abdulla's argument would be that the central issue identified by the parties - "*Whether the hypoxic event occurred antepartum or intrapartum*"[11] - would remain unresolved after 14 years of litigation, despite a full liability trial and appeal. That would not serve the overriding objective of civil justice[12] to deal with cases justly and at proportionate cost.

ANALYSIS OF THE TRIAL JUDGE'S CAUSATION FRAMEWORK

76. On the presumption of judicial regularity, the trial judge conducted a full trial on the merits to enable him to determine whether Aeden had established liability on the case advanced before him. His causation analysis proceeded within the same forensic framework adopted by the parties: whether the accepted hypoxic injury occurred during the intrapartum period, when the relevant duties to monitor, detect foetal compromise and intervene were engaged.

[11] Dr Abdulla's Statement of Issues on Liability (4/4/2016) **[EB 372/6]**.
[12] See the overriding objective of civil justice to deal with cases justly and at proportionate cost.

77. That framework was identified in the judgment itself. The trial judge expressly recorded Dr Abdulla's position that, on a timing of 04.30 Aeden's intrapartum case failed **(HC: [EB/36/14]; [EB/82/146])**. That is why the timing of Dr Abdulla's arrival, and the associated onset of full cervical dilatation, became the issue of paramount importance in determining liability.

78. In addressing causation, the trial judge stated **(HC: [EB/77/136])**:

> "*The failure to record could only have caused damage if it were the case that proper recording would have picked up something and that could only be the case if* [Aeden] *suffered foetal distress during delivery. If the position is as Dr Wilkinson surmises that is to was due to an incident before, then all the recording would not have picked up it to prevent the injury which occurred and likewise if it were that the despite the fact that the misoprostol dosage was too high the event occurred before the delivery,* [Aeden] *has not satisfied on a balance of probabilities that the breach of standard of care by* [Dr Abdulla] *is what caused the condition of* [Aeden]."

79. The trial judge then identified the principal evidential considerations relied upon for the defence timing case: Aeden's neonatal condition, the CT scan, and the absence of recorded foetal distress before the start of the second stage of labour **(HC: [EB/78/136])**. Those were the very routes by which Dr Abdulla sought to place the injury in the prepartum period.

80. That matters. If those matters had independently established that the injury occurred before labour, Dr Abdulla's arrival time would have been immaterial. The case would have failed irrespective of whether he arrived at 04.00 or 04.30. The fact that the judge instead treated timing as "*of paramount importance*" and "*critical*"[13] demonstrates that, within the causation framework before him, liability turned on whether sufficient intrapartum time existed for the accepted PPHI mechanism.

81. It was in that context that the trial judge stated **(HC: [EB/79/139])**:

> "*Of paramount importance in this case is the time of the arrival of* [Dr Abdulla] ... *The half hour difference between the parties is critical in whether enough time would have elapsed, the hour or more of damage required to have caused the PPHI due to an intrapartum event*". (Emphasis added)

82. The wording is important. The judge said "*to have caused the PPHI*". He did <u>not</u> say "*maybe to have caused*" or "*could have caused*" the PPHI. Nor did he indicate that timing was merely a condition precedent before a separate causation analysis had to be undertaken. Read fairly and in context, he identified the factual issue on which liability turned.

[13] In the transcript of the oral judgment **(HC: [EB/24])** and in the written judgment **(HC: [EB/79/139])**, the trial judge used both the words "paramount" and "critical".

83. Dr Abdulla's Ground 2 therefore overstates the significance of the absence of a separate positive finding in the form now suggested. The trial judge's reasoning was that if the PPHI was prepartum, the breaches could not be causative; if there was sufficient intrapartum time for the PPHI on the pleaded 04.00 chronology, causation could follow within the case as tried.

THE COURT OF APPEAL'S APPROACH

84. The Court of Appeal approached the case within the same causation framework which it understood the trial judge to have used **(COA: [EB/97-98/45-51])**. Timing therefore operated in the Court of Appeal's analysis not as an isolated factual dispute, but as the determinant of whether the pleaded intrapartum causation case succeeded or failed.

85. The Court of Appeal formulated the substantive appellate issue in the same way **(COA: [EB/112/108])**:

> "*The principal ground of dispute, however, related to the Judge's finding that* [Aeden] *had failed to prove that the injury which he suffered had been caused by the negligence of* [Dr Abdulla and Surgi-Med]. *This ground revolved around the time at which Dr Abdulla arrived at the hospital on the morning of May 19, 2002. Scientifically, this time was linked to the on-set of the second stage of labour, which if prolonged could be the cause of PPHI, which in turn could be the cause of injury to the brain*."

86. That was also consistent with Dr Abdulla's own submissions below. He submitted that the parties had agreed a "*qualifying factor*" in determining negligence and that the half-hour difference was of critical significance as to whether the one hour of damage occurred intrapartum or prepartum **(COA: [EB/109/97])**. He further submitted (**Dr Abdulla's submissions to the COA: [EB/2529/74]**):

> "*Putting aside the intricacies of the medical evidence, it was the consensus of all parties, based on the medical reports, that the* [04.00] *vs* [04.30] *was the critical time period that had to be distinguished. That was done, the Court preferred the latter, and the case was dismissed*."

87. Having concluded that the trial judge was plainly wrong to permit departure from Dr Abdulla's pleaded chronology, the Court of Appeal restored the pleaded factual position. That correction materially altered the causation analysis because it restored the factual chronology upon which the causation issue had been litigated and determined.

88. If Dr Abdulla is correct that correction of the chronology did no more than establish that intrapartum PPHI became medically possible, leaving the true causation issue unresolved, the consequence is stark: a full trial on liability failed to determine the central causation issue necessary to dispose of the claim. That is not how the case was tried, nor how the appeal was argued and determined.

89. The Court of Appeal had before it the full evidential record, including expert evidence, transcripts and trial submissions. It expressly recognised that the timing issue had been "*referred to by all learned Counsel throughout the submissions and indeed the cross-examination of witnesses*" **(COA: [EB/125/169])**. Had a distinct residual causation issue remained unresolved beyond the chronology dispute, the Court had both the material and the powers necessary to identify that deficiency and grant appropriate relief.

90. As to procedure, Aeden specifically drew the Court of Appeal's attention to CPR Part 64.7 **[EB/2881/64.7] (Aeden's submissions to the COA: [EB/2450/39])**. Although permissive rather than mandatory, it provides the recognised mechanism by which a respondent may seek to uphold a decision on grounds different from, or additional to, those relied upon by the court below. The same appellate discipline is reflected in Rule 22(3) of the Rules of the JCPC, which requires a respondent who wishes to uphold the order on different grounds to state that clearly in the notice of intention to participate.

91. No such residual causation issue was identified within the Notices of Appeal before the Court of Appeal **[EB/2297-2344]**; there was no CPR Part 64.7 Counter-Notice and no alternative procedural relief was sought. The Court of Appeal cannot fairly be criticised for not remitting or separately deciding an issue which, on the way the case had been advanced, was not treated as distinct from the timing question.

92. If, contrary to our primary submission, the Board concludes that correction of the chronology did not itself finally resolve causation, it still does not follow that the Court of Appeal erred in entering judgment for Aeden. The remaining question would be whether, on the evidential record and within the causation framework adopted by the trial judge and the submissions before it, the Court of Appeal was entitled to reach a final conclusion on liability. We submit it was.

93. The trial judge had already made clear that if the injury occurred during the intrapartum period, the pleaded breaches of monitoring, detection and intervention became causative; if it occurred beforehand, they did not **(HC: [EB/77-79/136-139]**; **COA: [EB/97-98/45-51])**. Having restored the pleaded chronology, the Court of Appeal was entitled to draw the consequential conclusion that the 04.00 timing established a prolonged second stage of labour **(COA: [EB/112/108]**; **COA: [EB/129-130/183-186])** and that liability was established.

94. The prolonged second stage overlapped with the period during which there was no FHR recorded[14], creating the intrapartum evidential window which the trial judge had treated as critical to liability if sufficient time existed.

95. It was Dr Abdulla who submitted that **(Dr Abdulla's Submissions to the Court of Appeal: [EB/2498/10])**:

[14] As admitted by Dr Abdulla in his Written Case at [9], [10] **[EB/2761].**

"Causation could not be fully pinned down (example umbilical cord prolapse or placental abruption) and hence, the issue was whether the 1 hour of damage occurred intra partum (while Dr Abdulla and the hospital owed [Aeden] *a duty of care to detect foetal distress and intervene) or pre partum (when no one could have detected foetal distress)."*

96. Dr Abdulla's present appeal does not identify any separate ground challenging those consequential findings or contending that the Court of Appeal lacked the evidential material to reach them.

97. Dr Abdulla's remaining complaint relies on the Court of Appeal's statement that second stage labour lasted from 04.00 to 05.30. That was a minor erratum of the court. The trial judge correctly described the second stage of labour as the time from dilatation to delivery **(HC: [EB/60/90])**, and the endpoint was fixed by delivery at 06.15. The error is immaterial. Once the 04.00 start time is restored, the causation consequence follows within the forensic framework the parties advanced and the Court of Appeal applied.

98. Dr Abdulla's complaint that causation remained unresolved does not reflect the basis on which the case was tried or appealed. The liability issue was litigated and determined on the footing that timing resolved whether the accepted hypoxic injury occurred during the actionable intrapartum period. The Court of Appeal was entitled to treat restoration of the 04.00 chronology as dispositive, or at least to conclude on the evidence before it that the PPHI probably occurred intrapartum. Accordingly, Ground 2 should be dismissed.

IN SUMMARY

99. Ground 1 fails because the Court of Appeal did not impermissibly interfere with a protected finding of fact. It corrected a chronology determination reached through procedural irregularity, departure from binding unamended pleaded admissions and reliance upon evidential material which did not justify a departure from Dr Abdulla's pleaded case.

100. Ground 2 fails because Dr Abdulla's complaint that causation remained unresolved does not reflect the forensic basis upon which the case was tried or appealed. The liability issue was litigated and determined on the footing that the timing issue resolved whether the accepted hypoxic injury occurred during the actionable intrapartum period.

101. In those circumstances, the Board is invited not to disturb the decision of the Court of Appeal.

RELIEF SOUGHT:

102. Dr Abdulla's appeal should be dismissed, and:

102.1 The order of the Court of Appeal dated 30 July 2024 should be affirmed.

102.2 Aeden seeks the costs of this appeal, to be assessed if not agreed.

Date: 3rd June 2026

Of Counsel

Dr Michael Powers KC

Rajiv Persad SC

Ricardo Williams

Niala Narine

Classification: Personal Action- Medical Negligence

Instructing Attorney: Niala Narine
Bar number: NAN2010058
Allum Chambers
No. 3 Shine Street
Port-of-Spain
Telephone: 1 868 222-7187/1575 (Ext. 105)
Fax: 1 868 625-8016
E-mail: niala_n@allumchambers.org

Junior Advocate Attorney: Ricardo Williams
Bar number: WIR2009162
Regius Edward Chambers
No. 53 Edward Street
Port-of-Spain
Telephone: 1 868 222 8388
Fax 1 868 222-8388
E-mail: ricwil306@hotmail.com

Advocate Attorney: Mr. Rajiv Persad
Bar No: PER1997069
Allum Chambers
Address: No 3 Shine Street
Port of Spain
Tel No: (868) 222-1575
Fax No: (868)625-8016
Email Address: rajivpersad@allumchambers.org

Queens Counsel: Dr Michael J Powers QC
Bar No. POM2012187
Regius Edward Chambers
No. 53 Edward Street
Port-of-Spain
Telephone: 1 868 222 8388
Fax 1 868 222-8388
Email Address: powersqc@icloud.com

The Republic of Trinidad and Tobago

In the High Court of Justice

Claim No. CV 2013-01909

Between

AEDEN BALWAH
(by Shelly-Ann Balwah, his mother and next friend)

Claimant

-v-

1. **SURGI-MED CLINIC CO. LIMITED**
2. **DR. MARWAN AHMAD ALSAYED ABDULLA**

Defendants

****

WRITTEN SUBMISSIONS OF THE CLAIMANT

the strength of the cervix is sometimes insufficient and in a worst case scenario, the baby may even fall out. This is the first time in the three years after Dr. Sinkhorn's report, in which he has admitted rapid labour in response to Dr. Jaiyesimi's assertion that this was caused by excessive contractions, has this alternative explanation been presented.

Dr. Sinkhorn's submission of an insufficient cervix syndrome, is not pleaded by the Second Defendant, is not mentioned in his reports, is not supported by any literary references by him and it was put forth at a point in time when the Claimant had already closed his case and could not have the benefit an expert opinion on the matter. Furthermore, what is most clear from the medical records, is the fact that this "baby did not just fall out."

The Prolonged Second Stage

Although there is a dispute about Dr. Abdulla's time of arrival at SurgiMed[486], the parties are in agreement that it coincides with:

a. the time of full dilation of the cervix[487];

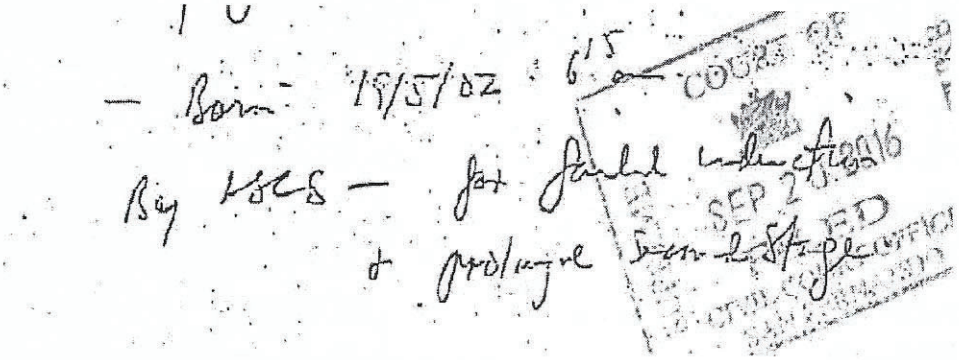
b. the time that Mrs. Balwah was moved from her private room to the delivery room; and

c. the start of 1hr of vaginal attempts at delivery

If the Court accepts the Claimant's submissions that Dr. Abdulla arrived at around 04.00 hrs, the second stage of labour lasted 2 hours and 15minutes before it was terminated by the LSCS.

[486] See PART II, Period 2
[487] by definition, the start of the second stage of labour

Dr. Aguilar, the Consultant paediatrician was present at the delivery. He identified a prolonged second stage as an indication for the caesarean section delivery of the Claimant. This was conveyed in his letter of transfer[488].



What are the characteristics of the Second Stage of Labour and how long should it last?

Dr. Jaiyesimi in his report filed 13th July 2015, says that[489]:

"*The second stage of labour is the most hazardous stage of labour for the baby. Active pushing should not normally exceed 60 minutes for primigravida clients.*"

Literature referenced by this citation is: Standard Operating Procedure Manual for Obstetric and Midwifery Services – Ministry of Health – Trinidad and Tobago[490]:

[488] 2/1/81
[489] 2/2/64
[490] 2/4/184

"4.2 Management of the client in 2nd Stage of Labour. Intent Statement: This is the most hazardous stage of labour for the baby. Active pushing should not normally exceed sixty (60) minutes for primigravid clients and thirty (30) minutes for multigravid clients."

Dr. Jaiyesimi informed the Court about the average length of time that should not be exceeded during the second stage of labour, and the potential complications that are associated with a prolonged second stage[491].

"The second stage should be no longer than 3 hours (1 hour passive, 2 hours active) in nulliparous women and 2 hours in multiparous women (1 hour passive, 1 hour active). Prolonged Second Stages are associated with adverse outcomes."

Literature referenced by this citation is: The length of Active Labour in normal pregnancies – Albers and Schiff [492]– RCOG:

"The length of the second stage was defined as time in minutes from complete cervical dilation to delivery of the infant." "We considered four complications associated with prolonged labour, which were recorded in our data set: postpartum hemorrhage, defined as estimated blood loss of greater then 500ml after delivery; postpartum fever, defined as an oral temperature of greater than 100.4F within 24 hours of delivery; infant resuscitation, defined as assisted ventilation with bag and mask or endotracheal intubation; and a 5 minute Apgar score less than 7."

Dr. Jaiyeismi's evidence was that[493]:

---

[491] 2/2/64
[492] 2/4/229
[493] 2/2/70

"*In the second stage of labour, when fetal oxygenation is prone to change more rapidly, intermittent auscultation should be at least every 5 minutes in the absence of active pushing and after each contraction with active pushing.*"

In the literature referenced by this citation is: "The effect of the duration of the second stage of labour on the acid-base state of the fetus – Katz et al[494]";

"*The second stage of labour is characterized by uterine contractions that are both frequent and prolonged. During those contractions there is a marked reduction in placental perfusion because of the reduction in pulse pressure (Bassell et al, 1980). Analyzing the influence of normal labour on feto-maternal acid-base balance, Beard & Morris (1965) found a decrease in base excess and a fall in scalp capillary pH (SpH) during the second stage of labour. Nickelsen et al (1985) monitored tissue pH and transcutaneous carbon dioxide (tcPCO2) continuously during the second stage of labour and observed a drop in pH and a rise in tcPCO2. These changes, which are consistent with those reported by Beard & Morris (1965), are apparent after 30 mins in the second stage of labour. The correlation between the duration of the period of expulsion and the metabolic state of the newborn infant was studied by Wood et al (1973), who found that prolongation of the period of expulsion is associated with maternal and fetal acidosis.*"

From Dr Jaiyesimi's 2015 report and the literature that he has referenced the Court may conclude that:

a. The second stage of labour is defined as the time from complete cervical dilation (10cm) to expulsion of the fetus (birth).

[494] 2/4/338

b. The second stage of labour is the most hazardous and perilous stage for the fetus.

c. The second stage is characterized by frequent and prolonged contractions.

d. Fetal oxygenation is prone to change more rapidly during contractions in this stage, with a marked reduction in placental perfusion.

e. Whilst the active part of the second stage should not exceed 2 hours, maternal and fetal acidosis (drop in pH and rise in CO2 levels) are apparent after only 30 minutes.

Accordingly, the Court is invited to find on the evidence that it is likely there was a prolonged second stage of labour and that it played a role in Aeden's outcome.

Dr. Abdulla is aware of the times associated with a diagnosis of a prolonged second stage[495]:

.....So how could they write second stage of labour as one of their indications and that will give the impression means the patient's prolonged second stage, means the patient, the baby was for long periods of time, over two hours or three hours in a second stage. What is that -- that is why, they would have built their opinion roughly on the opinion about if you have prolonged second stage, you may or may not get fetal distress....

And:

Q Just one point in answer -- in questioning on that point. You said if it is two or three hours, and we know that second stage is from full dilatation

[495] [9/109/1] *et seq*

to delivery. The maths are easy, if it is at 4 o'clock, it is a two and a quarter hours; if it is at 4:30, it is one and three-quarter hours, isn't it? It is a simple mathematical --

A Come again. Come again, please. Sorry.

Q Yes. The second stage is between full dilatation and delivery.

A That is right.

Q And the full dilatation is at 4 o'clock, it is two and a quarter hours?

A That is correct. Yes.

Q And if it is 4:30, it is one and three-quarter hours?

A That is correct.

Q And you are saying that it wasn't justified by Dr. Aguilar saying that this was a prolonged second stage?

A It was not a prolonged second stage.

Dr. Abdulla has not only identified that he is aware of the times that are associated with a prolonged second stage, but he has also aware of the dangers of a prolonged second stage. He has also provided the Court with an explanation as to why his arrival and subsequent times have "shifted by 30 minutes" after he became aware of Dr. Jaiyesimi's 2015 report. As he stated in his February 2016 statement, tendered and marked as CE5: *"Contradiction between both notes could incriminate me.."*

Mis-Management of the Second Stage

As was analysed in PART II – Period 3, the Claimant has submitted that Dr. Abdulla mis-managed the Second Stage of labour to the detriment of the well-being of Aeden. This came about as a result of Dr. Abdulla's erroneous determination of the true position of the fetal head in relation to the level of the ischial spines, and as a result having Mrs. Balwah push before the head was