Neutral Citation Number: [2018] EWHC 716 (QB)

Case No: HQ15 C04398

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/04/2018

Before :

HIS HONOUR JUDGE MCKENNA
(sitting as a Deputy High Court Judge)

- -

Between :

NILUJAN RAJATHEEPAN (By his mother and litigation friend SINTHIYA RAJATHEEPAN)	**Claimant**
- and -	
BARKING, HAVERING AND REDBRIDGE NHS FOUNDATION TRUST	**Defendant**

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- -

Mr Christopher Hough (instructed by **Wiseman Lee LLP**) for the **Claimant**
Mr Sebastian Naughton (instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing dates: 19, 20, 21, 22, 26, 27 February 2018

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Judgment Approved

HHJ McKenna :

Introduction

1. Nilujan Rajatheepan, the Claimant, was born at the King George's Hospital in Goodmayes, Essex, ("the Hospital") on 16th July 2009 and he is now aged a little over eight and a half years old.

2. Barking Havering and Redbridge NHS Foundation Trust, the Defendant, is responsible for the care provided to the Claimant and his mother at the Hospital.

3. This claim relates to brain injuries suffered by the Claimant shortly after his birth. The Claimant's parents are Tamil refugees from Sri Lanka whose native language is Tamil and who were granted asylum in this country. The Claimant's mother, Mrs Sinthiya Rajatheepan, who is also his litigation friend, was born on the 2nd June 1988 and came to this country in 2008. She was just over 21 at the date of the Claimant's birth and, it is said, at that time, spoke only a very few words of English. The Claimant's father is Sivarajah Rajatheepan, who was born on 27th April 1977 and came to this country in 2000.

4. This Court is only concerned with the issues of liability and causation pursuant to the order of Master Roberts dated 6th June 2016.

Background

5. The Claimant was delivered by caesarean section at 22.56 hours on Thursday 16th July 2009. At birth, his condition appeared to be good with his APGAR scores and cord blood readings being normal and there were no concerns about him by either the consultant paediatrician who examined him or the midwife who performed the new born examination.

6. The Claimant and his mother were discharged from the Hospital at around 21:50 hours on Saturday 18th July 2009. The formal discharge process was in fact completed by 14:00 but the Claimant and his mother remained in the Hospital until they could be collected by the Claimant's father who was working that day.

7. The following day at about 12:40 hours, the community midwife Ms Madigan arrived at the family home to discover that the Claimant was pale and lethargic and having not been fed since 21:00 hours the previous evening.

8. The Claimant was immediately transferred to the Hospital where he was described as unresponsive pale and floppy with reported seizures. Blood tests revealed raised insulin and low glucose. He was in a hypoglycaemic state and this hypoglycaemia has caused catastrophic brain injuries, leaving the Claimant suffering from cerebral palsy and with severely impaired physical and cognitive function which, it is common ground, were caused as a result of poor feeding.

9. The endocrinologists instructed by the parties are agreed that 12-15 hours of poor feeding would be sufficient to use up the normal reserves of energy and result in symptomatic hypoglycaemia. They agree that:

    i) If the Claimant had not been discharged on the 18th July 2009, his injuries would probably have been avoided;

    ii) If the Claimant had been returned to hospital before 06.00 hours on 19th July 2009, the damage would probably have been avoided;

    iii) If the Claimant had been returned to hospital after 06.00 hours on the 19th July 2009, some damage was unavoidable and;

    iv) A transfer to hospital taking place at 08.30 hours would not have avoided damage but would have reduced the severity of the insult.

10. The claim originally asserted breaches of duty in relation to both the management of labour and the post-natal care. There was a partial admission of breach of duty in respect of the management of labour in that it has been admitted that the Claimant should have been delivered by about 18:45 hours on the 16th July 2009, some four hours earlier than his actual delivery, but causation of injury flowing from that breach of duty remained in issue until a decision was made on the Claimant's behalf to abandon that aspect of the claim.

11. The Court is therefore only required to adjudicate upon the remaining part of the claim which, put simply, relates to the discharge of the Claimant and his mother on the evening of the 18th July 2009. What is said in summary is that the Claimant's poor

feeding was attributable to the Defendant's failure effectively to advise the Claimant's mother on proper feeding techniques and what to do if there was poor feeding, in the light of the very limited extent of her understanding of English and, on the facts of this case, the Claimant should not have been discharged on 18th July 2009 in which case the damage would have been avoided.

12. The Defendant for its part contends that the Claimant's post-natal care before he left the Hospital was, on the face of the contemporaneous notes, routine and appropriate and breach of duty is denied.

Chronology

13. The relevant chronology can be shortly summarised as follows:

> "**7th July 2009**
>
> Due date of delivery.
>
> **13th July 2009**
>
> Mrs Rajatheepan attended at the Hospital but was told to return on the 16th July 2009.
>
> **16th July 2009**
>
> Mrs Rajatheepan was admitted to the Hospital at 10:15am by midwife Lucas
>
> It was decided to deliver the Claimant by emergency caesarean section at 21:00 hours.
>
> The Claimant was born at 22:56 hours.
>
> The Claimant and his mother were transferred from theatre to a recovery room at 23:30 hours.
>
> **17th July 2009**
>
> The Claimant and his mother were transferred to Japonica ward in the early hours.
>
> The Claimant was discharged by the neonatal team.
>
> **18th July 2009**
>
> Midwife Oriakhi conducted a discharge interview with the Claimant's mother between 1:30 and 2pm.
>
> The Claimant and his mother were discharged home at 21:50 hours.
>
> **19th July 2009**

> The family home was visited by community midwife Madigan at 12:40 hours and the Claimant was found to be lethargic and hadn't been fed since 21:00 hours the previous evening and was taken back to the Hospital."

The Legal Framework

14. It is common ground that the relevant legal test to be applied is that set out in *Bollam v Frieren Hospital Management Committee* [1957] 1 WLR 582 and *Bolitho v City of Hackney Health Authority* [1998] AC 332.

15. In directing the jury in the Bolam case, McNair J said as follows at page 587:

> *"I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art… Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view."*

16. In *Bolitho*, the House of Lords emphasised that McNair J had said that the practice in question had to be accepted as proper by a responsible body of medical men. Elsewhere in his judgment he had said that it must be regarded as acceptable by a reasonable body of opinion. Lord Browne-Wilkinson, who gave the leading speech, commented as follows at page 241:

> *"The use of these adjectives – responsible, reasonable and acceptable – all show that the Court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or acceptable, will need to be satisfied that, informing their views, the experts have directed their minds to the question of comparative risks and benefits and reached a defensible conclusion on that matter."*

17. Later, at page 243, he continued:

> *"In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and the benefits of adopting particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinion. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible."*

18. The Court was also referred by counsel for the Claimant to *Montgomery v Lanarkshire Health Board* [2015] UK SC 11 and the recent application of that Supreme Court authority in *Thefaut v Johnstone* [2017] EWHC 497.

19. It was not sought to suggest that this was a case involving treatment choice or informed consent. Reliance was placed on these decisions for their emphasis on the importance of dialogue. Thus in the *Thefaut* case, Mr Justice Green said as follows:

> *"58. Paragraph [90] of* Montgomery *is significant in shedding light on the* modus operandi *of communication. Two points emerge. First the centrality of "*dialogue" *is stressed. No doubt, in this day and age, dialogue can occur, for example, face to face, or by skype, or over the phone. A patient who suffers from a disability or who is abroad may engage in a perfectly adequate "*dialogue" *via electronic means. The issue is not so much the means of communication but its adequacy. Mr Peacock used the apt expression "*adequate time and space" *to describe the characteristics of a "*dialogue" *that satisfied the test in law.*
>
> *59. The second point arising from paragraph [90] is the need to de–jargonise communications to ensure that the message is conveyed in a comprehensible manner. As the citation from paragraph [89] above makes clear this can include caution in the use of percentages… Paragraph [90] states:*
>
> > *"90. Secondly, the doctor's advisory role involves dialogue, the aim of which is to ensure that the patient understands the seriousness of her condition, and the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, so that she is then in a position to make an informed decision. This role will only be performed effectively if the information provided is comprehensible. The doctor's duty is not therefore fulfilled by bombarding the patient with technical information which she cannot reasonably be expected to grasp, let alone by routinely demanding her signature on a consent form.""*

20. The Court was also reminded by counsel for the Defendant of the observations made by the Court of Appeal in *Eckersley v Binnie* [1988] 18 Con. L.R. 1 at paragraphs [79]-[80] on the dangers prevalent in applying the wisdom of hindsight as follows:

> *"…The law does not require of a professional man that he be a paragon, combining the qualities of polymath and prophet.*
>
> *In deciding whether a professional man has fallen short of the standards observed by ordinarily skilled and competent members of his profession, it is the standards prevailing at the time of hi acts or omissions which provide the relevant yardstick. He is not… to be judged by the wisdom of hindsight.*

> *This of course means that knowledge of an event which happened later should not be applied when judging acts and omissions which took place before that event"*

21. The court was also reminded of the dissenting speech of Lord Pearce in Onassis v Vergottis (1968) 2 Lloyds reports 403 at page 431 on assessing the credibility of an oral witness and the comments of Lady justice Arden in Wetton v Ahmed and others (2011) EWCA Civ 610 as follows:

> *"11. By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.*
>
> *12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.*
>
> *…*
>
> *14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence."*

The Issues

22. This is a very fact-specific case. It is agreed by the midwifery experts that if the Court finds that the Claimant's mother and the midwives were not able to communicate effectively with each other, this would not be an acceptable standard. Conversely if the midwives' evidence is accepted and the Claimant's mother could understand, then there is no breach.

23. There are three main factual disputes as follows:

    i) Did a midwife ever sit down and observe Mrs Rajatheepan feed and give advice on how to attach the baby and monitor breast-feeding?

    ii) Did Mrs Rajatheepan seek help from the midwives during the course of the 18th July 2009?

    iii) Did Mr Rajatheepan and his friend ask the midwives to review the Claimant on the evening of the 18th July 2009?

24. Resolution of these factual disputes will in turn feed into the remaining allegations of breach of duty namely:

    i) that it was negligent to discharge Mrs Rajatheepan and the Claimant on the 18th July 2009,

    ii) that there was a failure to ensure that Mrs Rajatheepan understood the instructions she was being given and

    iii) that there was a failure to ensure that the Claimant was feeding properly before discharge.

25. At the heart of the Claimant's case is Mrs Rajatheepan's lack of understanding of and ability to communicate in English, it being the Claimant's case that, at the material time, Mrs Rajatheepan had a minimal command of English, which was limited to a few basic words and that, as a result, the midwives involved in the care of the Claimant and his mother were not able effectively to communicate with Mrs Rajatheepan.

26. There is some support for that case in the contemporaneous records as follows:

The Hospital Records
King Georges Hospital

Date	Entry
26 January 2009 Antenatal record	Language spoken Tamil. Interpreter required
26 March 2009 Birth plan	Communications slightly difficult
26 January 2009 Antenatal appointment	Written across top. Not speak English. Need interpreters. Husband to translate
28 May 2009 Antenatal appointment	Discuss birth plan communication difficult, will bring husband next time
11 June 2013 [sic] Antenatal appointment	Husband present as client communication difficult

17 September [sic - July] 2009	Reports does not understand / limited understanding of English language
18 July 2009	Mother does not speak that much English and I have asked her to call husband so that I can speak to him.
4 August 2009	Unable to discharge baby today as client understand little English. She said she will return with husband.
26 January 2009 Antenatal care	Not speak English. Husband translate

London Ambulance Service Records

19 July 2009	Patient's mother does not speak English well.

King George Hospital Records

19 August 2009 Neonatal discharge preparation	Mum does not speak English. Dad can understand and speak a little bit

King George Hospital: Paediatric Outpatient Records

Date	Entry
24 August 2009	Awaiting Tamil Interpreter
24 August 2009	Parents very anxious and has language barrier
11 May 2010	Mother very poor historian could not speak English and could not explain the problem

Queens Hospital Romford

17 August 2010	Info given to mother via language line interpreter
22 December 2009	Reviewed in presence of Dr Thyagarajan as some difficulty in speaking with them in English… parents have a problem with communication and the mother cannot speak English.

GP Records (Dr Naranjan)
Sinthiya Rajatheepan

8 August 2008	Sinthiya speaks English poorly

Great Ormond Street
Clinical Entries

23 May 2011	Seen with parents and family friend (no interpreter)
7 September 2012	Seen with father mother and family friend (as interpreter)
27 June 2012	Those present, Joy interpreter
27 June 2012	Interpreter Joy
27 June 2012	Parents and interpreter
8 October 2012	Parents and interpreter
15 November 2012	Seen with mum and dad and interpreter
13 March 2013 (?)	Accomp by parents and Tamil intepreter
26 September 2012	Nilujan attended with Mum, and interpreter
9 October 2012	The family will need a Tamil interpreter
28 November 2012	Consent obtained from father with the aid of an interpreter
29 November 2012	Radiology imagining [sic] in presence of interpreter

GOS "My family information"

21 January 2013	Give NBM via language line Tamil interpreter. *Tamil Interpreter*
21 January 2013	Mum needs interpreter. Do they have an interpreter Yes

Island Day Unit	
12 June 2013	Via language line Tamil interpreter
15 November 2011	Seen with parents and Tamil interpreter
13 April 2011	Seen with parents and interpreter
25 July 2011	Seen with interpreter and family friend who is acting as interpreter
15 August 2011	Fathers friend acts as interpreter
18 November 2011	Seen along with Tamil interpreter

27. The Defendant's case, by contrast, relying heavily upon the contemporaneous records written at a time when there was no suggestion of any claim or complaint, is that there was sufficient understanding between the midwives in question and Mrs Rajatheepan to establish that the Claimant had been feeding well, that there was no evidence of any abnormal signs demonstrated by the Claimant prior to discharge and that the Defendant's midwives reasonably believed that Mrs Rajatheepan understood the information given to her such that the decision to discharge was a reasonable decision. Furthermore, there was no failure to ensure that Mrs Rajatheepan understood the instructions that she was given and no failure to ensure that the Claimant was feeding properly prior to discharge. Finally, and to the extent necessary if the Court does find that there was a breach of duty, then factual causation is denied.

The development of the Claimant's case over time

28. The earliest contemporaneous record of any complaint by or on behalf of Mr and Mrs Rajatheepan was on the 26th April 2010. At that stage however no complaint was raised about the circumstances of discharge or feeding or indeed of any language concerns. The relevant PALS details report includes the following by way of summary:

> *"Mum and dad of this baby came to see me with their concerns regarding the delivery delay. Mum's delivery was slowed down and at one point they were told that the baby's heart had stopped. Baby now 10 months and is having problems walking. Would like to find out what actually happened during delivery."*

29. Shortly afterwards on 30th April Mrs Rajatheepan wrote a letter to the hospital which included the following:

> *"I have delivered this child in King George's Hospital. The delivery was delayed for one week and three days of the expected delivery date. The hospital failed to give proper assistance for me during the time of delivery and for this reason my baby is still suffering."*

30. On 30th June 2010 the Claimant's solicitors, Wiseman Lee LLP, sent a letter to the Defendant in which reference was made to the delay in delivery but no mention was made of the circumstances of discharge or of any issues over feeding or indeed any language concerns.

31. The first time that those allegations were raised was in a letter of claim dated 25th March 2014, almost five years after the events in question.

The Evidence

32. The Court has heard a great deal of factual evidence in this case. On behalf of the Claimant, the Court has heard from his mother, Sinthiya Rajatheepan, his father, Sivarajah Rajatheepan, together with friends of the Claimant's father, Varrnan Balasingham, Kevin Gunaratnam and Roger Ragavan. Finally, the Court has also heard evidence from Dr Niranjan, the family's general practitioner.

33. On behalf of the Defendant, the Court has heard evidence from Deborah Lucas, Pauline Clarke, Janet Wilkins, Noeline Boudville, Lai Thum, Amanda Madigan, Paula Theobolds, Victoria Wallen, Ethel Baddoo, Olakitan Oriakhi, Molly Mlilo, Sharon Reece, Wasim Lodhi and Nissanka Madipola, also known as Mr Gedara.

34. In terms of expert evidence, the Court has heard evidence from two experts in midwifery, Karen Bates on behalf of the Claimant and Tracey Reeves on behalf of the Defendant. In addition to their respective reports, there is a very helpful joint statement which reflects a good deal of agreement between them.

35. Mrs Rajatheepan gave her evidence through an interpreter. She explained that she was born on the 7th June 1988 in Sri Lanka and was a Tamil speaker with hardly any English. She came to this country in February 2008. The extent of her English was limited to a small number of words which were commonly used in Sri Lanka. She fell pregnant in November 2008. The pregnancy was uneventful. The due date of delivery was the 7th July but she went beyond that date. On the 13th July she thought she had started labour and was having contractions so was taken to the Hospital by her husband, seen and told to return on the 16th July 2009 which she duly did. It was her intention to breast feed and she recalls that after the delivery on the labour ward at the Hospital, she was moved to a side room and whilst there, there was a discussion with a midwife which was interpreted for her by her husband, during which it was agreed that although she would breast feed the Claimant, initially feeding would be undertaken by midwives whilst she recovered from the operation, as she was in pain at the time. Her husband and a woman called Suba, who was the wife of one of his friends, were present during this discussion. Thereafter, in the early hours of 17th July she was transferred back to Japonica ward and after that, her husband and Suba left the hospital.

36. Her recollection was that she began to breast feed the Claimant after lunch on the 17th July and continued to breast feed the baby thereafter. She believed that the Claimant was feeding successfully and after feeding, he slept.

37. On the 18th July the Claimant started to cry and it was her evidence that he continued to cry up until and indeed after discharge into the next day. At the time she thought he was hungry but was concerned about the crying so she called for a midwife using the buzzer provided for that purpose on two separate occasions, on only one of which however did a midwife attend. She described the midwife putting the Claimant on his back and trying to pacify him and then gave the Claimant back to her and left. Mrs Rajatheepan carried on trying to feed the Claimant. Whenever a nurse came by she

would smile and Mrs Rajatheepan would smile back and the nurse would nod her head and leave.

38. Because the Claimant kept crying she went to the midwives station but none of the midwives seemed to notice her so she returned to her bed and took the baby out of the cot again and tried to stop him crying without success so she returned two or three times to the midwife station, on each occasion without being able to attract the attention of any of the midwives on duty. She said that noone was paying her any attention and she felt unable to communicate her concerns because of her lack of English.

39. She was adamant that at no stage whilst she was in the Hospital did any of the midwives sit down with her and explain to her how to breast feed or what to do if she was unable to feed the Claimant, although she did recall being shown, along with other new mothers, how to wash her baby and change his nappy.

40. She recalled that later in the morning she learned that she was going to be sent home because she received what she described as a letter which was headed "Discharge" which had been left on her bed. She understood the word because it was a word which was used in Sri Lanka. She was confused because she had understood from one of the doctors that she was going to be kept in for longer. She telephoned her husband who was working that day and asked him to speak to one of the nurses, which he did, using her phone. Her husband told her that the upshot of that conversation was that she would be discharged, and her husband agreed to come and collect her after he finished work, sometime after 7.00 p.m.

41. She did not remember much about the discharge conversation with midwife Oriakhi. She said that she did not understand what she was being told, her concern being the Claimant who was constantly crying. She recalled being given a folder with a large number of papers in it but didn't look at the contents.

42. Her husband came to collect her with two of his friends, one of whom was Kevin Gunaratnam and the other was called Mathan at about 8.30pm. When her husband arrived the Claimant was crying and she explained to him that he had been crying all day and of the attempts that she had made to get assistance without success. He went to see the midwives and came back with one who put the Claimant in a car seat which her husband had brought, and explained to her husband that it was normal for newly-born babies to cry. She then left. Her husband then asked Kevin Gunaratnam to go and ask the nurse again why the Claimant was continuing to cry, and for her to come and see the baby again. The midwife did return, but again, explained that newborn babies will cry. She also explained that a community midwife would visit her and the baby at home the next day. Mrs Rajatheepan recalled that there was an argument, during the course of which the midwife repeated that if there were any problems she could always bring the baby back to hospital, but she did not explain what she meant by problems.

43. Mrs Rajatheepan, her husband, the Claimant and Kevin Gunaratnam then left the ward and went to the car, but because the Claimant was still crying her husband decided to take the Claimant back to the ward, accompanied by Kevin Gunaratnam whilst Mrs Rajatheepan stayed in the car. When her husband returned he told her that he had got the same reply, and so they left and went home.

44. When they got home Mrs Rajatheepan said that she went to bed and tried to get the Claimant to breast feed during the course of the rest of that night, but he continued to cry. She didn't know whether he was taking milk or not. The next morning her husband went to work early. She thought the Claimant was tired after all his crying. She picked him up and put him to her breast but he seemed to make less effort.

45. The community midwife arrived at about 12.40, by which time the baby had not been crying for some time. She didn't understand what the community midwife, Ms Madigan, was saying, so telephoned her husband who was told that the Claimant had a serious problem, that an ambulance had been called and she and the Claimant went together to the Hospital by ambulance.

46. It was her evidence that her husband would accompany her to appointments and he interpreted everything for her. If he couldn't attend, then he would make sure that one of his friends would accompany her. When asked why at no point did she explain to any of the midwives that she didn't understand, her response was that she couldn't speak any English and did not know how to say that she didn't understand.

47. Sivarajah Rajatheepan explained that he arrived in the United Kingdom in 2000 having been born on 27 April 1979. He confirmed that at the time his wife spoke very little English – just the odd few words here and there, whilst his own English was limited and he only had a basic vocabulary.

48. He confirmed that he attended most of the antenatal appointments with his wife as he was not working at the time and he acted as interpreter for her and when for any reason he couldn't attend he would arrange for one of his friends who could speak English to go with her.

49. He took his wife to the Hospital on 16th July, together with Varrnan Balasingam and he remained there until the early hours of 17th July. During the early evening his friend Mathan and his wife Suba arrived, and they also helped to translate information. He couldn't remember when Mr Balasingham left, but he was certainly still there when his wife was booked in.

50. He recalled seeing a midwife feed the Claimant in the recovery room because his wife was too tired to breastfeed. Suba was present at the time and he and Suba left after his wife had been transferred back onto Japonica ward some time after 02.00.

51. He said that he was working on 17th July and returned sometime that evening but couldn't remember exactly when. All he could remember about the return visit was that his wife was in pain and she asked him to tell the midwives, and as a result his wife was given some tablets and told to drink a lot of water.

52. On 18th July he was working a shift which started at either 10 or 11 o'clock until 7 o'clock in the evening. Between 12 and 1 o'clock he was telephoned by his wife and told by her that she had received a paper. His wife gave her phone to someone to whom he spoke over the telephone and discovered that his wife and baby were being sent home that day. He told the lady that he was at work until 7.00 p.m. and so couldn't come and collect them until after that. He also said that he wasn't ready to collect the baby yet, and would be working the next day, i.e. 19th July, and asked that his wife and son be kept in until the following day, i.e. the Monday, when he was not

working and could look after them. He was told that they couldn't stay so he reluctantly agreed to collect his wife and son after work.

53. He then phoned a friend, Kevin Gunaratnam, and asked him to accompany him to the Hospital because he didn't have a car of his own and needed to collect some things, including a cot and a car seat, for the Claimant. When they arrived at the Hospital the Claimant was crying and his face appeared to be red. He asked his wife why and she told him that the baby had been crying all day, and when he asked the nurse about that he was told that it was normal for newborn babies to cry. He explained that he wasn't happy and asked the midwives to keep his wife and son in for an extra day, but they refused. He therefore took his wife and son to the car, but because the Claimant was still crying he and Mr Gunaratnam returned to the Hospital, and he asked Kevin to speak to the midwives on his behalf, to tell them that the baby was crying and had been crying all day, and that in those circumstances, he was not happy about the baby being discharged. His recollection was that Kevin and the nurse argued, and Kevin asked for a doctor to be called but the nurse maintained that newborn babies crying was normal, but did say that if there was anything wrong they could always bring the baby back to the Hospital. His recollection was that he and Kevin took the baby with them when they went back to the Hospital.

54. Mr Rajatheepan was asked about the orange folder which had been given to his wife by the midwife involved in formal discharge (Midwife Oriakhi). He remembered the folder, but said that he didn't open it at the time.

55. During the course of the evening the Claimant was quieter, but still cried on and off. What worried him was that he didn't know the reason why his son was crying.

56. Dr. Niranjan explained that he was the family's general practitioner and like them he was a Tamil speaker and when Mrs Rajatheepan registered with him he ascertained that she spoke no English and all consultations with her were conducted in Tamil.

57. Varrnan Balasingam gave evidence that he remembered being asked to go to the Hospital on 16th July by Mr Rajatheepan because he needed help with English. They went by taxi, which he paid for. Whilst at the Hospital, he translated what was said to Mr Rajatheepan but couldn't recall the detail of what was discussed with the passage of time. He had, he said, also been to a number of other appointments with Mrs Rajatheepan because he had been asked to go by her husband because she didn't speak any English.

58. Roger Ragavan explained that he had known Mr Rajatheepan for about 11 years. When he first met him his understanding of spoken English was better than his ability to speak or to communicate in English, although it has improved over time. He used to help by translating documents, letters and the like. He also knew Mrs Rajatheepan and his evidence was that she only knew a very limited number of words. He had only ever heard her speak in Tamil.

59. He was at work on the day the Claimant was born but did speak to the Claimant's father, who told him that he was worried because his son was distressed.

60. Kevin Gunaratnam's evidence was to the effect that he was a store manager for Tesco and had known Mr Rajatheepan for several years and was aware that his English was very limited. He had helped him with translation.

61. On 18th July he received a telephone call from Mr Rajatheepan asking him to go with him and their mutual friend Mathan to the Hospital to pick up his wife and newborn baby because he wanted some help with English.

62. On the way to the Hospital they stopped off at Toys-R-Us because Mr Rajatheepan wanted to buy a car seat and some other items for the baby, and so they did not get to the hospital until after 8.00 p.m.

63. He recalled that Mr Rajatheepan was not happy about his son being discharged that day and was complaining about it. Whilst at the Hospital, he asked a nurse why Mrs Rajatheepan was being discharged when the Claimant seemed unsettled, but was told that crying by newborn babies was quite normal. He recalled them getting in the car with the baby, having left the Hospital, and described the crying as distressed crying rather than normal crying, and that as a result he and Mr Rajatheepan went back to the ward. He said that he asked to speak to a nurse or a doctor but was only able to speak to a nurse, who wasn't, he said, talking to them politely. He asked her to check up on the Claimant's condition. His impression was that she didn't want to help, and was really rather rude. He would estimate that the conversation lasted 15-20 minutes, during the course of which he asked a lot of questions, before eventually he and Mr Rajatheepan returned to the car and took the family home.

64. I now turn to the Defendant's factual evidence. As I have already indicated, there are a large number of witnesses and, given that the events in question occurred eight and a half years ago, it is perhaps not surprising that none of them had any clear recollection of the events and they all relied on the contemporaneous notes in the Postnatal Case Notes.

65. It is agreed between the parties that the most relevant of those notes are set out in an agreed Chronology of Postnatal records which is annexed to this judgment.

66. Sharon Reece was a student midwife in July 2009 and attended Mrs Rajatheepan and her baby on the afternoon of the 17th July 2009. She had no independent recollection. She said it would have been her practice to ask questions such as whether she had been to the toilet or had a shower and, from her notes, assumed that answers were given. If there had been any difficulty communicating, she said she would have noted it down. At one point in her evidence she said that she could not remember whether she used hand gestures but later in her evidence accepted that that was likely.

67. Molly Millo saw Mrs Rajatheepan once at a antenatal clinic on 11 June 2009. She would not have seen the earlier entries in the records. She noted that her husband was present "as client communication difficulties" which she interpreted as meaning that Mrs Rajatheepan could understand some English but might have needed support. It was her recollection that Mr Rajatheepan did not interpret for her that day. She spoke to Mrs Rajatheepan and she did not say she could not understand. She didn't look blank. For example, when asked how she was feeling, Mrs Rajatheepan answered "good". She did however say that she used hand gestures to assist with

communication. She said that she would not have given any breast-feeding information or demonstrated any breast feeding techniques at that appointment.

68. Wasim Lodhi was a specialist registrar in obstetrics at the Hospital in 2008-9 and was on call on the 16th July 2009 and had reviewed Mrs Rajatheepan and undertook a vaginal examination for which he would have needed Mrs Rajatheepan's consent. He had no independent recollection of the attendance and did not remember whether Mr Rajatheepan would have interpreted for him but conceded that that would have been quite usual.

69. Nissanka Madipola, also known as Dr Gedara, is a consultant obstetrician and gynaecologist at the Hospital who undertook his training in Sri Lanka. Although not fluent in Tamil he was able to hold a conversation with a patient in that language on medical issues. He first saw Mrs Rajatheepan on 26th March 2009 and again on 9th June 2009. She spoke to him in Tamil although his recollection was that she understood some English.

70. On 16th July 2009 he was night duty registrar and he attended and reviewed Mrs Rajatheepan at 2100 hours and spoke to her in a mixture of Tamil and English, as he explained, so that other members of staff would be able to understand what was being said. He also explained that for certain medical concepts there was no Tamil equivalent so that English would be used even in Sri Lanka. He gave examples such as "blood pressure", "caesarean", and "operation". He obtained the consent of Mrs Rajatheepan to undertake the caesarean section, explaining the procedure to her in Tamil. He performed the caesarean section delivering the Claimant at 2256 hours.

71. Deborah Lucas, a midwife, admitted Mrs Rajatheepan for induction of labour on 16th July 2009. She explained that she would have introduced herself before looking at the antenatal notes. She couldn't remember whether Mrs Rajatheepan was accompanied by her husband, but accepted that he probably would have been there. She wouldn't necessarily have looked at the earlier ante natal notes and probably didn't in this case. If there had been problems with communication she would have explored avenues such as use of the language line and confirmed that there was a telephone which could be plugged into the ward line so that three people could communicate at once, and there was a laminated sheet with a number of different telephone numbers, depending on the language required.

72. She frankly admitted that she didn't recall any conversation with Mrs Rajatheepan, but hadn't noted any problems with understanding but conceded that, assuming he was there, Mr Rajatheepan would have been just the other side of a curtain, so would have been able to translate what was said for his wife's benefit.

73. She was well used to dealing with clients with language difficulties, given the clientele at the Hospital, and indicated that she would normally have documented in the notes if the mother did not understand and her husband had translated for her.

74. Maureen Clarke was also a midwife who attended on Mrs Rajatheepan on 16th July. She said that she remembered Mrs Rajatheepan and in fact used to see her husband in her local Tesco.

75. On 16th July she was working a late shift from noon or 1 p.m. until 21:00 hours, and she took over care from Ms Lucas. Again, she couldn't recall Mr Rajatheepan being present but conceded that he might well have been. It was her evidence that she had no problems communicating with Mrs Rajatheepan, who she felt understood her. In her experience, if someone did not understand they would say something to the effect that they didn't understand English to make that clear, but readily accepted in the course of cross-examination, that such communication as she had might well have been with the use of gestures. She also said that if she had used a family member to help with translating, she would have recorded that fact in the notes.

76. Janet Wilkins was also a midwife who attended on Mrs Rajatheepan on 16th July when she was a patient on the labour ward. She had no independent recollection of the relevant events however, but did recall Mrs Rajatheepan asking to go to the toilet and using the word "piss" and suggested that as a result she went to get a bedpan for her. However, in cross-examination she accepted that it was more likely that Mrs Rajatheepan went to the toilet rather than being provided with a bedpan but she couldn't remember but nevertheless maintained her recollection that Mrs Rajatheepan used the word "piss".

77. She was present when the Registrar, Dr Gedara, obtained Mrs Rajatheepan's consent for a caesarean and confirmed that Dr Gedara spoke to Mrs Rajatheepan in a mixture of Tamil and English. She couldn't remember Mr Rajatheepan being present but did recall a woman friend of Mrs Rajatheepan being present.

78. Midwife Lai Yeen Thum had no independent recollection of events and therefore her evidence was based solely on her review of the relevant notes. It was unlikely that she would have looked at the antenatal records. She very candidly conceded in cross-examination that it was likely she would have used hand gestures to assist in communicating with Mrs Rajatheepan and that it was quite possible that midwives would have fed the Claimant until lunchtime on 17th July. Whilst there was no record of a discussion between Mrs Rajatheepan and any midwife about breastfeeding whilst Mrs Rajatheepan was in the recovery room, the content may well have been communicated orally to midwives on the ward.

79. She recorded Mrs Rajatheepan as breastfeeding the baby very well at 14:33 hours. She said that she was sure she would have seen the baby breastfeeding, otherwise she would not have written that note, but did concede that Mrs Rajatheepan might well not have noticed her observing her and the baby feeding as she walked around the ward. The note was based on her observation of the mother rather than any discussion she might have had with the mother about how to breastfeed. However, she was confident that she would have seen the baby on the breast, sucking well, for her to have written that note. She recalled that the ward was very busy. There were about 26 beds in total and she and midwife Humphrey were allocated to Mrs Rajatheepan.

80. Amanda Madigan, a a registered community midwife, attended at the Rajatheepans' home at 12:40 hours on 19th July to discover the Claimant lying on a bed with Mrs Rajatheepan nearby. She immediately noticed that the baby was pale and lethargic and asked Mrs Rajatheepan how she was feeding the baby and was told that she was breastfeeding. She tried to put the baby to Mrs Rajatheepan's breast but the baby was not interested in feeding. She asked when the baby had last fed and realised that Mrs Rajatheepan had very limited English, but was able to ascertain that the baby had not

been feeding since 9.00 p.m. the previous evening, and that there was no bottled milk on the premises. She called for an ambulance because she was concerned that the Claimant was dehydrated and asked Mrs Rajatheepan to telephone her husband so that she could speak to him and advise him that his wife and baby were going to be transferred to hospital straight away, but he was not contactable.

81. Paula Theobalds was in her final year of a three-year training course to become a midwife and on 4th August 2009 she was working on Japonica ward at the Hospital and saw Mrs Rajatheepan to conduct a regular postnatal check-up at a time when she was visiting the Claimant in hospital. Mrs Rajatheepan was alone. It was her evidence that she felt that Mrs Rajatheepan's command of English was sufficient to enable her to undertake postnatal checks albeit with the use of hand gestures, but insufficient for her to understand what would have to be communicated to her on a discharge, which was much more in-depth and covered various matters such as contraception, which she did not feel could be adequately communicated by hand gestures. In her note she recorded that Mrs Rajatheepan understood a little English, rather than no English.

82. Noeline Boudville, a woman's health physiotherapist, attended Mrs Rajatheepan on the morning of the 17th July for what would have been a purely routine appointment after a caesarean section to encourage mobility and in her notes she recorded that Mrs Rajatheepan did not understand English and then crossed that out and changed it to "*limited understanding of English language;*" her explanation in her witness statement being that it probably became apparent to her that she did understand some basic English during the course of her appointment. However, in her oral evidence, she conceded that she had no actual recollection of the events, still less of the sorts of words which Mrs Rajatheepan was able to use. She confirmed that she used verbal and non-verbal means of communication and said that if she had considered that Mrs Rajatheepan was unable to understand, she would have noted that she was unable to treat the patient. Because she did not note that conclusion she must have considered that Mrs Rajatheepan's command of English was sufficient to enable her to be treated. She noted having handed a leaflet to Mrs Rajatheepan so that she believed that she must have considered that she was able to understand basic terms.

83. Victoria Wallen is the head of patient experience at the Hospital, a role that she has undertaken since 2011. As such, she oversees the Patient Advice Liaison Services (PALS), which is responsible for translation services available at the Hospital.

84. She explained that leaflets, pamphlets and guidance were not kept as standard in languages other than English but if required, a particular document could be translated into a particular language within 48 hours. She also explained that staff were able to communicate with patients via a language line, which involved staff plugging into the language line phone, dialling the hospital code and then dialling the relevant code for the required language. Such a phone was available on every ward and would enable a three way conversation between staff, patient and interpreter.

85. She also explained that reliance on family members was not the policy of the Hospital but nevertheless it was common then and indeed now for staff to ask a patient's relative to assist in translating where it was felt that the relative spoke English to a good enough standard. She conceded that the Hospital's Policy on translation and

interpreting at the material time was poorly drafted and had subsequently been replaced at her behest.

86. Ethel Baddoo was a midwife who attended Mrs Rajatheepan whilst she was on Japonica ward, initially in the early hours of 17th July. She too had no independent recollection of the events in question and prepared her witness statement by reference to the relevant records. She couldn't recall whether Mr Rajatheepan was present when she was with his wife. She did not note him as being present but conceded that she would not necessarily have done so. She noted the baby was "…*very unsettled, breast feeding* +++" at 06.50 hours on the 18th July which she described as meaning that the Claimant needed more milk which was not unusual in the case of a birth by caesarean section so she would have asked the mother to put the baby back to her breast and after that she saw the baby sucking very well. Her usual practice was to stand and watch what the mother was doing and if the baby latched on well she would not necessarily say anything to the mother or she might just say something to the effect of well done. At 07.15 hours she noted having cup fed the Claimant.

87. So far as communication with Mrs Rajatheepan was concerned, she felt that she was able to communicate effectively and in her witness statement she indicated that if she had felt that Mrs Rajatheepan did not understand she would either have fetched someone to assist with translation or called the labour ward to see what, if any, communication issues they had had. She did neither. In her oral evidence she said that whilst she had no specific recollection, had there been any difficulty with communication, she would have used hand gestures to assist. So, for example, if she wanted Mrs Rajatheepan to drink more water, she would have put water in a glass and made a hand gesture of taking the glass to her mouth.

88. So far as final discharge at 21:50 hours on the 18th July was concerned, she had no recollection of whether anyone, husband or friend, was present but conceded that Mr Rajatheepan may well have been. She said that it would have been a very busy time on the ward following a shift hand over, with the need to check patients, administer drugs and the like. There are about 26 beds on the ward and two midwives on duty together with a support worker. If Mr Rajatheepan had asked for his wife and baby to be able to stay an extra night, she would first of all have checked to see whether there was a spare bed in order to see whether that was possible and if there was a request to see a doctor, she said she would have gone to get a doctor and she would have reassessed the baby. She also explained that in her experience it was entirely normal for new born babies to cry a lot. Finally she said that she wouldn't have allowed mother and baby to leave at 21:30 if she had considered the baby was not feeding well. She would also have documented in the notes if Mr. Rajatheepan had returned to the ward after discharge.

89. Midwife Oriakhi conducted the formal discharge discussion with Mrs Rajatheepan at 13:30 on the 18th July. She had no independent recollection of the discussion but indicated that if the baby had been crying as Mrs Rajatheepan had said he was and she had been concerned by that, she would have referred to it in the notes which she made. She was unable to say whether she would have looked back at the antenatal records. She was satisfied that she was able to communicate with Mrs Rajatheepan and that she would have been able to communicate with her. By way of example she said that she noted that she was informed by Mrs Rajatheepan that her husband would be picking her up after 19.00 hours. The discharge conversation would have taken

about 20 minutes or so and the communication would have been a combination of verbal and non-verbal, that is to say she would have included gestures as part of the process. She would have handed to Mrs Rajatheepan a folder containing a large number of documents all in English, some of which she conceded involved complicated concepts. She said she would have gone through key sections of the documents with Mrs Rajatheepan. It was her evidence that she would adapt her language to the level of understanding that she felt Mrs Rajatheepan had and used a series of hand gestures to get her message across.

Discussion and Conclusions

90. As I have previously identified, at the heart of this case is the extent of Mrs Rajatheepan's understanding or rather lack of understanding of English and her ability or lack of it to communicate effectively with the Defendant's midwives.

91. What is said on behalf of the Defendant is that, contrary to the evidence of Mr and Mrs Rajatheepan and their friends Mr Gunaratnam, Mr Ragavan and Mr Balasingham, on the whole there was a sufficient level of understanding to establish, for example, that the Claimant had been feeding well. All the midwives who had involvement with Mrs Rajatheepan post-natally independently formed the view that she understood what they were trying to communicate to her, albeit with the assistance of sign language and the like. Moreover communication is of fundamental importance to midwives and it is said that they are likely to have realised if she was unable to understand what was being said to her.

92. In this regard, it was also submitted that it was significant that, at no stage, whether in the presence of Mr Rajatheepan or otherwise, did Mrs Rajatheepan ever indicate in terms that she was unable to understand information being given to her. Her explanation in cross-examination was that this resulted from an inability to communicate that inability to understand. I have to say that at first blush I did find that explanation somewhat surprising but, on reflection, given her young age and lack of experience, the comparatively short time she had been in this country, the stressful situation in which she found herself and the fact that she had been used to being accompanied by her husband or one of his friends and all the surrounding circumstances it is not in fact so surprising.

93. What is surprising, however, is the fact that none of the attending midwives in the period 16th to 18th July apparently had any concerns as to Mrs Rajatheepan's understanding of English. This is in stark contrast to the various entries which appear in the ante natal records, the neo natal records, the note recorded by Noeline Boudville and the letter of Doctor Ahmed, consultant paediatrician dated 22nd December 2009, which included the following material passages:

> *"I reviewed Nilujan in the presence of my colleague Dr Baia Thyagarajon, specialist registrar in paediatrics, who helped me to talk to the parents as there was some difficulty in speaking with them in English…*
>
> *In view of the fact that the parents have a problem with communication and the mother cannot speak English, I thought the best thing would be to keep him at this dose, but I arranged*

> *to review him in the clinic soon if the seizure remains or the parents have any concerns*"

94. As it seems to me, the overwhelming weight of the evidence is that Mrs Rajatheepan had very little ability with the English language and was certainly unable to understand anything but the simplest of instructions and only then when accompanied with appropriate hand gestures. Her own evidence was to that effect and I accept the substance of that evidence supported as it is by that of her husband and his friends and her general practitioner Dr. Niranjan.

95. Of particular significance in this regard was the evidence of Midwife Theobalds who, although she felt that Mrs Rajatheepan was ready to be discharged on the 4th of August 2009, was not prepared to go through that process due to her level of understanding of English. Instead she requested that Mrs Rajatheepan be accompanied by her husband later in the week, the initial assessment by ante natal staff recommending the use of an interpreter, the evidence of Mr Gedara and indeed of community midwife Madigan. Moreover, in the course of their oral evidence each of the midwives, in marked contrast to their strong assertions in their witness statements that there were no difficulties with communication, to a greater or lesser extent, accepted in effect that there was a language barrier, albeit that they each thought, mistakenly, that they had succeeded in surmounting it with the use of hand gestures, sign language and the like.

96. I turn now to a consideration of whether, in all the circumstances, the decision to discharge was negligent. The midwifery experts are agreed that the midwifery records provide evidence that during the post-natal period, the Claimant was feeding well and feeding a lot and that there was no evidence of any abnormal signs demonstrated by the Claimant prior to discharge and that if those notes are accepted as the more reliable evidence, then it was reasonable to discharge.

97. It is fair to record that there are a number of references to the Claimant feeding well on the 17th and 18th of July, with feeding having been observed by both Midwife Thom and Midwife Baddoo and I accept that those records accurately reflect what their authors believed they observed in that regard.

98. Counsel for the Defendant submits that the events in question occurred eight and a half years ago and that in those circumstances none of the witnesses can have any clear recollection of events and that the contemporaneous records are the only reliable source for the facts. He points to the development over time of the Claimant's case, as I have previously described it, as an example of where a witness's recollection has been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others.

99. I do not accept that submission in this case. So far as the development of the Claimant's case over time is concerned, as it seems to me, it is not surprising that in the early stages Mr and Mrs Rajatheepan and those advising the Claimant should have focussed on the admitted delay in the carrying out of the caesarean section as being the most likely cause of the injuries sustained by the Claimant and directed their correspondence accordingly. That does not mean that the later identification by the relevant experts of the cause of the injuries being poor feeding has led in some way to Mr and Mrs Rajatheepan putting forward, albeit in good faith, a narrative which is

materially different to that which in fact took place. Rather, in my judgment, it has merely led them to recall those aspects of the history which are relevant to the changed perceived cause of the injuries.

100. I must say that I found both Mr and Mrs Rajatheepan to be witnesses of truth doing their best to assist the Court with their best recollection of events albeit that they took place several years ago. Where they did not remember, they were prepared to say so and if, at times, they were confused as to the sequence of events, that is not at all surprising given the passage of time. Equally, however, it is no surprise, still less is it a source of suspicion, if they remembered things more vividly that the midwives on duty at the material time. Mrs Rajatheepan's evidence was very clear on the key issues and she was adamant that she did not receive any instruction on how to feed and in fact, it is plain that there was no such instruction antenatally and on analysis, the oral evidence of the midwives tended to support that evidence of Mrs. Rajatheepan with the notes as to feeding being based on observation and the evidence suggested that if satisfactory feeding was observed there was no need to mention it. The sad reality is that Mrs Rajatheepan did not, in fact, ever get any instruction on how to feed properly, still less did she receive any instruction on what to look out for and what to do if feeding was unsuccessful.

101. Mrs Rajatheepan also gave very clear evidence of changes in the Claimant's condition starting on the morning of the 18th July and continuing throughout the day, with him crying continuously. Her attempts to draw attention to her concern in this regard were effectively ignored. Again there is some limited support for Mrs Rajatheepan's account in the records in that Midwife Baddoo recorded the Claimant as being unsettled at 06.50 hours on 18th July. Thereafter there are no entries relating to feeding prior to the discharge at 21:50 hours. I accept the substance of Mrs Rajatheepan's evidence on this issue.

102. To my mind, the changes in the Claimant's condition described by Mrs Rajatheepan were such as to require investigation. Both midwifery experts were agreed that if, as Mrs Rajatheepan described, she went to the midwives station and/ or pressed the bell to call for attention, she should have been seen and her concerns addressed. They were not, perhaps because of a combination her very young age and inexperience, her lack of confidence, her inability to express herself, coupled with her propensity simply to smile at people when she caught their eye and the fact that the ward was busy.

103. I turn now to the discharge conversation if I can so describe it. Given my findings on the limited extent to which Mrs Rajatheepan understood English, I have no hesitation in concluding that she did not and could not reasonably be expected to have understood the substance of the information which Midwife Oriakhi indicated in the course of her evidence that she had communicated, she felt effectively, to Mrs Rajatheepan as a result of a combination of the language she used and hand gestures. I entirely reject her evidence on this issue which is inconsistent with many of the entries in the records and frankly it beggars belief that she maintained her ability to convey effectively a substantial amount of often complicated information in the course of the twenty minute discussion which she said she had with Mrs Rajatheepan. To my mind, she should have done what Midwife Theobalds did on 4th August and declined to conduct a discharge conversation without, at the very least, the presence

of Mr Rajatheepan or, more appropriately, the use of the language line or of an interpreter.

104. What then of the evidence of Mr Rajatheepan and Kevin Gunaratnam that the parent's concerns were raised through Mr Gunaratnam. For my part I have no hesitation in accepting the substance of the Claimant's parents' evidence that they had initially understood that Mrs Rajatheepan and the Claimant would remain in the Hospital until 20th July and that Mr Rajatheepan did indeed ask whether his wife and son could remain in the Hospital until Monday in a telephone conversation with a member of staff on 18th July, albeit that at that stage, the request was prompted by the knowledge that he would be working on the 19th July rather than any concern about the welfare of the Claimant .

105. I also accept the thrust of the evidence of Mr Gunaratnam and conclude on the balance of probabilities that when they came to collect Mrs Rajatheepan and the Claimant on the evening of 18th July, attempts were made to persuade staff to review the Claimant and to keep mother and son in overnight as a result of concern as to the extent to which the Claimant had been crying. Such a request should have been noted but wasn't.

106. The fact of the matter is that the ward was very busy that day and Mrs Rajatheepan's attempts, albeit timid, consisting as they did in the main of approaching the midwives' station, to draw attention to her concerns about the Claimant, had been ignored. The discharge interview had been conducted several hours before physical discharge and plainly in my judgment the interview should not have taken place in the absence of her husband, a friend who spoke English to an acceptable standard, or the assistance of the language line or an interpreter and the midwives on duty at the time of actual discharge had their hands full dealing with a variety of matters as a result of a change of shift and did not give the concerns which were being raised the attention and consideration they deserved, perhaps because they believed that the Claimant had been feeding well and that the crying reported was nothing unusual. The midwifery experts are agreed that this concern should have led to a further review.

107. What is more, by repeating the mantra that it was perfectly normal for new born babies to cry without investigating the concerns raised, what was, in fact, false reassurance was given to the parents so that it is not surprising that they did not telephone the Hospital between discharge and the visit by the community midwife the next day to repeat concerns already raised and ostensibly allayed.

108. The reality is that no one had ever in fact given Mrs Rajatheepan a clear and understandable explanation of the importance of feeding still less as to how she should respond if she had concerns. Because of the language barrier, Mrs Rajatheepan had been unable to communicate her concerns to hospital staff and when those concerns were communicated on the parent's behalf by Mr Gunaratnam they were not acted upon. Given the time at which this review should have taken place, on the balance of probabilities, I conclude that if it had taken place as it should have done the Claimant and his mother would have been kept in hospital overnight and the difficulties with feeding would have become apparent and the injuries in fact suffered would have been avoided.

Disposal

109. In the circumstances I would enter judgment in favour of the Claimant with damages to be assessed.

110. I trust that the parties will be able to agree the form of an order to reflect the substance of this judgment.

111. Finally, I would like to take this opportunity to thank both counsel for their very great assistance in this case.

Annex 1

AGREED CHRONOLOGY OF POSTNATAL RECORDS

Date / Time	Entry / author	Page ref (Core Bundle)
16/7/2009		
22:56	NILUJAN DELIVERED BY CASESAREAN SECTION	
23:30	Client transferred from theatre to recovery room. Cardiovascularly stable IV Hartmans (1 L) and IV Hartmans + syntocinon 40 units running. Wound site clean and dry with mepore dressing. Foley catheter in situ draining urine freely Lochia minimal. TEDS stockings both legs. BP monitoring every 15 mins see observation chart	[49]
23:45	BP 122/80 Reg(istrar) called to review as diastolic was low. IV fluid rate increased pressure dressing applied to wound as site was oozing	[49]
17/7/2009		
00:00	BP 130/71 and remains stable. Baby bottle fed with C&G (formula feed) and took 20 mls and settled although mum intends to breast feed later	[49]
01:30	BP 130/71 pulse 84. Temp 36º. Client remains cardiovascularly stable. Catheter remains in situ. Client can move legs slightly but still heavy. Baby asleep. Both mother and baby transferred to Japonica Ward.	[49]
	JAPONICA WARD	
02:00	Transferred from (Labour Ward) following (emergency caesarean) for failing to progress, on (illeg) patient fully awake, IV Hartman's in progress catheter draining clear urine about 180 mls in bag. Wound got pressure dressing lochia minimal, TED stockings in place, baby boy, well prefused, feels warm sleeping in cot. Mum obs done T37 º pulse 93 BP 104/55, reassured MIDWIFE BADDOO	[50]
[UNTIMED]	Observation of mother and baby from chart	Tab 2 [33-34]
02:30	IV hartman 1L put up as a new bag. MIDWIFE BADDOO	[50]
06:05	T 36º P(ulse) 88, B/P 103/52 catheter draining well MIDWIFE BADDOO	[50]

06:25	New bag of 1L Hartman put up MIDWIFE BADDOO	[50]
07:15	Patient having a wash now baby cup fed by me very mucussy no (meconium) or (passed urine) 950 mls emptied from bag MIDWIFE BADDOO	[50]
08:55	Observation of mother and baby from chart, records all observations including that baby bottle feeding, had passed urine, stools. STUDENT MIDWIFE HUMPHREY	End tab 2 [33-34]
09:00	Ward Round Miss Sajjad Day: 2 FM o/s for fetal distress Feeling well (complaining of) abdominal pain eating & drinking obs stable Plan: 1. Analgesia 2. Bloods – FBC today 3. clexane 4. eat & drink 5. catheter out once mobilising	[50]
Untimed but 11 hours after birth likely around 09:00	Nilujan examination by doctor Confirms: Feeding well Passed urine Passed meconium [*whole note not transcribed, refers to right dysmorphic ear referral*]	[end tab 1, page numbered 84]
09:00	Introduction made, on arrival client is in bed recovering from (caesarean section). IV infusing, catheter in situ. Mother and baby obs carried out all satisfactory. CARE PLAN to follow doctors advice on previous page. Mother at the moment ~~would~~ is bottle feeding but would like to breastfeeding when mobile MIDWIFE HUMPHREY	[51]
10:49	Physiotherapy Patient verbally consented to (treatment) Reports that she ~~does not understand~~ limited understanding of English language. [Observation]: patient sitting up in bed; teds on; (intravenous drip) + (indwelling urinary catheter) in situ. [Treatment]:	[51]

	1. Transferred patient out into chair. 2. Taught patient foot, ankle and knee flex and advised patient to increase mobility 3. Provided patient with (post natal) exercise leaflet (? partner to assist) to discharge from physio NOELINE BOUDVILLE	
14:33	IV infusion removed, still not mobilised. Eating and drinking, breastfeeding baby very well STUDENT MIDWIFE REECE	[51]
16:50	Foleys catheter removed, baby to have OPD referral for rt dysmorphic ear. MIDWIFE LAI THUM	[51]
18:00	Passed 100 mls urine. Advised to increased fluid intake. Baby breast feeds well. MIDWIFE LAI THUM	[51]
21:55	T36º (pulse) 109 bp 108/69, has not pass any more urine since 17:30, baby last fed 19:30 hrs, sleeping at present, patient encourage to drink +++ Co-dydromol 1 gm & ferrous sulphate 200 orally given MIDWIFE BADDOO	[52]
18/7/2009		
02:30	Mum up breastfeeding MIDWIFE BADDOO	[52]
06:50	Mum up breast feeding baby T36º (pulse) 86 bp 114/75, mum still not as yet passing good volumes of urine last one pass 2nd from removal of catheter was 02:35 hrs. Baby very unsettled breast feeding +++ [bowels open 'tick', passed urine 'tick'] MIDWIFE BADDOO	[52]
08:30	Day 3 Introduced self O. Oriakhi, clients history noted – medications administered - mother: clinically stable, vital signs satisfactory BP 110/71, (pulse) 99 bpm Temp 36.4ºC. Lochia normal. Uterus contracted (below umbilical) - pressure dressing and mepore removed. No oozing or signs of infection sutures intact (prolene) - Legs (no abnormality detected) – pain relief relatively unclear control, mobilising without problems - Hb 11.6 g/dl	[52-3]

	Baby: Male infant, alert active well perfused with good tone - mother confirms baby has passed urine and meconium - baby discharged 17/7/2009 - mother coping well with babys needs. MIDWIFE ORIAKHI	
11:30	Observation of mother and baby from charts, records: *Mother:* Temperature 36.4º Pulse 99 BP 110/71 Breast nipples: filling Lochia: min Micturation: [tick] Bowels: not opened Perinium: i[ntact] Abdominal wound: proline sutures Hb: 11.6 Emotional state: good Sleep: good *Baby:* Temperature: (illeg) Muscle tone: good Activity: awake Colour: well perfused Skin: clear Eyes: clear Mouth: clear Cord: on Urine: [tick] Stools: [tick] Feeding: mix MIDWIFE ORIAKHI	End tab 2 [33-34]
13:30	- Discharge literature dispensed and explained - Page 12 explained - TTA's dispensed Plan home - informed by client that husband will be picking her after 19:00 MIDWIFE ORIAKHI	[53]
14:00	Medication administered as prescribed MIDWIFE ORIAKHI	[53]

21:50	Mother & baby discharge home in satisfactory condition MIDWIFE BADDOO	[53]
19/7/2009	[*NB: ERROR IN NOTES – WRONGLY REFERS TO 18/7/2009 CORRECTED HERE*]	[53]
12:40	Baby seen on entering house lethargic pale mum says she is breast feeding baby <u>but</u> baby has not fed since 21:00 last night – over 15 ½ hours ago – baby at mums breast but not at all interested no formula milk in house, baby appears dehydrated, mother does not speak that much English – and I have asked her to phone her husband so that I can speak to him; mothers wound moist - advised clean air, beads (stitches) in situ FATHER NOT CONTACTABLE SO TAKE BABY STRAIGHT TO HOSPITAL SO CALLED AMBULANCE TO TRANSFER BABY TO A&E ASAP COMMUNITY MIDWIFE MADIGAN	[53-54]