IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
**[2022] EWHC 337 (QB)**

No. QB-2021-000349

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 26th January 2022

Before:

MR JUSTICE EYRE

B E T W E E N :

JASON ASTLEY — Proposed Claimant

- and -

MID-CHESHIRE HOSPITALS FOUNDATION NHS TRUST — Proposed Defendant

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**John de Bono QC** (instructed by **Lester Aldridge LLP**) for the **Applicant**.

**Mr Angus Moon QC** (instructed by **Hill Dickinson LLP**) for the **Respondent**.

Hearing dates: 19th and 20th January 2022

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**J U D G M E N T**

MR JUSTICE EYRE:

1 Jason Astley was born on 24th August 1997. He suffers from severe cerebral palsy as a consequence of the events leading up to and following his birth. He wishes to bring proceedings against the Defendant alleging that condition was caused by the treatment in the period immediately before and after his birth. Mr Astley brought previous proceedings based on the same circumstances and those proceedings were discontinued by a notice of discontinuance on 14th June 2006. It follows that the Claimant needs permission to bring the current proceedings under CPR Pt 38.7. The matter is before me on his application for that permission.

2 Even the limited material I have shows that Jason Astley is severely disabled. His mother, who is his principal carer, has striven to do all that she can for Jason in the time since his birth. If the claim proceeds and succeeds any award will be substantial and will potentially provide security for Mr Astley and his family. The lawyers acting on his behalf are motivated by concern for him and his family. Paula Barnes, in particular, appears to have shown a commitment to advancing Jason Astley's case over and above that required by merely doing her job. It would be understandable if Mr Astley and his family feel aggrieved as a result of their perceptions of the care and treatment of Mrs Astley and of Jason in the period running up to and immediately after his birth; of the actions of medical experts at the time of the initial proceedings; and potentially of the legal system in not providing redress in respect of those matters. I am very conscious of those matters as the background to my decision. I will not necessarily repeat references to them but I do bear them in mind as underlying the decision I have to make.

3 I set out, first, something of the background. On 24th October 1997 Sandra Astley was 36 weeks pregnant. She fell at home. She went promptly to Leighton Hospital in Crewe. The treatment she received there resulted ultimately in a decision at 16.35 to deliver Jason by caesarean section, and at 17.31, with his delivery at the conclusion of that operation.

4 Turning then to the proceedings. The first proceedings were commenced on 10th August 2004. The original Particulars of Claim were in shorter form than is fashionable nowadays but were none the worse for that. They contained the following particulars of negligence. I should make it clear that the proceedings were against the Mid-Cheshire Hospitals NHS Trust, the same defendant as the current proposed proceedings, if permission is given, will be against. The particulars of negligence contained four particulars alleging that the Defendant or its servants or agents were negligent in:

> "1) Delaying in delivering the Claimant by emergency caesarean section: the Claimant's case is that he ought to have been delivered no later than 16.45 hours, namely 30 minutes after the decision to deliver made at 16.15 hours.
>
> 2) Delaying in transferring the Claimant's mother to the operating theatre.
>
> 3) Failing as aforesaid despite:
>
> (a) the diagnosis of placental eruption; and
>
> (b) the CTG appearance's suggestive of foetal hypoxia as aforesaid.
>
> 4) Failing to achieve vascular access, and thereby to administer volume replacement, within 15 minutes, but instead failing to do so until 25 minutes after the Claimant's birth."

5 The Claimant's case in essence, as supported by expert evidence, was that the decision to deliver Jason by caesarean section was made at 16.15; that the operation should have taken

no more than 30 minutes from commencement to delivery; and that delivery of Jason by 16.45 hours would have avoided the damage he subsequently suffered.

6 The expert evidence included the evidence of Mr Edward Shaxted and at [43] of his report of 27th September 2005 he said this:

> "It is my view that the timing of the decision at 16.15 hours was appropriate. It would be unrealistic to expect a decision to perform a caesarean section to be made much before 16.15 hours. Significantly later than 16.15 hours would have been unacceptable."

7 Also, the report of Dr Miles, in particular at [45] through to [47] of that report, said this:

> "45 In my opinion, looking at the balance of factors in favour of early or late damage, Jason suffered increasing asphyxia and hypoglycaemia leading up to birth over the last four to six minutes. I believe this was an escalating progressive problem, and although there might have been some damage but of a relatively mild nature if he had been delivered at 16.45 hours, I think it most probable that all of his damage would have been spared.
>
> 46 … On the balance of probabilities, it is my opinion that delivery at 16.45 hours would have resulted in Jason being spared permanent cerebral damage.
>
> 47 My understanding of the Defendant's case is that the decision to deliver should have been made at 16.35 hours. I cannot give an expert opinion on obstetric management relating to the time of the decision to carry out a caesarean section, however in a situation of a suspected eruption and their concerns over the CTG, I would have wanted to have seen delivery occur as soon as possible, and certainly within 30 minutes of the decision … I am not able to state with any confidence that delivery at 17.05, even with more prompt resuscitation, would have avoided all of Jason's damage, but he would have been born in a better condition, and it is likely that he would have now have less extensive brain damage."

8 In the light of that of that expert evidence the lawyers then acting for Mr Astley made a deliberate decision not to seek to amend the Particulars of Claim to add an additional claim relating to the cause and/or treatment of his hypoglycaemia after birth. That appears from an advice of 19th April 2006 from Mr James Badenoch QC and Mr Alexander Hudson. That was a detailed and thorough advice. At section 5 [34] under the heading "What difference did any delay make to the outcome?" it said:

> "This will be the main focus of the trial. The Claimant's case is that if he had been delivered by 16.45, his primary case, he would have avoided all his brain damage. If he had been delivered by 17.05, his secondary case, the substantial part of his brain damage would have been avoided. This is because the brain injury was caused by the effects of prolonged hypoxia, which only became irrevocably damaging in the period shortly before delivery."

9 Section 6 is headed, "Was the paediatric care negligent?" and at [43] it said this:

> "The other aspect of potential breach of duty, albeit not pleaded as yet, is the occurrence of lack of timely or adequate treatment for the Claimant's hypoglycaemia."

10 At [52(a)] the learned authors of the advice said:

"Our view is that:

(a) on balance it would not be in the interests of the Claimant to seek to amend the Particulars of Claim to allege that hypoglycaemia was definitely caused and/or negligently managed when it arose. While there appear to be reasonable grounds for alleging breach of duty in this respect, albeit denied by Professor Levine [the Defendant's expert] in relation to causation. Such a case would be directly contrary to the Claimant's own paediatric expert. This is likely to provide additional and potentially distracting complications in a case which probably does not need them, and while a case can be made for amending on this basis, we consider it safe to stick to the Claimant's existing case in the light of Dr Miles's conclusion."

11 At [53], under the heading "Conclusion on the merits", the advice said:

"After detailed analysis, it is our opinion that the Claimant has reasonable prospects of success on breach of duty and causation, and this is a case which ought to go ahead to trial in June. It must be acknowledged that the issues are neither straightforward nor clear-cut, and that there are areas of real dispute between the experts who are all eminent in their fields. The risk that the judge may prefer the Defendant's experts or experts on any or all of the major issues cannot be excluded. Nevertheless, for the reasons given above we conclude that the Claimant has the marginally stronger case. We put prospects of success of recovery of substantial damage in the 'reasonable' category - that is between 50 to 60% overall."

12 The matter was listed for trial on 7th June 2006. However, before then the Claimant's claim and the prospects of success suffered, in the words of Mr de Bono QC who appears for him before me, "two torpedoes" as a result of the experts' meetings. First, Mr Shaxted accepted that it would have been appropriate for the decision to proceed to birth by caesarean section to have been made at 16.35. He had not previously said in terms that 16.35 was an inappropriate time but the Claimant's team had rather assumed that was his position from the opinion expressed in his report, which I have quoted a moment or two ago, that any significant delay after 16.15 would have been inappropriate. Mr Shaxted remained of the view that the time from the decision to start the operation being made to actual delivery should have been 30 minutes. I note in passing that the Claimant's team expressed some puzzlement at that because the end result was that Mr Shaxted's view was that, having previously said a start at 16.15 and conclusion by 16.45 was appropriate, his revised view was that a start at 16.35 would have been appropriate with an end time of 17.05 being 30 minutes thereafter.

13 The second torpedo was provided by Dr Miles. He, as a result of the answers to the questions set out in the agenda to the meeting of experts, reported his views in the following terms:

"RM [Dr Miles] is of the view that Jason would have been in better condition if born at 17.05 hours. He probably would have been spared some of his brain damage that he [Dr Miles] agrees from a functional point of view that Jason would probably have still been significantly disabled."

14 The report of the meeting adds that Mr Levine remained of the view that much or all of the damage occurred earlier as a result of the initial fall.

15 In answering the next question at p.10 of the report of the meeting, this was said:

> "Dr Miles is not able to quantify the difference beyond saying there would have been less severe damage with delivery at 17.05 hours compared to 17.31 hours. If there was indeed some damage with delivery at 16.45 hours there would have been less damage than compared to 17.05 hours."

16 There was a consultation following the meeting of experts and on 31st May 2006 Mr Hutton prepared a note on the issues arising from that consultation. At [2] of the note he said this:

> "It is clear from the answers given by the paediatric causation experts in their joint statement, in particular the answer given by Dr Miles to questions 18(a) and (b) at p.10 of the document, that they significantly weaken the Claimant's case on causation in relation to delivery by 17.05. Therefore, delivery by 16.45 becomes all the more crucial if the Claimant is to win this case."

17 Mr Hutton then referred to the answers given by Mr Shaxted which I have already noted and said at [5]:

> "These answers would appear to destroy the Claimant's case that it was mandatory to decide no later than 16.15 to deliver and to have achieved delivery by 16.45."

18 In the light of the answers given by the experts in the joint session and the assessment made by the Claimant's lawyers as set out in that note, an application was made to adjourn the trial and to seek permission to obtain a fresh expert. The intention was to obtain an expert to replace Mr Shaxted. The plan was to keep Dr Miles but to make an attempt to get back to the position that the operation should have started at 16.15 and been concluded by 16.45. Of course, if the evidence had shown that then the concerns that Dr Miles had as to the position on conclusion of delivery after 16.45 would not have affected the prospects of the Claimant.

19 As I have already said, the trial was listed to start on 7th June 2006. The application to adjourn was heard by Swift J on 8th June. The bundle before me contained the Defendant's note of that judgment. The Claimant's advice on appeal shows that there were further elements in Swift J's judgment, or rather makes it clear that the language that she used was not transcribed in the Defendant's note word for word. Nonetheless, the effect was clear and the extracts in the advice on appeal do not show any differences from the general thrust of the judgment as recorded in the Defendant's note. It goes without saying that the judgment of Swift J set out a careful analysis of the position and the issues. She concluded that Mr Shaxted's change of position was neither illogical nor nonsensical and that it was a consequence of the exchange of views between experts. Quoting from the Defendant's solicitors' note the conclusion she reached was as follows:

> "Whilst paying due regard to the overriding objective of the CPR and the importance of the case to the Claimant, I do not consider it right to adjourn this matter as I do not consider there are at present any exceptional circumstances. The situation that has arisen in this case is not unique, and the application for an adjournment was refused."

20 The response of the Claimant's legal team to that pronouncement was to ask for a few minutes to consider the matter. Mr Badenoch then came back into court and said to the judge that the effect of her decision was to make it impossible for the Claimant to continue with the matter and that, on that basis, he wished to give an undertaking that the proceedings would be discontinued within seven days and that an appropriate order for costs would be agreed between the parties. That course was taken.

21 The order that was drawn up and sealed on 16th June 2006, but reflecting the position as at 8th June, recorded the dismissal of the application for an adjournment and for permission to rely on the new obstetric expert. Permission to appeal was refused, and then at [3] the order provided that:

> "Without prejudice to the Claimant's right to seek permission to appeal from the Court of Appeal and/or the outcome of any subsequent appeal of the decision not to adjourn and to refuse expert evidence, the Claimant's solicitor undertakes to file of discontinuance within seven days of today, that is by 4.30 pm on 15th June 2006."

22 The Claimant's legal team took stock of the position and provided some advice to the effect that any appeal was unlikely to succeed. They took the view that the case was untenable in the light of the stance of the experts and Swift J's refusal to allow the replacement for Mr Shaxted. Consequently on the afternoon of 14th June 2006 the claim was discontinued.

23 Miss Barnes had been the solicitor acting for Mr Astley in the original proceedings. She had changed firm at least once, I think probably two or three times, in the period after the original proceedings. However, she had kept in touch to some extent with the Astley family and more significantly had remained conscious of Mr Astley's position and the discontinuance of his claim.

24 In 2013 Miss Barnes had what she describes as a "*Eureka*" moment, in which it occurred to her that, as a consequence of the decision of the Court of Appeal in *Bailey v Ministry of Defence* [2008] EWCA Civ 883, Mr Astley might have a tenable case on the basis of contending that the Defendant's negligence made a material contribution to his condition. Miss Barnes got back in touch with Mrs Astley. They instructed counsel. A protocol letter was sent to the Defendant on 26th September 2014. The Defendant's solicitors responded saying that liability remained disputed. Matters then went quiet *inter partes*.

25 The Claimant's team had difficulties obtaining funding and related problems in getting matters off the ground. I accept that there was determined action on the part of Claimant, his family, and his legal team in trying to address those issues and trying to get matters off the ground but there was no further *inter partes* contact until 29th January 2021. In 2015 the Defendant had again closed its file assuming that the matter was not being revived in the light of any response to the denial of liability which it had made in response to the protocol letter.

26 It was on 29th January 2001 that the Claimant made an application for permission under CPR Pt 38.7. The permission sought is to commence proceedings on a revised basis. The Particulars of Claim which have been drafted are rather fuller than those which were previously before the court. To some extent, that is a consequence of the difference in style of pleadings that has developed over the last decade and more. More significantly, there are now three elements to the negligence alleged. The first element relates, as before, to the circumstances of Mr Astley's delivery. Paragraph (e) of the particulars of negligence contends that a decision for delivery by caesarean section should have been made by 15.50 hours. The particulars continue thus from (h):

> "(h) there should have been a decision to deliver by 15.50 at the latest, delay after this time was sub-standard,
>
> (i) delivery should have been achieved by 16.20 and delay after this time was sub-standard,

(j) if, which is denied, it was reasonable not to take a decision to deliver until about 16.35, it was nevertheless unreasonable to take until 17.31 to deliver the baby after a decision at 16.35."

27 The Claimant's case is that following a decision at 16.35 delivery should have been achieved within about 30 minutes, that is by 17.05.

28 A new element of the claim is a contention that there was a negligence under the principal enunciated in the case of *Montgomery v Lanarkshire* [2015] UKSC 11, [2015] AC 1430. This allegation is set out at sub-paragraph (k) of the particulars of negligence. In short it is said that by 15.40 it should have been apparent that there was a choice to be made as to whether or not to proceed immediately to delivery by caesarean section or to take stock and proceed more slowly. That choice should have been made by Mrs Astley and not by Dr Mukherjee or Mr Meakin, and there is said to have been negligence in a failure to present that choice to Mrs Astley. The Claimant's case being that if, at 15.40 or thereabouts, Mrs Astley had been given that choice she would have elected for delivery by caesarean section with the consequence that Mr Astley would have been delivered within half an hour or so of such election which would have been shortly after 15.40.

29 The next element of the negligence advanced is as to the treatment of the hypoglycaemia. This is set out at sub-paragraph (l) in these terms:

> "Given persisting hypoglycaemia from 24.00 hours on 24 October for some 13 hours the Claimant's blood glucose levels should have been checked more frequently than every hour, and more aggressive action taken to correct them and maintain them. Causing or permitting the Claimant to suffer hypoglycaemia for approximately 13 hours between 24.00 hours on 24 October and 13.00 hours on 25 October is said to have been negligent."

30 Particulars are given of injury and causation and for current purposes paragraphs (d) through to (h) are of note. It is said:

> "(d) there was continuing damage right up until the time of delivery at 17.31;
>
> (e) the delay in delivery materially contributed to the Claimant's brain injury;
>
> (f) the failure to correct his hypoglycaemia over a period of up to 13 hours between 24.00 hours on 24 October and 13.00 hours on 25 October materially contributed to the Claimant's brain injury;
>
> (g) it is not possible to divide the Claimant's injury and say how much less injured he would have been with earlier delivery or without the additional uncorrected hypoglycaemia.
>
> (h) for the avoidance of doubt, even had the Claimant been delivered at 17.05 it is likely that his injury would have been much less severe, but it is not possible to say whether or not he would have avoided injury altogether."

31 Those are the proceedings for which the Claimant now seeks permission. The starting point is the provisions of CPR Pt 38 which deal with discontinuance and which provide at 38.7:

> "A Claimant who discontinues a claim needs the permission of the court to make another claim against the same Defendant if –
>
> (a) he discontinued the claim after the Defendant filed a defence; and
>
> (b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim."

32 It is, of course, common ground that both (a) and (b) are applicable here.

33 The editors to the White Book have set out in the notes their view as to the circumstances in which the court is likely to give permission, and they say this:

> "The court is likely to give permission, for example, where the Claimant was misled or tricked by the Defendant where important new evidence has come to light, or where there has been a retrospective change in the law (e.g. a Supreme Court case overruling a Court of Appeal decision, which had led the Claimant to discontinue). All these examples are, of course, unusual cases and assume the limitation period has still not expired."

34 The position was considered by the Court of Appeal in the case of *Hague Plant Limited v Hague and Others* [2014] EWCA Civ 1609. At [59] Briggs LJ, with whose judgment Sharp LJ agreed with and in respect of whose judgment Christopher Clarke LJ delivered a concurring judgment, addressed the argument that there was no analogy between the re-introduction in existing proceedings of an allegation previously abandoned and the bringing of a new claim after discontinuance. At [60] he said this:

> "In my judgment there is indeed an analogy between the re-introduction of a claim previously abandoned in the same proceedings and the making of a fresh claim after discontinuance of a similar claim based on the same or substantially the same facts, as is controlled by Part 38.7. Both types of conduct, unless closely controlled by the court, tend to undermine the public interest in finality in litigation. But Part 38.7 imposes that control not in terms by the requirement to show special circumstances, but rather by the requirement that such fresh proceedings may only be brought with the Court's permission. In that respect they equate the bringing of fresh proceedings with the re-introduction of an abandoned claim by amendment, since amendment itself requires the court's permission. Beyond that, it seems to me that the rule leaves it to the court to decide whether to grant or refuse permission having regard, as I have said, to the public interest in finality."

35 At [61] Briggs LJ noted that the then edition of the White Book uses the phrase "exceptional circumstances" as characteristic of the sort of explanation like to be required in an application for permission under Pt 38.7. But he went on to say this:

> "... but it is dangerous in my view to erect that as a test imposed by the rules, not least because of its inherent uncertainty. To that limited extent the judge may have mis-described the ambit of the court's discretion to give such permission. The real question for the judge was whether, having abandoned the *de facto* directorship claim ... a sufficient explanation was offered for its re-introduction to overcome the court's natural disinclination to permit a party to re-introduce a claim which it had after careful consideration decided to abandon."

36 The approach to the operation of CPR Pt 38.7 was considered by Chief Master Marsh in the case of *Captain Saulawa & Anor v Captain Abeyratne & Anor* [2018] EWHC 2463 (Ch). At [12] he noted that counsel had invoked the approach set out by Briggs LJ in the *Hague Plant* case, and Chief Master Marsh accepted that that was the proper approach to apply in the case before him. Then he noted at [13] that counsel had gone to suggest:

> "... the way the court should consider the matter was to consider the relevant conduct of the parties, to consider prejudice and to consider whether there is any indication of harassment or other matters. In short, it seems to me that it is right that the court should look at the circumstances in which the discontinuance took place; but the court is also entitled to look at the position in the round, to have regard to the interests of justice and also to have regard to the not unimportant factor of the proper use of court resources."

37 He applied that approach to the circumstances of the case before him at [22] and following. He noted that the interim settlement agreement and the order made in that case were both valid, and he said this at [22]:

> "22 In those circumstances it is difficult to see why the court would contemplate permitting the Claimants to reopen the very matters that were before the court in 2015 when they reached an agreement that amounted to a final resolution of those claims,
>
> 23 It is, I think, of real significance that the settlement was reached the day before a trial was due to take place. The parties, with the benefit of proper advice from counsel and solicitors, entered into that agreement. It had the effect of preventing the trial going ahead. The parties made the decision to settle in order to avoid the risks of litigation which are well understood. It is very unattractive indeed that some three years later a party should seek to re-litigate matters which were resolved by agreement on that earlier occasion."

38 That was the first of three matters that Chief Master Marsh considered. The second was that the parties had behaved since October 2015 in a manner entirely inconsistent with the case that the claimants wished to bring. The third matter was that the Chief Master was in no doubt that those proceedings were intended to be, and were, a collateral attack on the arbitration award and were, as such, abusive. It will be immediately apparent that the second and third of those matters are not matters which have any comparison to the position in the current case.

39 The operation of Pt 38.7 was considered in the case of *Westbury Power Distribution v South-West Water* [2020] EWHC 3747 TCC by Joanna Smith QC (as she then was). That was a case where previous proceedings had been discontinued. They had been commenced on the footing that damage had been caused by operations carried out in 2008. The claimant had then been assured by the defendant that the 2008 operations did not relate to the potential damage and had discontinued. It had subsequently discovered that, in fact, the relevant works which were potentially damaging had occurred in 2010. At [22] the Deputy Judge said this, referring to the contention that there was an analogy between the approach under CPR Pts 17.4 and 38.7:

> "In my judgment, the context of applications under these two rules is different. 38.7 is concerned with ensuring a putative defendant is not placed in a situation where he must be twice vexed with the same matter. The purpose of CPR 17.4 is to avoid a defendant, and this is

> made clear in *Goode v Martin*, being placed in a position where he will be faced with a claim after the expiry of the limitation period which ought to have been investigated earlier."

40 In my judgement, the Deputy Judge over-simplified matters somewhat when she said that CPR Pt 38.7 is concerned with ensuring a putative defendant is not placed in a situation where it must be vexed twice. The very fact that permission can be given does envisage circumstances where a defendant will face for a second time proceedings arising out of the same or substantially the same facts as were considered or raised or ventilated in the discontinued proceedings. I do respectfully agree with the Deputy Judge's contrast between parts 38.7 and 17.4.

41 The Deputy Judge made it clear that she was satisfied that the two sets of proceedings with which she was concerned arose out of the same or substantially the same facts. She rehearsed the test enunciated by Briggs LJ, which I have already quoted. Then, at [29], she said that the key issue for present purposes is whether there is a sufficient explanation for the second claim. Her approach to that issue was to have regard to the rule in *Henderson v Henderson* and to the need for a broad merits based approach as provided for in decision of *Johnson v Gore Wood* [2002] 2 AC 1. From [33] through to [41] she undertook that broad merits based assessment. She considered whether there would be a manifest unfairness in allowing the claimant to bring the new claim and concluded that there would not be, and in the light of that concluded that permission should be given. It is to be noted that although the Deputy Judge focused on the broad merits based assessment and the absence of manifest unfairness she was doing so in the context of applying the test set out by Briggs LJ, and had also adverted to the approach set out by Chief Master Marsh.

42 The operation of CPR Pt 38.7 has also been considered by Tom Leech QC (as he then was) sitting as a deputy in the case of *King v Kings Solutions* [2020] EWHC 2861 (Ch). The proceedings before Mr Leech involved a s.994 petition. The petitioners had previously brought a misrepresentation claim against some of the respondents. They had discontinued that claim in the course of the trial. The Deputy Judge concluded that the petition arose from the same facts. In resisting the continuation of the proceedings the respondent relied on the *Henderson v Henderson* abuse of process principle. The Deputy Judge's consideration of Pt 38.7 began at [103]. At [104] he quoted from the judgment of Arnold J in *Westbrook Dolphin Square v Friends Provident* [2011] EWHC 2302 (Ch) at [45]. Mr. Leech then referred, at [105], to the passage from the judgment of Briggs LJ, which I have already quoted and described Briggs LJ as having adopted a similar approach to that of Arnold J. I am bound to say that it seems to me that the approaches are different and that I ought to have regard to the approach laid down by Briggs LJ rather than that enunciated earlier by Arnold J, which does appear to have emphasised the relevance and input of the *Henderson v Henderson* principles.

43 The Deputy Judge went on to take the view that HH Judge Matthews had been in error in the case of *Ward v Hutt* [2018] 1 WLR 1789 when that judge had taken the view that *Henderson v Henderson* was an aspect of the law of *res judicata*. The Deputy Judge rightly said that *Henderson v Henderson* is an aspect of the law of abuse of process rather than being narrowly confined to *res judicata*. At [113] Mr Leech said this:

> "In my judgment, it remains open to a party to rely upon *Henderson v Henderson* abuse of process where the first claim has been discontinued as well as resulting in a judgment or compromise."

44 Mr Leech then proceeded to explain his differences with HH Judge Matthews' approach. It is of note, and this appears at [116], that in the case before him Mr Leech had found that CPR Pt 38.7 was engaged but that there was no application before him for permission to make a claim for permission to be granted under 38.7. He found that it was abusive to bring the proceedings in respect of the respondent who had not been a party to the misrepresentation claim. What is significant is that there was no application before Mr Leech under Pt 38.7. However, it is clear that he would not have granted permission if there had been such an application on the footing that he regarded the proceedings before him as abusive under *Henderson v Henderson*

45 What was significant about the decision by Mr Leech was his view that discontinuance does not prevent a party from asserting that there is a *Henderson v Henderson* abuse if the party who had discontinued subsequently seeks to bring fresh proceedings. However, he was not, in my judgement, laying down or seeking to lay down, any general principles as to the operation of Pt 38.7 or as to the approach to be taken to applications for permission under that rule.

46 I have considerable reservations about the appropriateness, and in particular the benefit, of looking to *Henderson v Henderson* or *Johnson v Gore Wood* as laying down the test to be applied when the court is considering permission under CPR Pt 38.7. There are particular considerations when Pt 38.7 comes into play. In the light of the discontinuance, which *ex hypothesi* there will have been, there will not have been an adjudication on the merits of the previous claim. Again *ex hypothesi* because the claim is one arising out of the same or similar circumstances the position will be one where the defendant is at least at risk of being vexed twice in the same matter. When permission is being sought under Pt 38.7 the circumstances will fairly frequently be such that if the previous proceedings had been concluded by settlement or judgment rather than discontinuance the defence of *Henderson v Henderson* abuse of process would have been available to the potential defendant. Moreover, if the court gives permission for proceedings to be brought it is hard to see how those proceedings can then be said to be abusive. The court having given permission would have indicated that it did not regard the proceedings as abusive. Conversely, if permission is refused there will be no need to have any further regard to the concept of abuse of process. The *Johnson v Gore Wood* requirement that the court is to make a broad merits based assessment and the need for finality and for the avoidance of abuse of process which underly the *Henderson v Henderson* principle can of course be relevant when the court is considering giving permission under Pt 38.7. Looking at the merits broadly and considering manifest unfairness will often be relevant factors. It may well be on occasion relevant as a check to see whether, if the earlier proceedings had been resolved in a way different from discontinuance, there would be an abuse in bringing fresh proceedings. However, none of that, in my judgement, is the actual test to be applied. Instead, those are matters which go into the circumstances to be considered when the court is looking at matters in the round and applying, as it should, in my assessment, Briggs LJ's test to see if there is sufficient explanation given to overcome the court's disinclination to allow further proceedings arising out of the same circumstances. Consideration of the merits broadly and potential abuse are elements in the process described by Chief Master Marsh in the *Captain Saulawa* case but they are not the governing criteria. They will often be very potent factors in what is an exercise of discretion but the test must be that laid down by Briggs LJ.

47 So I come back to the question I have to consider. I have to look at matters in the round to see if there is sufficient explanation to overcome the court's reluctance to allow re-litigation or re-introduction of these proceedings.

48 It is in that context that I have to consider the next topic which is whether the decision in *Bailey v Ministry of Defence* [2008] EWCA Civ 883, [2009] 1 WLR 1052 changed the law. This was a significant area of disagreement between the Claimant and the Defendant. That disagreement was triggered by the reference in the White Book to a change in the law, or a retrospective change in the law, as a potential circumstance in which permission would be given under Pt 38.7. It was advanced by Mr de Bono for the Claimant as a key factor in support of giving permission. At [21] of his skeleton argument he said this:

> "Prior to *Bailey* the conventional understanding in a clinical negligence case was that a Claimant could succeed where he would have suffered some injury in any event, but only where the breach of duty made a quantifiable or measurable difference to the outcome."

49 Then at [26]:

> "What *Bailey* changed was a recognition that the breach did not have to be proved to have made a measurable or quantifiable difference **on its own**." [Original emphasis]

50 At [28] and [29] talking of the effect of *Bailey,* Mr De Bono said:

> "28 Instead of starting with a breach of duty and asking how much damage the breach of duty caused, the court was now starting at the other end with the damage. The question is, would the same damage have occurred in any event? Was it not possible to say? If the same damage would have occurred in any event, there is no causation. If it is not possible to say whether or not the outcome would probably have been the same, it is necessary to ask the question, did the breach of duty make a material, that is more than negligible, contribution to the outcome? If yes, then causation is established.
>
> 29 This pivot, starting with the damage and ask whether it is contributed to by the breach, rather than starting with the breach and asking how much damage it is responsible for, has fundamentally changed the landscape in clinical negligence."

51 Mr. De Bono described a situation in which dozens of cases were coming before the courts and in which settlements will be approved which would not have begun before *Bailey.*

52 Mr De Bono refined that argument, or perhaps I should rather say developed it, in his oral submissions to say that *Bailey* brought about a change in the understanding of the law amongst those engaged in clinical negligence work. He said that on the understanding of practitioners as it had been in 2006 the decision to discontinue had been appropriate. However, now after *Bailey* the understanding of practitioners is very different so that it is now possible to say that there is a legitimate or tenable claim, even on the footing that it was reasonable to commence the delivery by caesarean section at 16.35. In the course of the trial he discovered a commentary written by Adrian Whitfield QC and James Watson QC on the decision in *Bailey* and which appeared in the Medical Law Reports. In part that said:

> "It is suggested that we have, if not new law, at least a new application of earlier principles. We have an express departure from the basic 'but for' test in clinical negligence resulting in an award of damages to the Claimant whose risk of injury was enhanced by negligence, who could not prove that, but for the negligence, injury would have been avoided. Putting it another way, she recovered damages because her risk of injury was increased, which

> is tantamount to saying her chance of avoiding her injury was diminished by negligence whose effect could not be provided to be determinative."

53 Mr de Bono placed stress as an indication of the law as it had been, or at least had been understood, before *Bailey*, on the decision of the Court of Appeal in *Tahir v Haringey Health Authority* [1998] Lloyd's Rep (Med) 104, and in particular the passage at p.108 where Otton LJ said this:

> "Here the plaintiff does not seek to prove the loss of a chance. His case is that because of the delay he was worse off, or had it not been for the delay he would have been better off. It is not sufficient to show that delay materially increases the risk or that delay can cause injury. The plaintiff has to go further and prove that damage was actually caused - that is that the delay cause injury. In my judgment, it is not sufficient to show a general increment from the delay, it must go further and prove some measurable damage."

54 Mr de Bono's argument was that the effect of *Tahir* in the case of incremental damage was that it was not sufficient to show a material contribution from the negligence but that a Claimant had to show on a "but for" basis that measurable loss was suffered.

55 In *Bailey* at [46] Waller LJ set out the position thus:

> "In my view one cannot draw a distinction between medical negligence cases and others. I would summarise the position in relation to cumulative cause cases as follows. If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the Claimant will have failed to establish that the tortious cause contributed. *Hotson* exemplifies such a situation. If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the Claimant will (obviously) have discharged the burden. In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the Claimant will succeed."

56 Mr de Bono says that that was an indication that the material contribution approach can apply to cumulative damage cases. In addition he referred me to the judgment of Ward LJ in the case of *Popple v Birmingham Women's NHS Foundation Trust* [2012] EWCA Civ 1628, where at [79] Ward LJ quoted from *Bailey* at [46] describing it as "the rule established by *Bailey v Ministry of Defence*". I attach very little weight to the one word "established" appearing in Ward LJ's judgment. On any view that was not being said as a result of a review of the authorities to see the source of the alleged rule. What was happening was simply that in *Popple* the approach as set out in *Bailey* was being applied.

57 Mr Moon QC, for the Defendant, characterises matters very differently. He says that *Bailey* did not make a change in the law. At [28] of his skeleton argument he says this:

> "*Bailey v Ministry of Defence* did not involve a retrospective change in the law as to causation, it was rather an application of long established legal principles which had been laid down by earlier House of Lords authority, including *Bonnington Castings v Wardlaw* [1956] AC 613. The doctrine espoused in *Bailey v Ministry of Defence* was the well established doctrine

> that a material contribution to the damage may suffice to render the Defendant liable."

58 The Defendant's position was that it was well established before *Bailey* that causation could be shown if it could be proven that the negligence made a material contribution to the damage in question.

59 Mr Moon undertook a survey of the earlier authorities to show that the approach in *Bailey* was not precluded by those existing authorities. Indeed he said that the approach in *Bailey* was inherent in those authorities even though not perhaps expressed. Mr Moon's submission was that it was sufficiently clear to be the position that one knew what the law was before *Bailey* and that there had been no change.

60 Mr Moon's survey of the authorities was indeed impressive but there is also force in Mr de Bono's reference to the commentary as an indication of the views of the Bar at that time and the understanding of the effect of *Bailey*.

61 In my assessment the following matters are significant in considering whether or not *Bailey* changed the law. The argument which ultimately succeeded in the Court of Appeal and indeed before Foskett J at first instance in *Bailey* was advanced by counsel at first instance by reference to the existing authorities and in particular to the *Bonnington Castings* case. That argument was advanced in November 2007 at the trial at first instance in *Bailey* where proceedings had been begun in August 2006. The Court of Appeal in *Bailey* saw their decision as an application of existing principles by reference to existing authority. They did not in terms express themselves as laying down a new rule nor as overruling other authorities.

62 As I have already noted Mr de Bono placed great weight on the decision in *Tahir* as indicating the previous approach which was superseded in *Bailey.* However, it is of note that *Tahir* was cited in argument in the Court of Appeal in *Bailey* but was not referred to at all in Waller LJ's judgment. In the light of that I must proceed on the footing that Waller LJ did not regard *Tahir* as inconsistent with the approach he was expressing let alone take the view that he was departing from the approach enunciated and laid down in *Tahir*. Against that background, I am satisfied that at most *Bailey* was a clarification of the law as derived from existing principles and existing authorities, potentially a clarification expressed in a new way, but a clarification nonetheless.

63 The previous absence of such clarification may be relevant to explain why the Claimant's lawyers acted as they did in 2006 but there was not a change in the law of the kind envisaged by the editors of the White Book referring to circumstances where the Supreme Court overrules a Court of Appeal decision. Instead, there was at the most the type of incremental development from existing principles which is inherent in the common law approach and which is present to a greater or lesser degree whenever a court states the relevant principles in language different from that used by earlier courts.

64 It is important to keep in mind why the court has had to engage in the exercise of analysing whether *Bailey* did or did not make new law. Mr de Bono and Mr Moon engaged in debate about that because of the reference in White Book to a retrospective change in the law. That reference is not a matter of statute or the Rules. Instead it is an example given by the editors of White Book of the kind of circumstances in which an explanation sufficient to overcome the court's disinclination to allow re-litigation could be present. The change effected by *Bailey*, to the extent there was a change, is a change of a different kind from that which

arises when a Court of Appeal decision is overturned. That does not mean, as will be seen, that the effect of *Bailey* is entirely irrelevant to my decision.

65 Against that background what are the factors which are relevant here?

66 The following are matters which support the Claimant and which go to overcome the court's disinclination to allow re-litigation. The first is combined circumstance that Jason Astley has on any view suffered catastrophic effects following his birth and that there has been no determination on the merits of his contention that those effects were due to the negligence on the part of the Defendant. The claim, as currently formulated, is supported by his legal team and I will assume has at least some support in the expert evidence they have obtained. I cannot make any detailed assessment of the strength of the claim. However, I note that it is not being suggested on behalf of the Defendant that it is a claim which would be capable of being struck out. Accordingly, I will approach the matter on the basis that if permission is given for fresh proceedings there is a claim which will be capable of proceeding to trial with a prospect of success. I go no further than that but that is clearly a factor operating in the Claimant's favour.

67 A further factor is that a successful claim would result in a substantial award which would make a real difference to Mr Astley and his family. Mr Moon put down a marker as to the value of the claim and I am very far from being in a position to make any detailed assessment of the value of the claim. Nonetheless it is clear that if a claim succeeds it will result in substantial damages and would have a real effect on Mr Astley and his family. I also take account of the fact that success will bring a non-monetary benefit. A successful claim would be a vindication of the Claimant's position and that of his family. It would involve the court saying that Mr Astley's condition resulted from the Defendant's failings.

68 In addition, although there has now been a very long period of time since Mr Astley's birth, and a long period since the discontinuance, this is not a case of inaction. At least not of inaction since Miss Barnes' "*Eureka*" moment. There has not been much in terms of court action but that has not been for the want of trying on the part of those acting for Mr. Astley.

69 I have already explained my assessment of the effect of *Bailey*. It is important again to remember that it was put forward as being relevant because of the example given in the notes in the White Book. The situation here is significantly different from that envisaged in those notes. What happened in *Bailey*, even if it was a clarification which was not thought of before, was very different from the example given in the White Book of a discontinuance in the light of a particular Court of Appeal decision in different proceedings from those discontinued with the Supreme Court subsequently overruling that Court of Appeal decision and indicating that the law is different from that as expressed by the Court of Appeal. Such a change would clearly be a factor of great weight. The position must be different where the further authority relied on indicates an incremental development and an elucidation or clarification which is inherent in the common law system. I accept that such a clarification and incremental development can be a relevant factor for the purposes of Pt 38.7 but its weight is limited. It is certainly not the kind of striking circumstance envisaged by the editors of the White Book nor is it the trump card which it was characterised as being by the Claimant's team.

70 A further factor is the absence of other redress. The Claimant says he has no claim against the legal team who acted in 2006 because their approach was in accord with the general understanding of clinical negligence practitioners at the time. Mr Moon disagrees with that. He says there is potentially a claim because those acting at the time should have realised that

an approach based on material contribution would have been available. The presence of a claim against the lawyers acting in 2006 might have been a factor in the Defendant's favour but I cannot say on the material before me that there definitely is such a claim. I am not obviously making a ruling on that one way or the other but on the face of matters there is at least an argument as to the understanding of clinical negligence practitioners at the time. Also account has to be taken of the fact that the lawyers acting in 2006 were confronted by a change of tack by experts at the eleventh hour. Those lawyers, not surprisingly, took the view that that change would result in significant difficulties for the Claimant. In any event, proceedings against a party's own lawyers are markedly less satisfactory than proceedings against the actual tortfeasor. So the asserted potential for a claim against the 2006 lawyers is not a factor that can assist the Defendant here although the alleged absence of a claim is only a factor of very small weight in favour of giving permission.

71 What are the matters that operate against giving permission against the background of the court's interest in finality; against the court's need to ensure that its resources are used properly; and against the background of the overriding objective in resolving disputes between parties?

72 The first factor is the circumstances in which the earlier claim was discontinued and the consequences which follow from those circumstances. The claim was discontinued in the context of having been listed for trial and indeed in the context of an application made on the first day of trial. On that first day of trial an application was made for an adjournment so as to get fresh expert evidence. That application was refused and a judgment delivered after consideration and after argument. Swift J gave a breathing space for discontinuance. An undertaking was given to discontinue within seven days, subject to a potential appeal. The undertaking to discontinue was to some extent the price for the seven-day breathing space not calling the matter on there and then and at that stage requiring the Claimant either to call evidence or to discontinue. There was a breathing space so that the Claimant's team could consider whether to appeal. In addition there was also an element of Swift J giving all concerned a chance to assimilate the position.

73 In those circumstances the Claimant's team considered whether to appeal and deliberately chose not to do so. If I give permission now and the fresh proceedings move forward the Claimant will, in effect, be getting the relief which Swift J declined to give. He will be able now to present his case with fresh expert evidence. He will be getting the benefit which he would have obtained if he had appealed Swift J's order and had been successful on that appeal. However, he chose not to do that. Putting matters in slightly different words: permitting the bringing of proceedings now would be a reversal of Swift J's decision and would be allowing in 2022 the Claimant to have the new experts for whom permission was refused in 2006. I do not need to, and I do not, characterise that as abusive conduct. It is sufficient to say that the circumstances of discontinuance and the effect which permission would have must figure in the court's disinclination to permit the reintroduction of the claim.

74 A related point is the amount of court resources and the parties' resources which have already been taken up in dealing with this case. Discontinuance came at the door of the court in the circumstances I have already set out and with substantial court time and of the parties' resources already having been allocated to and used up by this case.

75 A further factor is the impact on the Defendant. I accept, as mitigating that impact, the fact that statements were taken when the proceedings were originally brought. I also accept that the two lay witnesses who are no longer available are of limited importance. Further,

I accept that the matter was investigated in 2006 and before that so that the Defendant has available documents, statements and the like. There is nonetheless a real and detrimental impact on the Defendant in having to resurrect the matter.

76 There is an issue between the parties as to the effect on the Defendant of the loss of Mr Walkinshaw as an expert. Mr Walkinshaw was able to give particular evidence about the contention that the operation to deliver Mr Astley by caesarean section should have been conducted within 30 minutes. His absence is a detriment to the Defendant. It is not of itself a factor of great weight but it is a factor going into the balance.

77 What is significant is that if permission were to be given the Defendant would now be facing a wider claim with material differences in the way the claim has been put. There will be differences in the way in which the delivery claim, if I can characterise it as that, is being put. There will also now be a claim based on *Montgomery v Lanarkshire* and a claim in respect of the treatment of the treatment of Mr Astley's hypoglycaemia in circumstances where the Claimant's team in advance of trial in the previous proceedings had made a deliberate decision not to advance that last claim.

78 All those matters are compounded by the passage of time and the fact that the case has been put to bed twice. The Defendant was entitled to proceed on the basis that discontinuance in 2006 was the end of the matter. A protocol letter threatening revival came in September 2014 but nothing further came after the rejection of that claim and again the Defendant closed its file in 2015. The attempted revival then came in January 2021. I have already indicated that I accept that the Claimant's family and advisers were seeking to advance the claim in the intervening period but it had gone to sleep as far as the Defendant was concerned. It follows that to give permission would involve revival of the claim 14½ years after discontinuance and 6 years after the second closing of the Defendant's file.

79 I have already explained that the decision in *Bailey* is not, in my judgement, a change of the kind envisaged by the White Book editors and does not have anything like the weight that such a change would have.

80 The development of a claim on the basis of *Montgomery v Lanarkshire* would be a claim advanced as a result of a change of law. However, that is not entirely a factor in the Claimant's favour because it means that the Defendant is now facing a wider claim than it faced before: a wider claim than that which it took time to prepare against in 2006.

81 I have to look at matters in the round and it is a matter of balancing factors. No one factor is conclusive but the most significant factors are the circumstances in which the proceedings were discontinued and the fact that permission would have the effect in practice of reversing Swift J's order, an order which the Claimant deliberately decided not to appeal. That is combined with my conclusion that the decision in *Bailey v Ministry of Defence* was, at the most, an incremental development of the law and not a reversal of the kind envisaged by the White Book editors.

82 In those circumstances, the matters advanced by the Claimant are not sufficient explanation for the reintroduction of the claim to overcome the court's disinclination to permit this and to warrant giving permission and I refuse the application.

**CERTIFICATE**

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**This transcript is approved by the Judge**