Neutral Citation Number: [2020] EWHC 994 (QB)

Case No: QB-2004-000001/HQ04X04213

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2020

Before :

MRS JUSTICE FOSTER DBE

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Between :

HARRY ROBERTS **(A minor and a protected party, by his mother and litigation friend, Mrs Lauren Roberts)**	**Claimant**
- and –	
(1) SOLDIERS, SAILORS, AIRMEN AND FAMILIES ASSOCIATION **(2) MINISTRY OF DEFENCE**	**Defendant**
-and-	
ALLEGEMEINES KRANKENHAUS VIERSEN GMBH	**Part 20 Defendant**

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Derek Sweeting QC (instructed by **Simpson Millar Solicitors**) for the **Claimant**
Charles Hollander QC & Niazi Fetto (instructed by **GLD**) for the **Defendants**

Hearing dates: 25 November 2019 – 28 November 2019

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 24th April 2020 at 2pm.

MRS JUSTICE FOSTER :

INTRODUCTION

1. Harry Roberts was born on 14 June 2000 in the Allegemeines Krankenhaus in Viersen, North-Rhine Westphalia, Germany ("the AKV Hospital"), a hospital providing medical services to families and members of UK Armed Forces in which his father was at the time a serving member. It is alleged that at the time of his birth, Harry suffered an acute profound hypoxic brain injury, accordingly, although aged 20, he is a protected party as a result of the injuries suffered at his birth.

2. He has had level 5 Cerebral Palsy and is 100% dependent on the care of others. Has bilateral dystonic athetoid cerebral palsy. He has no independent mobility; relying upon a wheelchair. His fine finger movement is limited and he is doubly incontinent. He is able to vocalise but cannot speak and suffers from some sensorineural deafness. At the special school that he attends he has full support. He feeds primarily through a gastrostomy tube and has required surgery in respect of orthopaedic issues to do with his hips and further surgery in respect of his spine is anticipated.

3. Harry's case (which I describe here variously as his case or, his mother's case, not intending any distinction) is that the negligent failings of Midwife Clelland who attended his mother's labour in the latter stages and who is employed by the first defendant, caused his injuries. The central allegation is that she ought to have sought the assistance of hospital doctors at a much earlier point and that such action is likely to have hastened his delivery and allowed his birth without the injuries from which he now suffers. The claimant says that the first and/or second defendant is vicariously liable for the midwife's acts or omissions.

4. Proceedings were issued in the High Court in London on 31 December 2004 and have been subject to a number of stays and orders since that date. The claimant brought proceedings against the first defendant Soldiers and Sailors, Airmen and Families Association – Forces Help ("SSAFA") and the Ministry of Defence ("MoD") on the basis of the first defendant's vicarious liability for the negligence of the midwife. They did not sue the German hospital.

5. A joint defence was filed on 17 February 2016 on behalf of the first and second defendants. The second defendant, who in fact indemnifies them, argues that liability is that of the first defendant. The defendants commenced Part 20 proceedings against the third party, the body responsible for the AKV Hospital where Harry was born.

6. Whilst the first defendant admits that Midwife Clelland was its employee, it denies that it was vicariously liable for any failings on her part saying she was working under the control and instruction of the AKV Hospital, who were the sole providers of medical obstetric expertise through its medical practitioners. It is denied that the defendants are liable for any negligent acts or omissions that may be proved against Midwife Clelland at trial, but, in any event, it is the failure of the hospital clinicians to note and react appropriately to visible decelerations which they say occurred both in the course of early antenatal treatment and in the course of Dr Baysal's examination of Harry's mother between O240 and 0250 on 13 June 2000. They say it was not a culpable failure not to call the doctor as alleged, and even were it a failure, the doctor would have done nothing different from what she did do in any event.

7. SSAFA and the MoD say in a nutshell:

   a. that if there was any negligent action or omission then it was wholly on the part of the German obstetricians who are employed by and/or working at the AKV Hospital; that is to say no negligence by Midwife Clelland is accepted by the first or second defendant, however,

   b. if she was negligent, the AKV Hospital is vicariously liable for that negligence in German law which applies to the case and

   c. if and to the extent that Midwife Clelland was negligent, then so also were the doctors from the AKV Hospital.

8. Twice before, the court has decided preliminary issues arising out of Harry Roberts' claim concerning contribution and the third party proceedings.

THE ISSUES

9. The questions of private international law arising in this trial of preliminary issues will give answers which are relevant to limitation of action against the claimant upon which the defendants wish to rely.

10. This judgment is in respect of two preliminary issues ordered to be heard by Master Yoxall on 31 July 2018 arising in the clinical negligence action in respect of Harry Roberts. These issues arise between the claimant and the defendants.

11. They were described as follows:

   a. **the applicable law of the claimant's claim** against the defendants;

   b. **whether the claim is time-barred and/or whether the defendants are prohibited from reliance on it** by any applicable limitation provision and, if pursued, whether the defendants are estopped from relying on, or have waived any entitlement to rely on, any applicable limitation defence.

12. The effect upon the claim made by Harry Roberts of the answers to these questions is considerable.

13. If, in answer to the first question **(a)**, English law applies, then the claimant, being under a disability from birth, will not be statute barred. However, if German law applies then, **(b)** a number of sub-issues arise:

      i. **German limitation- is it to be disapplied?** If the applicable law of the claim is German law, whilst it is clear the substantive negligence and quantum issues in the claim will be covered by German law questions then arise under the Foreign Limitation Periods Act 1984 ("FLPA") as to whether or not the German law of limitation should also apply: the claimant's case is that it falls to be disapplied because it is contrary to public policy either generally or, because it causes undue hardship in all

the circumstances including not recognising the disability of the claimant as does English law and not abrogating the limitation period of 3 years.

ii. **German limitation – date of accrual of cause of action?** If the German law of limitation does apply then there is a dispute as to the effect of that law upon the facts of this case: the defendants say that the claimant's cause of action had accrued and limitation had expired by December 2004 when the claim was issued.

iii. **German limitation – is the period inhibited or suspended?** If the defendants are correct that under German law Harry Roberts is prima facie time-barred, it is accepted that that limitation period may be "inhibited", or maybe "suspended" by certain factors such as an assertion of legal rights or as a result of negotiations. The claimants rely on features of the negotiations between Harry Roberts mother and the Army Legal Service and a reference of the case to the Nordheim Experts Commission by the second defendant.

iv. **Estoppel/waiver?** Further, the claimant's assert that a letter from the Army Legal Assistance in April 2003 operates as a form of estoppel in German law prohibiting reliance on the German limitation period

SUMMARY OF CONCLUSIONS

14. Given the length of this judgment, and the necessity for a certain amount of detail it appears to me most practical that I give here, in brief the answers to the questions that have arisen. I use with gratitude the framework of issues provided by the claimant's counsel.

15. Thus:

a. Although Germany is the place where the tort took place under section 11 of PILA, is it substantially more appropriate to apply English law to the claim pursuant to section 12 of The Private International Law (Miscellaneous Provisions) Act 1995 ("PILA" or "the 1995 Act")? Answer: No. German Law is applicable

b. If German law is the applicable law:

i. Did the claimant have sufficient knowledge to start the limitation period running prior to 31 December 2001? Answer: No, the claimant was fixed with sufficient knowledge according to German law for limitation to begin to run in respect of a claim against Midwife Clelland in June 2003 when Dr Baysal's letter and chronology were sent to the ALA and sent to Mrs Roberts.

ii. Was the running of the German limitation period suspended by reason of the reference to the Experts Commission? Answer: No

iii. Was the running of the German limitation period suspended by reason of negotiations between the parties? Answer: No

iv. Was the running of the German limitation period suspended by reason of the claimant's assertion of his legal rights? Answer: No

v. Are the defendants estopped from contending that the limitation period had expired before proceedings were issued? Answer: No

vi. Would the application of the German limitation period be contrary to public policy pursuant to section 2 of the FLPA? Answer: Yes, it would impose undue hardship upon the claimant under section 12 (2) (if I am wrong about the answers to certain of the questions above and that under German law, the claimant is time-barred).

16. Accordingly, German law is the appropriate law of this case, and the claimants are not out of time to bring it under German law.

BACKGROUND FACTS

17. Harry's mother had served in the Royal Signals from 1984 to 1994 and she met her husband whilst they were both serving in that regiment in Northern Ireland. Mr Roberts was so serving in Germany, at the time of Harry's birth in June 2000. They lived in military quarters at a military establishment under Crown Jurisdiction. After Harry's birth, after the purchase and the special adaptation of a bungalow in St Helens in the UK in the summer of 2003, the family moved back from the UK to Germany, where they have lived since that time.

18. The first defendant, the Soldiers, Sailors, Airman and Families Association – Forces Help ("SSAFA") is a long established Armed Forces charity with a number of functions one of which is support for health and social care services. Their role is best understood in the context of the history of provision of medical care to servicemen and women in Germany. I take the main points of this description from the judgment of the Court of Appeal in *A (A Child) v Ministry of Defence [2005] QB 183 (2004)*. That was a case in which it was argued unsuccessfully on behalf of a serviceman's child, (brain damaged at birth by a German obstetrician's negligence), that there was a non-delegable duty of care upon the MoD.

19. I emphasise again, that I am not here making conclusions on contentious medical matters going to the allegations of medical negligence in this case. I find the following as facts relevant to the discrete issues before me. They derive both from the written statements of Mr and Mrs Roberts and from the oral evidence they gave before me.

The Provision of Medical Care in Germany to Service Families

20. The British military hospitals in Germany were originally set up to provide routine secondary care for British forces of occupation after the Second World War. More specialised hospital care was provided by referral back to military hospitals in England.

Primary health care was provided in Germany by medical reception centres on base, staffed by military general practitioners and civilian health professionals employed by the MoD, for whose negligence the MoD was vicariously liable.

21. Over time the circumstances that justified the system of British military hospitals in Germany changed. By 1994 or 1995 there were only two still in existence. It became the Government's policy to improve the facilities that existed and the view was formed that the British Forces Germany Health Service was too small to provide a high-quality, peacetime medical service. In the 1990s a market-testing process began and a series of bids invited to provide and arrange the medical service.

22. Until 1996 secondary medical care was provided in Germany by British military hospitals staffed by Army Royal Air Force doctors and nurses and midwives or civilian health professionals employed by the MoD for whose negligence the MoD was vicariously liable. Primary healthcare at this time was provided in Germany by medical reception centres on base, staffed by military general practitioners and civilian general practitioners employed by the MoD. Community care was provided by nurses and midwives provided by the SSAFA, mostly funded by the MoD.

23. The provision of care was thereafter organised in the following way.

24. An umbrella organisation, with no legal personality called the Health Alliance ("THA") was selected after a tendering process as offering the best package for British Forces in Germany. It consisted of an in-house MoD entity called Defence Medical Services, which was to provide primary healthcare services, and SSAFA which was to provide community services including midwifery services under contract to the MoD; Guy's and St Thomas's Hospital NHS Trust ("GSST") was to procure secondary healthcare which was provided by certain Designated German Providers ("DSGs").

25. Since this THA had no legal personality, (it is described as being designed to achieve seamless care through its three component bodies), the MoD accordingly entered into the two main contracts. The first of these contracts was with SSAFA for the provision of general and community nursing, and the second with GSST for procuring all non-emergency secondary healthcare at five DSGs – one of which is the Viersen Hospital.

26. The MoD closed its own hospitals in Germany and did not itself arrange directly for the provision of secondary healthcare by German hospitals, this was done by GSST. GSST was accountable to THA for the delivery of all the required medical services. With regard to obstetric care it had to ensure provision of a comprehensive service within the DSGs although it did not manage them. GSST entered into a contract with AKV under which it was obliged to provide clinical service, including obstetrics, to British service staff and their dependents.

27. The 1996 Service Level Agreement between SSAFA and the MoD obliged them to provide general and community care and midwifery services. The terms of the Service Level Agreement indicate that English qualifications and regulatory requirements were to be fulfilled, for example:

> "61 (a) "SSAFA is to employ for THA community midwives able to provide intrapartum care in hospital"

> "(b) "SSAFA is to provide for THA midwives able to undertake deliveries who must be up-to-date and competent to work in community and hospital settings"
>
> "63 "The THA Community Midwifery Service will ensure that, firstly, midwives' records comply with Rule 42 of the Midwives' Rules UKCC, the format of the records meets the UK supervising authority approved standard (even though UK/NHS authority has no jurisdiction in BFG [British Forces, Germany)"
>
> "113. The standard of care, developments or enhancements, must at least conform to current and future practice within the National Health Service, and the standards laid down by the Surgeon General all the Directors General of the Army…"
>
> "114. All clinical and management practice is to be in-line with best UK practice and with due note taken of the Royal Colleges and Professional Body guidelines."

28. The contract provided that all work was to be performed in accordance with the Statement of Requirements and other stipulations specified in the contract. The service required was to be consistent with British health standards, cultural expectations and the provisions of the British NHS patients' charter, and to be delivered in the English language.

29. The conditions under which midwives were required to work in the community were equivalent standards to the British NHS and those required by the Royal College of Midwives.

30. There was useful information in the witness statement of Paul Branscombe, Deputy Controller of a SSAFA and Managing Director of SSAFA's Family Health Services between January 1997 and December 2011. He there explained that in 1996 the MoD had entered into an agreement with GSST to take charge of secondary medical care for British forces and their families in Germany. Contracts between the GSST and the DGPs including the AKV Hospital obliged the hospitals to provide secondary medical care including maternity services and treatment to British forces and their families.

31. It appears from the evidence both of Mr Branscombe, and the two midwives, all of whom also gave evidence orally, that there was a requirement for some facility in German language, and a week's induction course was afforded, but otherwise no specific German training for the British midwives serving in the German hospitals was provided.

32. Mr Branscombe said it was implicit that whilst working in the German hospital and in the German system the English midwives would have to work under the direction of the German system and to German standards and disciplines. He said the midwives were given German language training so they could react to the direction supervision and procedures within the German hospital. He said their qualifications were equivalent under EU law and gave them a right to work in a German hospital without additional qualification.

33. He also said that there was a cultural distinction between the English midwives and the German system in the latter, midwives were required to work more closely under the direction of an obstetrician than in the UK. He described the hospital as being on the edge of an industrial German complex close to the Dutch border, being very cosmopolitan with a large and shifting population of many nationalities. Most of the German midwives were part-time and were constantly changing. He described operation in the German hospital as being centred on control coming from the chief doctor and the team of doctors. He described the midwives as "working to UK standards, but whilst in the hospital, under the direction of the German hospital system." Mr Branscombe's evidence was that the MoD indemnified any liability for midwife negligence.

34. The Conditions of Contract for SSAFA provide under the heading "Medico Legal Liability"

> "52. The Authority shall provide Medico Legal Indemnity for all Service, MoD and SSAFA personnel working as part of the Contractor's operations.
>
> 53. In the event of any claim being made alleging professional failure or malpractice by the Contractor staff the Contractor shall make available to the Authority all relevant information and facilities including access to the Contractor's employees for the purpose of investigation. If requested, the Contractor shall undertake any investigation and shall submit a written report."

The Authority here referred to is the MoD, and the contractor is SSAFA.

35. There was no contractual relationship between GSST and SSAFA governing arrangements for midwives working in the DG's. Midwives were placed in the DGPs' obstetric teams, having undertaken a German language course since they were required to understand procedures and complete necessary paperwork in German.

36. In turn, the German hospitals undertook to provide British Forces Germany members with various types of treatment and services through the intermediary of subcontractors, and that included midwife and nursing care.

37. Part of the agreement between GSST and the AKV Hospital dated 29 April 1996 provided as follows:

> "annex B paragraph 13. 1. 2:
>
> the DGP has agreed midwifery to be delivered by an integrated team of German and British midwives, sufficient numbers of British midwives to allow up to 2 British midwives to be on duty on each shift. These midwives will be under the direct control of the DGP."

38. In the section dealing with Dispute Resolution as between GSST and the AKV Hospital, clause 19.2 provided:

> "if a dispute is based on a clinical matter, e.g. medical malpractice leads to a decision against DGP and/or to an insurance claim by DGP, the German court shall have jurisdiction unless DGP consents to arbitration proceedings under clause 19.3"
>
> "disputes that are not based on the grounds mentioned in clause 19.2 shall be referred to arbitration tribunal for decision after giving the other party written notice thereof."

39. Midwife Clelland's own contract required her to be available to work at any place in the world, as notified and is expressed to be "governed by and construed in accordance with English law".

40. Mr Branscombe said three midwives were placed in the AKV Hospital in February 1997 and later were joined by two more. In fact, as was common ground, this arrangement did not work well. Internal materials at the time revealed that the AKV Hospital had been fraught with problems. Generally, there were differences in practice which the British midwives found professionally unsatisfactory and stressful: the German practice being much more medically-led than midwife-led. Anxiety about skill fade from the lack of deliveries performed by midwives was recorded as a significant concern. Mr Branscombe accepted that in part there was a clash between the expectations of British midwives and of the German hospital obstetricians.

41. During 2000 and 2001 the midwifery service at the 5 DGPs was discontinued. A statement made in May 2004 by a Maj General Lillywhite of the Directorate of Army Medical Services for the purposes of the case of A (a child) records the requirement to practice midwifery under the German healthcare system was subject to the control and supervision of German doctors. It was the submission of Mr Sweeting QC for Harry that this did not reflect the position accurately. Further Major General Lillywhite explains that in February 2000 the MoD asked SSAFA to cease providing intrapartum care within the DGPs. Indeed, midwives had been withdrawn from Paderborn in 1997, from Bielefeld by December 1998, and Osnabruck by January 2000. By April all midwives had been withdrawn from these hospitals and the last midwife was withdrawn from Viersen in November 2000. Harry Roberts was born in June 2000, his mother was attended by midwife Clelland.

42. Mr Branscombe explained that from April 2001 it was expressly provided that midwifery services did not include "hands-on" delivery practice. Midwives were present as "birthing partners" on request but were not part thereafter of the obstetric team or under direct clinical direction of the DGPs. This reflected what were regarded as necessary changes to the system.

43. He described the position of the midwives' employment by SSAFA within the DGPs in oral evidence as being that the midwives could not be stand-alone, working in a hospital which was owned and operated and regulated by somebody else. It was

intended they would be working in a hospital fully integrated within the team – which was reflected in an internal memorandum proposing changes in 1999. The memorandum describes what the position was intended to be – and reflecting its failure, for the reasons given, including language difficulties and stress because deliveries in Germany were obstetrician not midwife led.

44. AKV Hospital is described as "fraught with problems with several British midwives leaving because of difficulties in professional practice". The memorandum says that there is "little doubt that the hospital management and clinicians at Viersen have been the least willing to listen to anxieties and concerns expressed by mothers and THA staff". Radical revision is recommended.

45. I heard two nursing witnesses from the defendants, Ms Oliveira, currently employed by SSAFA in Germany as a Nurse Adviser in Health Protection, Health Promotion and Soldiers' Health. She had been employed as a midwife between June 1996 and April 2010 by SSAFA including at AKV Hospital in 1997. She was not at the hospital at the time but gave evidence of a one-week induction course provided to British midwives, which appears to have involved an introduction to the particular paperwork, and to the hospital premises. She said that when no British mothers needed assistance, she and the other British midwives were expected to assist with the German mothers which she regularly did. She worked to UKCC rules and standards, which allowed her to practice in Germany but was expected to work to standard operating practices at the Hospital. At AKV Hospital, continuous electronic monitoring was a standard operating procedure. It would remain on unless the doctor agreed to remove it.

46. Her evidence was that the doctors directed all the work done by German and British midwives at AKV Hospital which was different from the UK. She explained that continuous CTG monitoring was standard at this hospital with a central station where CTG is in progress could be viewed. She had significant concern about differences in practice, including significant force used to speed deliveries and episiotomy, which concerns she brought to the attention of her superiors about, her statement relates, the response was that they were to work to German standards and policies. She gave vivid evidence of having sometimes to go along with things rather than risk a conflict at the bedside but felt British midwives were asked to do things that were against the UKCC code. On occasion, applying fundal pressure and administering unlabelled drugs were part of it.

47. Similar evidence was given by Ms Askew, currently PA to Director British Forces Early Years, and employed by BFG HQ Germany. She had the same objections to administering fundal pressure, which she described as traumatic for the woman and traumatic to witness. Likewise, concerning syringes prepared by another. She is a trained midwife and worked in AKV Hospital in 1998. Again, she records that the doctors directed all of the work done by German and British midwives and a doctor had to be present at every delivery.

The Birth of Harry Roberts

48. Before setting out the found facts, I must recognise the dignity and grace with which both parents gave evidence concerning these deeply traumatic events. There was no

murmur of complaint or dissatisfaction from either. They displayed what appears to me to have been extraordinary resolve and resilience throughout the hearing and, indeed, have done so since these events happened now almost 20 years ago. I accept in its entirety the evidence they put before the court as set out below. Mrs Roberts, towards the end of her evidence, and also when invited by me to do so, made a final observation expressing dismay at the length of time resolution of the case had taken. She used words which in my judgement were an accurate insight saying as follows:

> "We just crack on with whatever life deals with us, and just deal with it to the best of our abilities…"

49. The main fact framework surrounding the birth of Harry Roberts was largely agreed. Insofar as these matters are related below, I do not intend to make any findings as to the matters in issue on the medical negligence case. Nothing I say with regard to those matters is intended to influence another court which may be charged with deciding issues of liability concerning medical activities at the relevant times.

50. Mrs Roberts had an early labour assessment at about 2200 on 12 June 2000 after suffering irregular contractions at home, she was examined then sent home to await developments. She was later admitted to the AKV Hospital at 05:20 on 13 June 2000. The claimant pleads that a decision was taken to induce labour at that point. At least during the course of induction, and the defendants say, during the weeks preceding delivery, the appearance of the cardiotocograph ("CTG") trace reflecting the fetal heartbeat showed variable decelerations.

51. In a statement made in support of Harry Roberts' compensation claim Mrs Roberts explains that her pregnancy was managed by Community midwives from the base hospital at Wegburg although delivery was planned at the AKV Hospital. Sheila Clelland was a friend of Mrs Roberts as well as a midwife working, not in the community but at the AKV Hospital. Mrs Roberts had voiced her concerns to the obstetricians at Wegburg about loss of weight and about loss of blood in the week before Harry's birth and again on 11 June 2000 at the AKV Hospital. Harry had in fact been due on 6 June 2000 when she voiced her concerns, Mrs Roberts says the obstetricians did not seem concerned. Although being looked after by another midwife, because Sheila Clelland was a friend, Midwife Clelland had said to phone her, and it was her that Mrs Roberts telephoned on the evening of 12 June 2000 when she felt further contractions and was spotting. When Mrs Roberts telephoned again, later, Midwife Clelland told her to go to the AKV Hospital.

52. On arrival she was given a scan by the duty obstetrician and gel was apparently (Mrs Roberts was not told this at the time) applied to induce labour at about 10:00. She says she understands the record indicated she had no waters at all at this point namely 05:00 on 13 June 2000. She recalls after strong contractions beginning at 14:00, she went into labour at about 17:00 on 13 June 2000. At this point she was taken to the delivery suite, put into a bath, under the care of another British midwife Bernie Simmons until about 20:00, after which Midwife Clelland took over.

53. Mrs Roberts explains you did not necessarily get a British midwife just because you are British; on the ward, British midwives Bernie and Sheila both spoke German. Routine

checks were carried out by both Bernie and Sheila recalls Mrs Roberts. Mrs Roberts recalls an anaesthetist giving her an epidural, and when it needed to be turned up, she believes it was Midwife Clelland she spoke to. She recalls both British midwives coming in and doing routine checks and she drifted in and out of sleep. Dr Baysal, who only spoke German, also came in.

54. Mrs Roberts recalls she had CTG monitoring, the stomach strap moved around a lot.

55. At the time of delivery, Dr Baysal is particularly remembered by Mrs Roberts as arriving and pushing Midwife Clelland out of the way with a firm push and shouting at her. She thought that was a bit strange. When she later mentioned it to midwife Clelland the latter said "oh it's okay" so she had thought it might not be unusual. Mr Roberts remembers the obstetrician "went ballistic", in German, she pushed her out of the way and then "just seemed to crack on with the drills and skills of being… Delivering a baby". He recalls she did not burst in but went and spoke to the midwife loudly and then got on with delivering the baby. He did not know what was concerning Dr Baysal, emphasising he spoke only pigeon German. He remembers Dr Baysal "shouting at all the midwives commanding them to do jobs, she was definitely in control at that point."

56. Mrs Roberts describes being exhausted and that the monitor had come off Harry's head during the delivery process, which was accomplished using a Venteuse, and remembering the obstetrician saying lots in German in a raised voice and it was obvious that she was angry with Midwife Clelland. She had urgency in her tone, one of the midwives applied pressure to her stomach and the obstetrician was telling Mrs Roberts to push. She remembers the midwife trying to push on her stomach which hurt and that the midwives were doing what the obstetrician told them.

57. Harry was born, the cord was not round his neck, he was placed on her, she then explains that she told the doctors he was floppy and they snatched him away. The obstetrician took over from midwife Clelland. Again, the obstetrician pushed Midwife Clelland out of the way and took over with another hard push, shouting. Mrs Roberts remembers the midwife telephoning for the paediatrician, very calmly, although she could not understand what was said but she recalls there did not seem to her to be any sense of urgency. Midwife Clelland told Mr Mrs Roberts not to worry that they were having a few problems and trying to resuscitate Harry, the paediatric team was on its way. In cross-examination she volunteered:

> "in retrospect, I now realise – I realised years later – that the reason that the paediatricians strolled into the room and then nearly, just shot into action, was because when Sheila rang them it was like a singsong voice. I saw, I was looking at Sheila ring and thinking "I wonder who she's talking to" and it was la la la la la la, so the paediatricians strolled up the corridor, strolled into the room, and then just burst into action because they were not expecting what they found. Obviously, as I keep saying, I had not experienced this before, but years later, when I was putting my statement together, I thought you know, looking back, that was not right. That is why they burst in."

58. Mrs Roberts said they rushed and placed Harry in an incubator, whisking him away to the ITU. He was there for three weeks. The placenta was taken away for tests. Mrs Roberts understood it had nearly died anyway.

59. Mr Roberts said it was only some years later when the expert reports were received that they became aware that Harry's profound disabilities were caused by the failings around the time of his birth.

60. Mr Roberts otherwise gives evidence consistent with that of his wife, adding detail as to the monitoring strap which was moved around seeking to get a heartbeat. And that it had been, he thought removed at some point by the midwife, because it was ineffective. The midwife continued doing observations. He also recalls the anger of the obstetrician when she arrived and that she tried to replace the sensor and appeared to be "going ballistic" with Midwife Clelland.

61. It appears an earlier statement made by Midwife Clelland has since been destroyed under the six year rule. The closest document to a statement before the court at present is a letter written in July 2012 to the Treasury Solicitor in which she attempts to translate some of the entries in the medical records sent to her. She refers to a statement made in December 2011 and sets out that she is not sure why the expert obstetrician states the fatal heart rate signal abruptly stopped at 03 39, but that the fetal scalp electrode did cease to function. She refers back to her statement (which is not before the court) and she discusses the difficulties with the external transducer and difficulties in recording the fatal heart rate for various reasons. Midwife Clelland says the heart beat was heard by all present though, and was deemed to be satisfactory and during an instrumental delivery. Had it ceased abruptly at 03 40 she says she would have summoned help immediately - but that did not happen because it was heard to be satisfactory.

62. The doctor, she says, could not suggest any better way of recording the fatal heart rate. She stated that the fetal heart rate recovered once the contractions were over and early decelerations were considered normal. The doctor was aware of the decelerations when she assessed Mrs Roberts between four and for 10 minutes, following which she decided to expedite the delivery.

63. As indicated, I make no findings about matters that go to the heart of the negligence case, but it is Mr Sweeting QC's argument on behalf of Harry, that the fetal heart rate cannot have been normal given Harry's presentation at birth and that what was heard was either an artefact or possibly Mrs Roberts' heartbeat. Given Harry's condition when he was born, it is not possible, the claimant will say, for there to have been a non-pathological fetal heart rate before the birth at this point.

64. The obstetrician Dr Baysal appears to have attended Mrs Roberts at about 02 30 on 14th of June. The claimant argues that the fetal scalp electrode malfunctioned shortly after that, but that Midwife Clelland did not call the doctor back until 04:00, and that was negligent.

After Harry's birth

65. Mrs Roberts recalls the day after Harry's birth, when Midwife Clelland who was a personal friend of Mrs Roberts visited her in the nursery she had said to her "I might want to ask questions about his birth" and she started to cry. When asked what she understood by that she answered:

> "A. Well, Sheila knew at this point that the cerebral had been affected, because she stayed around, so she knew. I was not really taking much notice. I did not have time for anybody else's upset, because I was dealing with what had happened with our child, so I did not really take much notice. I just sort of said, "it's okay, Sheila". Harry was my first child. When the paediatricians came in to speak to us, after they had whipped him off to resuscitate him, the first thing me and my husband said is, "is he alive?" Is he alive?". And they said "yes". So Harry is my first child and he is alive. I am not bothered about Sheila. I just said to Sheila, "it is okay, Sheila, whatever you are", for me, I did not have time to comfort Sheila, really. It just went over my head. When she came to visit me, I was sat expressing milk in the nursery, so whatever Sheila was saying to me with my baby brain, you know, I did not really have time or comprehend what she was saying. I was just happy that our son was alive."

66. A short while after Harry's birth a German doctor came to speak to her in the Special Baby Care Unit and told her Harry had been asphyxiated at birth and his brain may have been affected. Mrs Roberts said she was apologising and said if only she had called me earlier – understood to mean midwife Clelland. Mrs Roberts says she was still in shock at this time and extremely tired and confused. She says she:

> "did not know what these complications were and whether the complications were caused by negligence or due to the inherent risks involved in childbirth. I also did not know if any such complications had caused any or any long-term injury to Harry at that point in time."

67. Mrs Roberts describes how in the early days the paediatricians were upbeat and optimistic: "I was told that the early signs were good and that the EEG tests showed good recovery" she says in her second statement sworn for these proceedings where she gives more detail of events after the birth. In August 2000 Harry's progress was described as being quite good by a Dr Harper who stated that any long-term effects could be relatively minor. On further review in October 2000 no deterioration had been noted from the previous brain scan but there were concerns about Harry's hearing and he was referred for tests. Mrs Robert recalls that at during the 18 month period following Harry's birth was away for a period just under a year she thinks in Bosnia for

the second time. She moved house in August/September 2001 and was by then heavily pregnant with her daughter.

68. Mrs Roberts states that eight months after his birth, therefore, in February 2001 he was reassessed. The senior physiotherapist "told us in no uncertain terms that his Cerebral Palsy was severe and that he would never walk again". This is described as a crushing blow by Mrs Roberts and it was the first time they knew, she states, that his disability was profound and long term.

69. In her written statement, looking back to that time in 2001, Mrs Roberts explains that she still did not know if Harry's cerebral palsy had been caused by substandard treatment around the time of his birth "but I certainly had my suspicions". When invited to consider the accuracy of her statement in the witness box, unprompted, she said that looking back, she did not think that she did have suspicions at that point. She believes she was mixing it up with further along in time. In cross-examination she said it was a few years later that she discussed the issue with her husband. "With hindsight, this you know, actually, that was not right and that was not right, but we would not know any different when our child was first born."

70. Mrs Roberts became pregnant with their daughter about 6 months after Harry's birth. She was born in October 2001. Mrs Roberts wanted to have a caesarean section, and Dr Baysal, she says, asked if she could deliver the baby as she had felt bad about Harry's birth for a year, and it would help her if she did. Mrs Roberts contradicted a statement made by Dr Baysal that Mrs Roberts had asked her if she could deliver the second baby. In any event, Mrs Roberts agreed she could. Happily, the delivery of Beau, the Roberts daughter, was without incident.

ALA Claim

71. It was in about June 2002 that Mrs Roberts says she eventually called Army Legal Aid, (the "ALA") about making a claim in respect of Harry's injuries. On 18 July 2002 the ALA in Detmold wrote to the Medical Arbitration Agency, an expert referral body or commission facility available to those injured in medical accidents in Germany. I shall refer to it here as "the Commission". This was a first step, guided by the ALA, to obtain an expert adjudication of their medical negligence case by an outside body. The findings of such a body are not binding, but it is the claimant's case that time ceased to run for the duration of the Commission's consideration of Harry's case. That is to say from 18 July 2002 until final determination by them in May 2004.

72. The letter of 18 July 2002, written in German on her behalf by the ALA, refers to the fact that in the week before Harry's birth Mrs Roberts had spoken to the specialist at Wegburg about weight loss and bleeding and that she had presented with no amniotic fluid. The Commission by letter directed to the ALA enquired against whom allegations of negligence were being made, and in answer on her behalf, the ALA said that she could not make the accusation against a particular person, in her opinion it was

> "the interaction of various doctors of the hospital in Viersen Therefore, the allegations of medical negligence directed at the doctors of the hospital in Viersen".

73. The ALA also put her in touch with a Mr Poole working for a private UK firm Teacher Stern (TSS law) who was first instructed in about mid October 2002 for Harry. He at that time had conduct of the case of *A (a Child)* on behalf of claimants.

74. A later, 2005 letter (below) records that in October 2002 Colonel Eyton-Jones had written regarding an action against the MoD – in respect of which, obviously, there would be a conflict. It was in respect of this action (on the same basis as *A (a child),* asserting a nondelegable duty to Harry fell upon the MoD), that Mrs Roberts had been referred to David Poole the external solicitor in 2002. The 2005 letter went on to say:

> "with regard to a civil action in the UK against Mrs Clelland, SSAFA and the MoD, you were made aware… that Army Legal Assistance cannot help you in any action against the MoD. This is due to a potential conflict-of-interest, as Army Legal Service officers are employees of the MoD. You would therefore have to use a UK solicitor and it would be natural for you to continue with Mr David Poole who has been involved with your case. I suggest that you make contact with your solicitor to discuss how best to proceed. I enclose a copy of the findings of 8 December 2004…"

75. That was a reference to the final findings of the Commission.

76. In my judgement, contrary to the suggestion in cross-examination that the ALA was aware of a claim against Midwife Clelland at the end of 2002, this is plainly written in light of the new development: the fact of the Commission Report of 8 December 2004, showing that the obstetrician blamed Midwife Clelland completely for injuries sustained by Harry at birth.

77. The ALA is there suggesting the action lies in England against Midwife Clelland. Of course, by this time a writ had been served: on 31 December 2004. This letter of 2005 does not reflect any knowledge of a claim in October 2002 against Midwife Clelland, which, it is clear from an examination of the early letters passing between the ALA and the Commission between September and December 2002, related solely to doctors' treatment, the Commission having been told in the letter of application to it by the ALA, that Mrs Roberts' concern centred on her treatment before the birth at Wegburg. The letter (in translation) from the Commission says in terms:

> "referring to our letter of 10 09 2002 we would like once again to ask for clarification as to whether the allegations of medical negligence are against the treating resident gynaecologist at Wegberg solely or are also against the doctors of the obstetric clinic."

78. The response, on Mrs Roberts' behalf on 17 December 2002, was, as stated, that she could not make the accusation against a particular doctor:

> "In her opinion, it was the interaction of various doctors of the hospital in Viersen. Therefore the allegations of medical negligence are directed at the doctors of the hospital in Viersen."

79. Mrs Roberts' evidence, which I accept, was they did not know in 2002 who was at fault, if anybody was at fault. They left it in the hands of their solicitor to guide them. This evidence is given depth and support by Mrs Roberts' spontaneous evidence to me which she apologised for as "digressing". She had been in very regular contact with Midwife Clelland since she was a friend. When she found out about the Commission result, Mrs Roberts rang midwife Clelland and said to her:

> "Sheila, it has come back, there was negligence. There was." She just started crying, handed the phone to her partner, and I never heard from her again, never spoke to her again, … disappeared off the face of the earth and that was that."

80. Returning to correspondence in 2003, on 7 April 2003 Major AG Fryatt of the ALA wrote to Mrs Roberts under the heading "medical negligence claim" saying that her case was still unresolved in view of the unsettled state of the law. He explained that the panel of experts for medical liability were obtaining comments from the doctor in question, an expert opinion would be taken and there would be an Arbitration Panel Report (i.e. from the Commission). 15 months later he said a final report would be produced. The letter goes on to explain they are awaiting a judgment (this is the case of A (a child)), with regard to the MoD responsibility for the provision and standard of medical treatment. The letter is crafted on the basis that there might lie an action for the damage caused by the German doctor against the MoD, as well as against the German hospital.

81. Major Fryatt explains in his letter that in respect of claims or potential claims "arising from treatment in DGP hospitals" there was a three-year limitation period in Germany applicable to both adults and minors. Any claim had to be brought within three years of the date of the event or the date when the claimant may reasonably have had knowledge of the event. He said this would "affect you in any event". He said that if the Commission accepts an application to determine liability then the limitation period is stayed from the acceptance of the application.

82. The letter explains that the case of *A (a child)* awaited in the English jurisdiction against the MoD, was likely to be appealed once decided. The MoD had agreed to extend the limitation period there for a further 12 months and it is therefore, the letter says, unlikely that the MoD would refuse to honour its extension to the limitation period, but

> "I will confirm with the MoD that the 12 months extension to the limitation period will apply to the final outcome of the present lead case".

83. Major Fryatt explains the second defendant GSST did not give an undertaking but the ALA will ask them to confirm whether they would extend the limitation period in a similar way. It says to register a claim against the MoD/GSST she should contact the Treasury Solicitor (and contact details are given) together with those of GSST's representatives. A mention is made of David Poole at Teacher Stern with whom in fact Mrs Roberts had already been in touch.

84. As Mr Sweeting QC pointed out, there is no disclosure of any immediate response to this letter; it is not disputed that some materials including ALA documents were destroyed or lost it is not possible to say whether or not Major Fryatt did what he or she promised to do in respect of extensions of the limitation period as stated. The letter on 7 April 2003 comes, of course, two months before the expiry of limitation for actions for tortious damages against the AKV Hospital under the German rules, if knowledge is said to date from the time of Harry's birth.

85. By a further letter of 24 June 2003 Major Fryatt gave Mrs Roberts the following information: on 27 May 2003 the Commission had sent to the ALA a letter from Dr Baysal implicating Midwife Clelland in the birth. Major Fryatt says:

> "In a letter of 27 May 2003 the German panel of experts sent a copy of a letter from Dr Ring and Dr Baysal dated 5 March 2003. In that letter Dr Baysal explains that the midwife did not consult (Dr Baysal) between 02:30 hours and 0410 hours on 14 June 2000. It explains that without the doctor's knowledge the CTG (Cardiotogram) lead was removed, thereby stopping the graphic registration and display of the fetal heart sounds. When Dr Baysal entered the labour room there had not been any CTG recording for nearly 30 minutes."
>
> "Dr Baysal states that both the doctor and the midwife bear the responsibility for the birth and accordingly Mrs Sheila McClelland should also be a party to your claim."
>
> "The panel of experts will obtain records of the medical treatment together with reports from Dr Ring (Chief Physician of the Paediatric Clinic of the AKH Viersen in order to clarify the facts. Finally, an experts opinion will be obtained so that in due course a decision can be made by the panel of experts."
>
> "I will keep you informed as soon as I hear anything further."

86. That letter from Dr Baysal was a statement dated 5 March 2003 prefixed by a table containing an annotated chronology of events from the admission of Mrs Roberts at 05:20 on 13 June 2000, the morning before Harry's birth. It details at 3:40 that the internal CTG is taken off as it does not work any longer and an external CTG is attached and at 4.10 she, the doctor is called to the maternity room. However, in the statement, Dr Baysal states

> "between 0230 and for 10 hours I was not consulted anymore by the midwife. The internal CTG degeneration was taken off without my knowledge. Since this time no proper fetal heart sounds could be recorded. When I entered the maternity room for the birth, 30 minutes had already passed without CTG recording."

87. Towards the end of the letter, after expressing her astonishment and regret, and reflecting on her good relationship since the birth with Mrs Roberts, and, what Dr Baysal says was Mrs Roberts' desire for Dr Baysal to deliver her second child by caesarean section (which she did, successfully), she says this:

> "After all these events I am very astonished and find it regrettable that Mrs Roberts now issues proceedings and only holds the doctors of the Allgemeines Krankenhaus Viersen and to be responsible. The responsibility of the birth is between doctor and midwife. In this case the midwife, Sheila Clelland, should be called, who is responsible too for the care of Mrs Roberts during the birth."

88. On 29 April 2004 an initial decision was made by the German Medical Arbitration Agency. This was to the effect that Midwife Clelland and the German doctors/hospital may have borne responsibility for Harry's disabilities.… On 4 May 2004 the ALA send a copy of that decision together with a letter from Dr Ring and Dr Baysal dated 5 March 2003 to Teacher Stern explaining they will inform and advise Mrs Roberts separately.

89. On 11 May 2004 AKV Hospital wrote to Headquarters British Forces indicating that Midwife Clelland was named in the statement by their doctors in the liability case of Harry Roberts. They cite the expert decision of the Commission and ask for a statement from Midwife Clelland.

90. On 16 of July 2004, the letter of claim is sent by Simpson Millar to SSAFA; it asserts that Midwife Clelland worked at the DGP but was employed by SSAFA and under SSAFA's control. The letter encloses reports and Dr Baysal's statement of 5 March 2003. It sets out particulars of Midwife Clelland's alleged negligence and requests disclosure.

91. In the event, the hospital appealed the decision of the Commission and on 8 December 2004 the Commission communicated revised conclusions which held only Midwife Clelland to blame.

92. On 31 December 2004 Simpson Millar issued proceedings against SSAFA and the MoD as vicariously liable for damages for personal injury and loss arising out of clinical negligence during the course of medical treatment by their employee Midwife Clelland.

93. On 10 January 2005 the AKV Hospital insurers wrote to ALA with regard to the "difficult legal matter". They note that the ALA says it is still dealing with the medical

treatment and point out that is contrary to what Simpson Millar said on 1 October 2004, making a claim against the hospital. They ask for clarification. The letter suggests that the "English side" "doesn't appear to realise" that the Commission's report is not legally binding. They set out their view that their client is not liable for the actions of the English midwife and that this is a matter for SSAFA and the MoD. They refer to the need for further investigations because commonly in such cases over the last 15 years only a small percentage share a connection between the birth and damage.

94. On 17 March 2005 a letter from Commander, Colonel JC Bowman ALA Headquarters, sends the result of the Commission to Mrs Roberts.

95. The ALA, Mrs Roberts was informed, dealt with the Commission until such time as the decision from the Commission which rather than implicating the doctors, blamed solely Midwife Clelland. In respect of such a claim, the ALA indicated there was a conflict, as it was another potential case against the MoD.

96. Thus, in March 2005 ALA correspond with Mrs Roberts, further to the Commission's Review of the original findings. The conclusions are set out, these are now to the effect that the doctors in fact cannot be blamed, but there was inadequate treatment provided by Midwife Clelland who did not call the doctor immediately when the CTG electrode came loose. They do however say that they are uncertain whether the outcome would have been different if a paediatrician had been involved earlier. The official findings of the Commission are therefore altered.

97. The options are set out for Mrs Roberts as being: one a civil action under German law against the German doctors and hospital, two, a civil action in the UK against the British midwife SSAFA and the MoD.

98. The letter also says a note is included which shows that the German hospitals insurers reject liability for midwife Clelland because she was not employed by the hospital. The insurers state that they are of the opinion that German law is the only law applicable regarding a claim against the hospital. The ALA offer to advise further on the process of litigation in Germany and to assist her in obtaining a list of German lawyers.

99. The letter then says,

> "as you were made aware by Col Peyton Jones in her letter of October 2002… Army legal assistance cannot help you in any action against the MoD. This is due to a potential conflict of interest, as all Army Legal Service officers are employees of the MoD."

She was also told she should contact her civilian solicitor David Poole, as to how best to proceed.

THE PLEADINGS

100. I am grateful to the parties for a short Agreed Case Summary for these proceedings. I rely upon it for the following synopsis.

101. The case is described in terms of proceedings for damages for personal injury and consequential losses arising out of alleged clinical negligence of nurse Clelland around the time of the claimant's birth at the AKV hospital on 14 June 2000. Proceedings were begun on 31 December 2004.

102. The particulars of claim alleging vicarious liability for the actions of Midwife Clelland is dated 27 November 2015. This defence is served in February 2016 in which no point is taken on the proper law of the proceedings or limitation but was stated as "currently pleaded on the assumption that the applicable law is English law".

103. By amendments dated about 3 August 2018, the defendant added the body responsible for the AKV Hospital as part 20 defendant, and expressly pleaded that the claim was properly governed by German law further, that the claimant had knowledge of the damage and the identity of the person potentially liable to him for such damage "within the meaning of section 852 more than three years prior to the issue of the claim form. In the premises, the claimant's case is statute-barred".

104. Following a series of agreed stays the first and second defendants filed a joint defence on 17 February 2016 and commenced part 20 proceedings against the AKV Hospital as third party. The defence was amended to plead German law as the proper law on 6 August 2018. The essence of the allegation made by the claimant is that Midwife Clelland ought to have sought the urgent assistance of doctors present at the hospital much sooner than she did and that if she had done so, the claimant's delivery would have been hastened and otherwise dealt with in a manner which avoided hypoxic injury. Further, it is likely that Harry would have been born neurologically intact and without any significant or indeed any injury says the claimant.

105. In 2016 Dingemans J (as he then was) held that the English courts had jurisdiction in respect of the third party claim (reported at [2016] EWHC 2744 (QB); [2016] 11 WL UK 77). As between the defendants and the third party Soole J in 2019 gave judgement (reported at [2019] EWHC 1104 (QB) [2019] 3 WLR 343) to the effect that the Civil Liability (Contribution) Act 1978 applied automatically to all proceedings for contribution brought in England and Wales without reference to any choice of law rules. That case is under appeal to be heard in April 2020.

106. Whilst SSAFA admits that Midwife Clelland was its employee it denies that they were liable for any failings on her part rather, that she worked under the direction and control of the AKV Hospital, therefore if there were any negligent acts or omissions on her part the third party is liable. Further, Midwife Clelland has made at least one statement for the purposes of this or other actions, although not for the purposes of this application, one of which is before the court. From it, and from the pleadings it is clear that the negligence is defended. Midwife Clelland asserts that she did hear a heartbeat, that she was able, after the malfunction of the cardiotocograph ("CTG") to monitor Harry. Accordingly, there are issues of causation raised in the case.

107. It is asserted that the claimant was not aware the damage was caused by a negligent breach of an applicable standard of care before then, and there was reasonable doubt as to the identity of the person potentially liable.

108. As already described, the claimants rely upon the letter of 7 April 2003 to the effect that the defendants cannot deny that the German limitation period is inhibited since

Major Fryatt states that, where they accept an invitation to determine liability, the limitation period is stayed from their acceptance of that application.

109. Against that essential background the issues fall to be decided. The first material point concerns the applicable law and I turn to it now.

ISSUE a. the applicable law of the Claimant's claim against the Defendants;

110. Turning to the first of those issues, namely whether English law does apply, the parties were agreed as to the legislative framework.

(i) The Private International Law (Miscellaneous Provisions) Act 1995 ("PILA" or "the 1995 Act")

111. The alleged tortious act took place now some time ago since the negligence concerns Harry's birth on 14 June 2000. It is common ground that the applicable law must be determined under PILA and not by reference to the European Parliament and Council Regulation (EC) 864/2007, Rome II, governing liabilities as between EU Member States.

112. The relevant law is set out in sections 11 and 12. Section 11 states the "general rule" as follows:—

> "(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—
>
> (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
>
> (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
>
> (c) in any other case, the law of the country in which the most significant element or elements of those events occurred."

113. Section 12 states a secondary rule that may displace the general rule:

> "12(1)
>
> If it appears, in all the circumstances, from a comparison of—

> i. the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
>
> ii. the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country,
>
> the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

114. It is the Claimant's argument that although prima facie the case falls within the provisions of section 11, section 12 applies to take the case out of the general rule.

115. Dicey, Morris & Collins on the Conflict of Laws 15th Ed encapsulates the correct approach as follows

> "35-148
>
> The application of the displacement rule in s.12 first requires, taking account of all the circumstances, a comparison of the significance of the factors which connect the tort with the country the law of which would be applicable under the general rule and the significance of any factors connecting the tort with another country. Secondly, it then has to be asked, in the light of that comparison, whether it is "substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues," to be the law of the other country.
>
> The provisions of s.12 have been applied to displace the law applicable under s.11 on very few occasions."

Among the points of relevance that they note are the following:

> "(i) The rule applies irrespective of whether the applicable law has been determined by s.11(1) (clause (5) of this Rule) or by one of the limbs of s.11(2) (clause (6) of the Rule).
>
> (ii) It would seem that the case for displacement is likely to be the most difficult to establish in cases falling within s.11(2)(c), because the application of that provision of itself

> requires the court to identify the country in which the most significant element or elements of the tort are located.
>
> (iii) S.12 envisages displacement of the general rule not only in relation to the case as a whole, but also in relation to a particular issue or issues.
>
> (iv) The factors to be taken into account include, but are not limited to, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.
>
> (v) It has been emphasised that "substantially" is the key word in determining whether displacement of the general rule should be permitted689 and that the general rule should not be dislodged easily, lest it be emasculated.
>
> (vi) The general rule in s.11 is not displaced simply because on balance, when all factors relating to a tort are considered, those that connect the tort with a different country prevail.
>
> (vii) Accordingly, the party seeking to displace the law which applies under s.11 must show a clear preponderance of factors declared relevant by s.12(2) which point towards the law of the other country. Whether that is the case will depend on the facts of the case and on the particular issue or issues which arise for decision.
>
> (viii) If, however, in addition to the factors to which the general rule in s.11 refers, there are other significant factors connecting the tort to the country whose law applies under that rule (such as the fact that it is the national law or country of residence of at least one party), this will make it much more difficult to invoke the rule of displacement in s.12."

116. Plainly, in my judgement, the events constituting the tort, which is alleged took place in the AKV hospital, in Germany all took place in Germany, and under section 11 (1) of the 1995 act, the applicable law to the main claim would under the usual rule, be German.

117. Accepting German law is applicable under section 11, Mr Sweeting QC for the claimant relied on section 12 and emphasised the fact that Harry's parents were both in Germany at the time of Harry's birth because Harry's father was serving the British Crown. Mr Roberts had no choice about his posting and Germany was not their permanent home, rather it was and remains England, where they returned in 2003. Other than Mr Roberts' service, they had no connection with Germany. The effects of the tort would, except at the very beginning, be experienced in England in Harry's early years and onwards.

118. He points to the fact that the nurses were trained in England, according to English standards, they are regulated by the UKCC (as it then was). The Claimant argues Midwife Clelland's actions would be judged against standards of care applicable to English nurses in England and the requirements of the UKCC. In carrying out their role they sought to abide by duties and obligations placed on them by their English training and regulation, even when in apparent conflict with the working practices of the supervising doctors. They were, he said, careful not to carry out any act that they felt to be inconsistent with their duties and obligations as British midwives. The usual position in a German hospital was that the clinical obstetricians directed the nursing staff. What actually occurred in the present case, however, and what is demonstrated by the contractual provisions are he submitted two different things.

119. This submission was based upon the evidence of midwives who had served in this capacity, and it is clear from their evidence, which I accept, that they were very conscious that they were British midwives acting as such. They were careful not to act, they said, even if so requested, or required, in a way that would impair their registration. Examples were given of types of perinatal care in which they would not participate because they believed, from their own training and experience, that it was wrong and not in the best interests of the patients.

120. The claimant submits that although the British midwives are described in the contract between GSST and AKV as being under the direction of the German obstetricians in the AKV Hospital this is no different from any midwife in a clinical setting and does not derogate from the proposition that they are acting according to English standards and English practices. The contracts show that SSAFA's obligation is to provide British trained midwives working as such says the claimant, indeed that their presence was considered a particular benefit to the wives and the female service people whose children were born in Germany.

121. The evidence of Paul Branscombe who was employed at the material time by SSAFA, shows that in fact "the provision of a hospital-based midwifery service at the five [German hospitals] was not successful, and was progressively discontinued between 2000 and 2001." The last British midwife left the hospital where Harry was born in November 2000, about five months after his birth. A new contract, with effect from 1 April 2001 provided there would be no hands-on delivery practice by British midwives in the German hospitals and the hospital-based midwifery service was discontinued.

122. In considering this issue some assistance is gained from this court's earlier consideration of the provision of medical care for English service personnel and their families serving in Germany- this is the same case of *A (A Child) v Ministry of Defence* [2005] QB 183 referred to above. The issue before the court was whether, where a German obstetrician had been negligent in the course of a claimant's birth, the MoD could be sued as owing a nondelegable duty of care to the claimant and thus be liable for that negligence. At first instance, Bell J held that they did not and this conclusion was supported by the Court of Appeal. Certain passages in the decision of the Court of Appeal have resonance for this case.

123. Two passages from the judgment of Bell J which were undisturbed by the Court of Appeal sought to explore the relevant circumstances of the particular case in order to decide whether the claimed tortious duty was owed under the same regime as is in issue

here. It describes the role of the MoD and also refers to a special relationship between it and servicemen and their families:

> "101. The MoD did not in fact assume responsibility for treating service personnel dependents, including A and Be, in hospital itself after 1 April 1996. It did not accept them as patients for the purposes of hospital care. What it is assumed, and put into effect by various contractual arrangements with GST, was the obligation to provide access to an appropriate system or regime of secondary, hospital care provided by another. It had some teeth by its visits to the GPs which it monitored by "outcome", although its contract with GST left management of the DGP contracts in the hands of GST which knew about such matters."

> "107. In my judgement, the features of the special relationship between the MoD and service personnel and dependents in Germany, to which I have referred, imposed a duty on the MoD to provide access to an appropriate regime of secondary healthcare in Germany. The MoD's assumption of this duty met the reasonable expectations of service personnel and their families. The MoD's duty of care must be seen in the context of the obligation to provide access to an appropriate regime of secondary healthcare, and was, therefore, a duty to exercise reasonable care in selecting and putting into action appropriate providers. It discharged that duty by contracting with GST to procure the GPs and to manage their contracts."

124. In the case of *A* it was accepted that a non-delegable duty had only been found in a situation where the claimant suffered injury in an environment over which the defendant was in control. It was accepted by counsel for the claimant in *A* that the MoD was not in control of the German hospital. The submission was that once the child's mother went to live in Germany with her serving husband she came under the protection of the MoD who provided her with primary healthcare leading to the secondary treatment provided at the German hospital. The court rejected the submission that it was reasonable for the MoD to have responsibility for the care administered. They also rejected an argument of public policy that it was desirable that British servicemen and their dependents should be able to sue the MoD in England in respect of medical negligence suffered in a foreign hospital rather than being constrained to bring proceedings in the foreign jurisdiction in question. In that case, of course, the issue was the German obstetricians' negligence, not the suggestion that SSAFA/MoD were responsible for the negligence of an employee, namely a midwife.

125. My attention was also drawn to certain other short passages as follows in the conclusion of the Court of Appeal which are of assistance to other issues I have to consider and which I set out here:

> "55. The MoD is no longer in the business of treating patients in hospital in Germany. Its sole role is that of arranging for such treatment to be provided by others. If there is merit in [counsel

> for the claimant's] argument of public policy, it can only lie in his basic proposition that it is plainly desirable that someone in the position of A and his parents should be able to bring proceedings against the MoD in England rather than against the hospital in Germany. Despite [counsel's] submissions, I remain unpersuaded of this."
>
> …
>
> "57. The injury suffered by A in this case was not one that raised an automatic inference that there had been negligent treatment. It is a tragic fact that babies are quite often born with brain damage although all reasonable skill and care has attended the delivery. In order to get a claim off the ground against the MoD, assuming the existence of a duty of care, it was necessary to investigate what had happened at the birth. This A's parents were able to do by initiating the process that produced the investigation by the Gutachter Kommission…
>
> …
>
> "59. If one postulates that the MoD is not itself subject to liability in a case such as this, I expect that it would, through the army legal service, assist the service personnel to seek a remedy in Germany, albeit that German lawyers would almost certainly have to be involved. I'm inclined to think that such a situation would be more satisfactory than one in which the MoD, being itself a defendant, can less readily assist its personnel to obtain a remedy."

126. The thrust of the Defendants' submissions is that it is only rarely that the general rule as to the applicable law is to be displaced. They submit that the circumstances here make clear that it is not.

127. There was no disagreement before me as to the applicability of the principles set out in the Dicey and Morris.

128. They were applied in the case of *Fiona Trust and Holding Corporation and others v Dmitry Skarga and others and Yuri Nikitin* [2013] EWCA Civ 275, where, referring to the Court of Appeal in *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808 [2012] 2 Lloyds Rep. 313 Longmore LJ said as follows:

> "15. This court also set out the correct approach to section 12 in the case of VTB and this was again approved in the Supreme Court at paras 149 and 203 of the respective judgements: –
>
> "…

> A (7) The exercise to be conducted under section 12 is carried out after the court has determined the significance of the factors which connected tort or delict to the country whose law would therefore be the applicable law under the general rule. (8) At this stage there has to be a comparison between the significance of those factors with the other country. The question is whether, on that comparison, it is "substantially more appropriate" for the applicable law to be the law of the other countries so as to displace the applicable law as determined under the "general rule". (9) The factors which may be taken into account as connecting a tort or delict with a country other than that determined as being the country of the applicable law under the general rule potentially much wider than the "elements of the events constituting the tort" in section 11. They can include factors relating to the parties' connections with another country, the connections with another country of any of the events which constitute the tort or delict in question or the connection with another country of any of the circumstances or consequences of those events which constitute the total delict. (10) In particular the factors can include: (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (C) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict."

129. The Court of Appeal in *Fiona Trust* noted the Supreme Court had viewed the Dicey and Morris extract, part of which appears above, as emphasising that the general rule had been displaced on very few occasions and also emphasising that there is stress upon the word *"substantially"*, which was key. Parties seeking to displace the section 11-appropriate law had to show a *"clear preponderance"* of factors declared relevant by section 12(2).

130. In *Fiona Trust* the issue was as to the proper law for claims in the tort of bribery which, under English law afforded much greater opportunity of recovery than if the same claims were heard under Russian law. The claimants alleged that Mr Nikitin had dishonestly conspired with others including Mr Skarga to enrich themselves by entering highly profitable contracts with the claimants, in the nature of vessel purchases, sale and lease backs, and time charterparties. These contracts had provisions for English law and jurisdiction, however, the case based upon them failed – rendering the claim in bribery key. The issue left for decision was what was the proper law of the tort of alleged bribery. The real contest concerned the application of section 12 of PILA. The judge at first instance decided it was Russian law. His task, and therefore mine, it is agreed, is to make an evaluative judgement of all of the circumstances (*Fiona Trust* paragraph 22, *Morin v Bonhams and Brooks Ltd* [2004] 1 Lloyds Rep *702, Dornoch Ltd v Mauritius Union Assurance Co* [2006] 2 Lloyds Rep 475 at paragraph 47, and per Lord Clarke at paragraph 199 of *VTB*).

131. In that case the claimant sought to displace Russian law with English law on the grounds that there were contracts made as the result of the alleged bribes, almost all of which were subject to English law or English jurisdiction or both. Bribery, in any event, it was submitted, was international; the court at first instance held that whilst relevant, the English contracts were insufficient to make it substantially more appropriate for English law to govern. The defendants were for the most part Russian individuals or companies controlled by Russians and, despite international connections, "the focus of the conspiracy remained Russian and the collusion was based in Russia".

132. Turning to the analysis, guided by the authorities, and making my evaluative judgement I consider

a. What factors connect the tort to Germany, whose law would apply under Section 11? Recognising that such factors are potentially much wider than the events constituting the tort itself, and may include the parties' connections with another country, the connections of the events with another country and the consequences et cetera as set out above, I identify (as a non-exhaustive list) particularly the following:

i. Mrs Roberts' care was under a German obstetric team, led by a German obstetrician in a country where perinatal care is led by obstetricians, not midwives.

ii. The tort took place entirely in a German hospital.

iii. The whole of Mrs Roberts' ante-natal care took place in Germany because she had been resident there for some time as a service family member, it was part of the expectation for her delivery and not adventitious.

iv. The presence of the Roberts family could not in my judgement be described as transitory, although it was not permanent residence in Germany and I accept, as explained to me by Mr Roberts, that he was away quite a lot and in different places pretty much everywhere over the world in the course of his military career. However, nonetheless, the whole family lived its life in the country at the relevant time. The Roberts cannot be classed as temporary visitors in the same way as holidaymakers or other short-term leisure visitors might be.

v. In this case, the alleged negligence of the midwife was wholly bound up with the procedures and expectations of the German obstetric system, and with this her interrelationship with the German doctors and the hospital which elements would necessarily be governed by German law.

vi. The MoD was providing a German hospital obstetrics system for UK service personnel and their families, albeit they sought to ameliorate the experience by employing English-trained midwives.

b. With similar recognition, what factors connect the tort to England? In my judgement the following are relevant:

i. Midwife Clelland and Harry Roberts are English.

ii. Mr Roberts was in service of the British Crown, his wife was necessarily there with him for as long as he was posted to Germany.

iii. The Defendant employer of the alleged tortfeasor and the departmental indemnifier are firmly UK- based, indeed represent UK institutions, not comparable to companies which may have a base of operation anywhere in the world.

iv. Importantly, Midwife Clelland was trained in England and employed to offer an English-type service.

v. The English midwives were required to adhere to their English registration requirements when practising abroad.

vi. Actual operation on the ground involved the midwives in acting according to their own registration requirements, not participating in those aspects of obstetric care which conflicted with them.

vii. Midwife Clelland, as a registrant of the (then) UKCC could, it appears, be called to account by reference to the standards deriving from her British registration as a midwife.

c. Lastly, as to the question of whether there is a clear preponderance of factors relevant under section 12(2) which points to the law of England. Whilst there are a number of factors going both ways, I cannot conclude that there is a clear preponderance of factors connected to the tort itself, tying this case to England.

133. The significance of the whole obstetric team for the allegations against Midwife Clelland is a highly persuasive factor in my judgement. I acknowledge the UK nationality of both claimant and defendant and alleged tortfeasor. These factors, however, are insufficient to outweigh what in my judgement formed the focus of the actions in question: namely the operation of the German obstetrician-led team at the time of Harry's birth.

134. Accordingly, the connection with Germany cannot be diminished as the claimant contends. Further, in my judgement it is highly relevant that the British midwifes were "grafted on" to the German obstetric system and were, naturally, subordinate to the direction of the German obstetricians. The evidence shows that German obstetric care differs from English obstetric care to an extent: namely the involvement and autonomy of the midwife. The evidence of the midwifes shows that there was an expectation of following the German model, the very chafing under German direction, and the absence of hands-on experience of British midwifes, points up the direction and control of the AKV Hospital over the midwives' professional activities.

135. I am unpersuaded that because the British Crown was the reason for the Roberts' presence, and because their true homes were the UK, that it is substantially more appropriate for English law to be the applicable law.

136. Also, some midwives were English and some German. Indeed, an English midwife could not be guaranteed to the family of an English serviceman.

137. Moreover, it is plain from the history and the arrangements between the MoD, THA, GSST and the AKV Hospital that the practical consequences of judging the clinical members of the obstetrics team under the law of one jurisdiction and the midwife element under the law of another would be cumbersome and confusing. I do not base my decision upon that factor, however.

138. It seems to me overwhelmingly the case, that by agreeing to work in Germany, even though employed to do so by SSAFA, Midwife Clelland became part of a German obstetrics team. She had to learn German, obey the German obstetrician, and deliver a service that was German in character. Her own particular dislike or refusal to carry out certain parts of the role, do not take the claimant's case on this point any further.

139. There was clear evidence before me of the chafing of the midwives within this system, and I do not diminish it nor underestimate the fact that the midwives gave cogent and reliable evidence for which I am grateful, of a system of which they, in truth, did not feel part. Their instincts as to its lack of efficacy were proven correct as demonstrated by the recognition of the difficulties of the arrangements by the MoD and SSAFA and their ultimate withdrawal. This difficulty of settling within the system, however, in my judgement, as much as anything, as stated, serves to illustrate the fact that they were operating within a German system. In my judgement it is not possible to say that German law should be displaced.

140. The case put by the defendants was to the effect that section 12 does not apply to take the facts outside the provisions of section 11 for the following reasons:

a. The strong connection forged by the fact that the events took place in a German hospital in Germany.

b. The British midwives were working under the supervision and the direction of the German doctors and,

c. in this case, the issues surround not just the midwife about her interrelationship with the German doctors and the hospital which elements would necessarily be governed by German law. It is argued that it would constitute an anomaly if the behaviour of the midwife, interwoven with these two elements, was to be considered under a different law from them.

d. It was not predictable that the claimant would be delivered with the assistance of a British midwife – the team was constituted by German and British midwives.

141. For those reasons also, where they differ from or elaborate the reasoning above, I accept that German law is the appropriate proper law. I must turn to the effect of that German law in this case.

(ii) The Foreign Limitation Periods Act ("FLPA")

142. This question arises logically, if it is the case that the German law of limitation applies to disallow Harry's claim. Accordingly, the issue is dealt with on the premiss that that is the effect of German law. German law is dealt with in detail later in this judgment.

143. I have come to the conclusion, as indicated, that time did not run against Harry so as to bar his claim issued on 31 December 2004. Part of the reasoning as to an analysis of the actions of Mrs Roberts, is contained in the section of the judgment dealing with my findings as to the date of knowledge, below. That reasoning should also be read into this section of analysis. Put shortly, the context of the claim against which the 1984 Act questions must be answered, includes acquiring knowledge.

144. The question that arises in this section is thus as to whether or not, German law being the appropriate choice of law, the limitation period arising under it should be disapplied. For this purpose the consideration of the *Foreign Limitation Periods Act 1984* ("FLPA") is required.

145. The claimant's case is that it falls to be disapplied because it is contrary to public policy and/or causes undue hardship in not recognising the disability of the claimant as does English law and not abrogating the limitation period of 3 years.

146. Section 1 of FLPA provides:

> (1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter —…
>
> (a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and
>
> (b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

147. Section 2 provides:

> (1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.
>
> (2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that

> its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.

148. The claimant relies upon the judgment of Foskett J in *Harley v Smith* [2009] EWHC 56 (QB), [2009] 1 Lloyd's Rep. in respect of the "undue hardship" exception and in particular upon paragraph 94 encapsulating a series of propositions:

> "i) That it is not sufficient to cross the "undue hardship" threshold by reason only of the fact that the foreign limitation period is less generous than that of the English jurisdiction.
>
> ii) That the claimant must satisfy the court that he or she will suffer greater hardship in the particular circumstances than would normally be the case.
>
> iii) That in considering (ii) the focus is on the interests of the individual claimant or claimants and is not upon a balancing exercise between the interests of the claimants on one hand and the defendant on the other."

149. The decision was upheld by the Court of Appeal on a different basis but without criticism as a statement of the law, at [2010] EWCA Civ 78, [2010] C.P. Rep. 33 (although the judge at first instance was held to have misapplied the correctly stated test).

150. The Court of Appeal judgment is important as indicating the irrelevance to the statutory question of mistaken legal advice and uncertainty as to the relevant limitation period.

151. The claimant relies upon the "multi-factorial approach" explained in *In Bank St Petersburg v Arkhangelsky* [2014] EWCA Civ 593 [2014] 1 W.L.R. 4360 and the requirement to examine all the circumstances of the particular case; (*Hellenic Steel Co v Svolamar Shipping Co Ltd (The Komninos S*) [1990] 1 Lloyd's Rep. 541 [1989] 12 WLUK 307) where the agreed extension of time was found to be ineffective under foreign law.

152. In order to support his first ground that the application of the German period of three years is contrary to UK public policy the claimant relies upon the fact Harry is under a disability, without capacity does not have resonance for the German law of limitation.

153. Further issues prayed in aid for the claimant are those asserted under the PILA grounds of argument, above, namely the tenuous links of family to Germany, the service for the British Crown, and the lack of effective choice for persons in service of the Crown. Mr Sweeting QC refers to the Armed Forces Covenant as giving rise to a public policy consideration in terms that Harry Roberts should not suffer any disadvantage because of his father's service in Germany the British Army.

154. He also relies on what he submits is an early "intimation" by the Defendants that a limitation defence did not arise or would not be relied upon, but, thereafter, as

evidenced by the 2018 amendment to plead reliance upon it. Many of the matters prayed in aid in support of his case that in fact English law should apply, were understandably utilised in respect of the 1984 Act submissions and I do not set them out again here.

The public policy question

155. It is necessary that a system of limitation must be looked at in the round. It is also the case, that different systems balance the interests of litigants in different ways. Many of the cases cited are evidence of this. Commentators have remarked that different states may take different views as to where the balance lies. Each authority shown to me has made it clear that a cardinal principle I must apply is that a foreign limitation period is only very seldom disapplied on grounds of public policy. The position is usefully captured in *McGee, Limitation Periods eighth edition at paragraph 25. 027:*

> "it is obvious that a legal system can trade off within its limitation rules between the length of the period and the events which caused time to start running. What German law has in effect done is to be unsympathetic to claimants in relation to the commencement of the limitation period, yet generous to them in the length of the period.… There ought to be more respect for the policy choices made by other states… Limitation law is about balancing the interests of claimants and defendants and different states may legitimately take different views about where the proper balance lies. Judges should be very slow indeed to substitute their views for the views of a foreign legislature."

156. There was no serious contention as to the meaning of the jurisprudence on section 2 (1) and public policy conflict.

157. In *City of Gotha V Sotheby's and Colbert Finance*; 9 September 1998 (unreported), Moses J emphasised that the general public policy argument under section 2 (1) is only exceptionally successfully invoked, referring to *Arab Monetary Fund v Hassim* [1993] 1 Lloyds Rep. 543 at 592. Further, foreign law should only be dis-applied where that law is contrary to a fundamental principle of justice reflected by the phrase used *in The Estate of Fuld, deceased* (No.3) [1968] P.675 where Scarman J characterised the circumstances as where a law "outrages" an English court's "sense of justice or decency".

158. Moses J indicates that the fundamental principle with which foreign law is said to be in conflict requires identification and gives as example the case of *Oppenheimer v Cattermole* [1976] AC 249 involving a racially discriminatory piece of legislation inconsistent with English public policy. Importantly, this class of exclusion is not dependent on an individual judgement by the judge as to fairness or expediency. Moses J held, also, by reference to the Law Commission report in support of the Bill underlying the 1984 Act, that the section would likely be read as meaning public policy was invoked only where foreign law was "manifestly" incompatible with English public

policy. In *City of Gotha*, Moses J identified a public policy from the limitation act 1980 that time is not to run in favour of the thief or someone who is not a bone fide purchaser. In that case the purchaser had admitted the absence of good faith, the plaintiff, seeking recovery of a looted painting who had no knowledge of its whereabouts no possibility of recovering it was protected by the general public policy exception which, Moses J held did not undermine the purposes of the law of limitation.

159. The exception could not, he held, depend upon the nature of the plaintiff who sought to disapply that law, emphasising the high level policy requirement under this limb of the section.

160. Wilkie J in *KXL v Murphy* [2016] EWHC 3102 (QB) set out a checklist of principles in respect of the application of section 2(1) public policy as follows:

> "45. I accept that the following principles are established from the relevant authorities.
>
> i) It would be wrong to treat a foreign limitation period as contrary to English public policy simply because it is less generous than the comparable English provision in force at the time (*Durham v T&N plc* 1 May 1996 Court of Appeal unreported).
>
> ii) Public policy should be invoked for the purposes of disapplying the foreign limitation period only in exceptional circumstances. Too ready a resort to public policy would frustrate our system of private international law which exists to fulfil foreign rights not destroy them.
>
> iii) Foreign law should only be disapplied where it is contrary to a fundamental principle of justice.
>
> iv) The fundamental principle of justice with which it is said foreign law conflicts must be clearly identifiable. The process of identification must not depend upon a Judge's individual notion of expediency or fairness but upon the possibility of recognising, with clarity, a principle derived from our own law of limitation or some other clearly recognised principle of public policy. English courts should not invoke public policy save in cases where foreign law is manifestly incompatible with public policy. (*City of Gotha v Sothebys, Transcript October 8 1998 p89)*
>
> v) The English law of limitation serves the purpose of providing protection for defendants from stale claims, encouraging claimants to institute proceedings without unreasonable delay, and conferring on a potential defendant confidence that after the lapse of a specific period of time he will not face a claim *(Law Com report No 114 para 4.44)* and
>
> vi) The absence of any escape clause such as that contained in Section 33 of the 1980 Act cannot make the imposition of [the

> foreign limitation period] in any way contrary to English public policy *(Connelly v RTZ Corp plc & anr 1999 CLC 533 at 548*)."

161. I accept and apply those principles in this case.

162. Accordingly, although the protection of a person with a disability, such as Harry, might be said to be attributable to a matter of public policy choice in England, its absence in the law of German limitation, is not in my judgement a ground for holding that the German limitation period is contrary to public policy under the 1984 Act.

163. It is reiterated in the case law that different policy choices may be made under foreign law and, importantly, that certain aspects of a limitation policy may be more beneficial to a claimant, and others less so within any one jurisdiction. In my judgement, such may be seen here. Whilst the three-year limitation from the date of knowledge is less generous, aspects of the medico-legal system in German limitation, such as the suspension of time during reference to the Commission, are more generous than the English system. As Lord Bingham said in *Durham v T and N plc* (CA) :

> "it would in our judgement be wrong to treat foreign limitation period as contrary to English public policy simply because it is less generous than the comparable English provision in force at the time."

164. Further the encapsulation of the principles under both section 2 (1) and (2) principles by Wilkie J in *KXL* reflected a rejection of the submission that whilst certain jurisdictions had relaxed time limits in respect of historic sexual abuse claims, the fact that a strict three years applied under the law of Uganda, there in issue, was not evidence of incompatibility with English public policy under subsection (1) as being a conflict with a fundamental principle of justice.

165. Further, that in that case, the subsection (2) hardship suffered was neither more nor less than the consequence of the imposition of the time bar itself.

166. It is possible to over-elaborate what is, in my judgement, a clear test in respect of subsection 2 (1) of the 1984 Act. I am clear that it is not a test which the facts of this case surmount.

167. Indeed, the real battleground between the parties under PILA was whether or not it could be said that "undue hardship" had been suffered by Harry by the imposition of the German limitation period pursuant to section 2 (2). I was referred to a number of authorities on interpretation of the statutory phrase.

168. As with the first ground of general public policy, I propose to decide this issue on the basis (at this point) that the German law of limitation applies so as to shut out the claim on behalf of Harry Roberts. It is appropriate, lest this matter go further, that an answer is given on each of the questions posed, whether or not in the event, a decision upon them is shown to be necessary.

169. In *The Komininis S* [1990] 1 Lloyds Rep 541 at 545 undue hardship was held to exist where parties, having agreed an extension of time for beginning proceedings, did not realise that under applicable Greek law, such an agreement was ineffective – per Leggatt J. This appears to be a case where both parties were to an extent at fault but a result depriving a party of the opportunity to make its claim at all, would have been disproportionate. In that case the judge held that Greek law was the proper law of the contract and, it was agreed that the claims had become time-barred under Greek law. It was submitted by the plaintiffs that the defendants were disentitled from reliance on the Greek limitation period because they had extended time in the context of English proceedings in which such an agreement was lawful. The material passage is as follows (page 545 col 1):

> "According to the plaintiffs "undue hardship" would result to them if the defendants were allowed to rely on the time bar after agreeing to an extension of time. It is true that it was not to an extension of time for the purposes of Greek law that the defendants agreed, and it is the plaintiffs who have invoked Greek law. But by agreeing to extend time the defendants plainly intended to vouchsafe the plaintiffs more time in which to bring proceedings against them without being time-barred. Within the time allowed the plaintiff instituted proceedings in respect of cargo damage such as were contemplated by the parties. In these circumstances it would in my judgement constitute a real and undue hardship if the plaintiffs were to be denied the opportunity of pursuing their claim by an incident of foreign law by which the parties did not realise that their contract was governed. That hardship outweighs any that the defendants might be said to suffer by reason of the plaintiffs being able to take advantage of Greek law which excludes reliance on exemption clauses."

170. This case shows, that where, absent disapplication of a time limit, the effect of overlooking the true legal position is loss of the right to claim at all, the court may characterise it as disproportionate. In that case it is clear the parties were intending to conduct themselves by reference to agreements and the allowance of time. For one party to take advantage, was disproportionate and therefore evinced undue hardship.

171. The importance that the hardship is caused by the application of the foreign limitation period, and not by concomitant negligence was underlined in *Harley v Smith* [2010] EWCA Civ 78. The Court of Appeal disapproved reasoning from the judge below who had held that hardship which derived from the lawyers instructed failing to realise the short limitation period was relevant to the question of undue hardship.

172. Wilkie J had this to say about section 2 (2): deriving the following propositions from the authorities:

i. Undue hardship is an example of conflict with public policy (*Jones v Trollope Colls Cementation Overseas Ltd The* Times January 26 1990 (CA) at page 4).

ii. The Courts must be astute not to allow what are really Section 2(1) arguments to be re-introduced by way of 2(2) (*Gotha City v Sotheby's at page 99*).

iii. "Undue" in this context means "excessive". One has to see whether the plaintiff has suffered greater hardship in the particular circumstances by the application of Section 1(1) than would normally be the case *(Jones ibid at page 4).*

iv. Consideration of undue hardship does not require a balancing act between the interests of the claimant and the defendant (*ibid at page 5*).

v. Where Section 2(2) is involved the focus is on the undue hardship caused to the claimant by the application of a foreign limitation period over and above that inevitably caused by the application of the foreign limitation period in question *(ibid at page 5).*

vi. If, within the foreign limitation period, the claimant acquires all the material required for bringing the action, it is not contrary to public policy to apply the foreign rule even if he is only a few days late in commencing the proceedings *(Arab Monetary Fund v Hashim & ors 1993 1 Lloyd's Rep543).*

vii. The fact that a claimant did not issue in time on account of inaccurate legal advice as to the limitation period does not suffice as a hardship would not have been caused by the foreign limitation period *(Harley v Smith 2010 EWCA Civ 78).*

viii. It cannot be said that the 3 year period for claims of this sort is so short that the plaintiff suffered undue hardship merely by reason of the fact that it is imposed. There must be some additional factors which make the hardship excessive in this case *(Arab Monetary Fund v Hashim & ors).*

ix. The question can be framed in the following manner. Does the application of the foreign limitation period deprive the claimant of his claim in circumstances where he did not have a reasonable opportunity to pursue it timeously if acting with reasonable diligence and with knowledge of its potential application, where the claimant is deemed to have knowledge of the application of the relevant foreign limitation period *(Naraji v Shelbourne 2011* EWHC 3298(QB) at paragraph 177, and, *Bank of St. Petersburg v Arkhangelsky* 2013 EWHC 3674 CH at paras 15 and 17).

x. Reasonable diligence can be considered by reference to, for example:

(a) Any unusual difficulties in effecting the steps necessary to bring the claim.

(b) The reasonableness of any expectation of the claimant, though subsequently falsified, that a particular means of

bringing the claim within the foreign limitation period will be effective.

(c) Any efforts in fact made, albeit without success, to bring the claim and the reasons for their failure.

(d) Any special factors which have made it unusually difficult for the claimant to bring the claim within the time prescribed by the foreign limitation period *(Bank of St Petersburg, ibid para 17*).

xi. The Court will not accept as justifying the disapplication of a foreign limitation law:

(a) Hardship caused not by lack of time but by a factor unconnected with the specific period prescribed such as wrong advice as to the application of the period.

(b) The mere fact that the period specified by the foreign limitation law is less generous than the period allowed under English law, or

(c) Hardship that, however regrettable, is no greater in the particular circumstances than would normally be the case *(ibid para 18).*

xii. The existence of an alternative route to redress can be significant and it is not necessary for the alternative route to provide equivalence to access to the Courts in England and Wales *(OJSC Oil Company v Abramovich & ors* 2008 EWHC 2613(QB) paras 318 – 324).

173. More recently in *Kazakhstan v Zhunus* [2017] EWHC 3374 (Comm), Picken J approached undue hardship on the basis that undue means excessive in all the circumstances. It means greater hardship than the particular circumstances of the case warrant. In other words, on the particular facts, disproportionate. He said:

> "Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault" [557]."

174. *Kazakhstan* was a case involving the discovery of a fraud. The claimants were at fault regarding beginning proceedings but applying the limitation period would have enabled the defendants to get away with the fraud. In that case, Picken J referred to the decision of Longmore LJ in *Bank St Petersburg* (supra) on appeal at [2014] 1 WLR 4360 which Wilkie J had seen only at first instance. Wilkie J's criteria were applied in the *Kazakhstan* case but Picken J amended one of them in light of material from a Court of Appeal judgement that had not been before the other judge. A material passage from Longmore LJ's judgement was highlighted, applying a passage of a judgement of Lord Denning MR in Liberian Shipping Corporation *"Pegasus" v A King and Sons Ltd* [1967] 2QB 86 at page 98G where he said this:

> "… undue… simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault"

175. Longmore LJ had agreed that the question concerning hardship was correctly identified in words that approximate to Wilkie J's principle (ix) above. He added, however, the citation from *Liberian Shipping* above. He held, in that case, that applying the Russian time-limit so as to prevent any counterclaim caused undue hardship because, although the sufferers may have been to some extent at fault in not applying sooner than they did for an order dispensing with service and not finding enough money to translate the proceedings into Russian and serving them, the consequences of not being able to pursue the counterclaim were out of proportion to that fault.

176. In my judgement the Picken J addition to the *KXL* criteria is an important one in the circumstances of this case, and appears, with respect, to be fully justified in light of the way Longmore LJ expresses himself in the *Bank St Petersburg* case. Accordingly, I adopt and apply the principles enunciated by Wilkie J in paragraphs (i) to (xii) set out above, as modified by Picken J in *Kazakhstan*.

177. The cases of *The Komininis* and *Kazakhstan* are characterised by Mr Hollander QC for the defendants as on exceptional facts. He submitted that in the present case there was just no sufficient detail, or no comparable facts, adduced by the claimant to support a comparable case.

178. He contrasted the plethora of material advanced in support of the undue hardship contention including where the defendant descends into great particularity as to what he had been told by his representatives, his lack of resources, his worries about limitation about the effect of certain procedural steps taken or not taken it in the Chancery Division. He lists a series of six factors which led to the conclusion of undue hardship in that case including: impecuniosity, an expectation a firm would be instructed to accept service, hardball attitude of those who did not instruct that firm, difficulty and delays in serving proceedings in Russia, a short time only between an agreement for the English jurisdiction and expiry of the time, and the disproportionality and unfairness when the bank had long been aware of the claims themselves. I observe that the circumstances cover a very wide compass: financial hardships, commercial and practical difficulties, delays, and the effect for the claimant, in other words "what the claimant would have lost".

179. In the present case, the essential submission of Mr Hollander QC for the defendants was "we have absolutely no material in support of what could be put forward as a claim in undue hardship."

180. Mr Hollander says there is a complete gap in knowledge as to what happened once the solicitor was instructed. He says the German time-limit is mentioned in correspondence in the letter of 7 April 2003, and an indication in June of that year is given that she should be suing the midwife. He describes the evidence on behalf of the claimant as demonstrating that there was "no engagement with this issue at all" there is therefore

no material he submits upon which an undue hardship finding could be made. It is not asserted, he noted, that any reliance was put upon ALA.

181. Applying the principles that are set out above I begin conscious of the clear exhortation to take into account matters that could properly be said to take this case into the exceptional category in which there is a disproportionate hardship to the claimant. It is obvious that the hardship suffered must be properly described as over and above the hardship that is inevitably caused by the application of the foreign limitation period itself. I interpret "hardship" as meaning significant detriment, since the statute indicates is a subset of the notion of "public policy". It must therefore be a detriment of real significance which should not be countenanced.

182. I have held (above) that there is no public policy offence in the disparity between the English policy decision to remove limitation in the case of a disability such as that suffered by Harry, and/or to afford protection to a claimant during their minority, and the German system which does not protect these classes of claimant in this way. Nor is there, in my judgement any other reason of public policy, as that phrase is to be understood in section 11, that requires the court to disapply German law. Similarly, in terms of undue hardship, more is needed than reference to the difference between the position of Harry under English law and under German law, and I have come to the clear conclusion that this is such a case where the hardship exception does apply.

183. I reject the submission on behalf of the defendants that there is no evidence before the court or that the claimants have somehow not sought to put appropriate material before the court to decide this matter. I do not read any absence of correspondence as pointing to a failure to grapple with the issues or as demonstrating an absence of material on which it is appropriate to consider hardship. I agree with Mr Sweeting QC for the claimant that the material emerges from the remaining documentation and from the unusual context of this case.

184. In my judgement, the case law, which compels a highly fact sensitive assessment of undue hardship, requires an overview of all the circumstances affecting the potential sufferer of that hardship. The question of undue hardship (which incorporates the concept of disproportionate burden upon the litigant - i.e. the loss of the whole claim) is premised on, for the main part, the notion that contrary to my holding, German law compels the conclusion that knowledge was acquired earlier than the date at which I have held it was.

185. In assessing whether imposition of such a time limit would cause undue hardship I, following the case law set out above, have to take into account a wide variety of factors. These are, most importantly:

a. <u>The circumstances of the early knowledge and its character.</u> Knowledge of the kind acquired in this case, effectively within hours of birth, is on this premiss, relevant to fixing time to run for medical negligence. The early "knowledge" comes from oblique conversations immediately after birth, in circumstances of considerable stress. Mrs Roberts was having her first baby, she was inexperienced, therefore in childbirth, her knowledge she reasonably asserted was small. Knowledge is also based on an observational comment, by the child's father, that the recording monitor was not in place, and, importantly, perception of a single fleeting social interaction in the throes of delivery, of in the delivery

room. If German law compels these factors to be the start of knowledge, then, in the very particular circumstances of this case, involving a badly affected victim of cerebral palsy, and a primigravida giving birth in a foreign country, it contributes to the view that there it would be a disproportionate application of the law contrary to public policy, to deprive her of her action on behalf of her son.

b. The circumstances of Mrs Roberts. If it be said that the early materials together with the appointment in February 2001 at which the devastating news was given of Harry's permanent and serious impairment, constituted knowledge sufficient to start time, this also is material to be taken into account in judging whether disproportionate hardship has been suffered. In this case, it was clear that Mr Roberts was absent on military service for much of the relevant time between Harry's birth and the end of 2001. Mrs Roberts, mostly alone, was expecting and gave birth to, another child in October 2001, and had regular medical trips to help cope with Harry and his worsening condition. Subjectively, it is clear the Roberts are not people to complain or seek to place blame as a first recourse. If the German law of limitation imposes so strict a timescale that Mrs Roberts is out of time because only in 2002 did she begin to think about placing blame (the doctors), in all of these circumstances, and only when it became clear in 2003 the midwife was involved, were steps taken in that direction, then this is clear evidence of undue, disproportionate hardship.

c. The circumstances of the various legal representation and various legal proceedings. The interrelationship of a potential claim against the obstetrician, thereafter a claim against the midwife and the effect of the case of *A (child)* so as to effect a stay of the former, was complicated. The focus of the legal endeavours was always in respect of seeking to establish liability for the doctor's negligence against the MoD. If, under German law, Mrs Roberts is obliged to have considered/questioned whether Midwife Clelland was also to blame, and, failing to do so, is then shut out from any claim, on the facts of this case, this would be evidence of undue hardship in my judgement. It is clear in the correspondence, and in particular a letter written by Simpson Millar on 29 June 2004, after the translation of the April 2004 report of the Commission, that, at least in respect of her representative for the case against the doctors, the Commission report and the March 2003 letter from Dr Baysal triggered a response. That response led to the letter before action the next month. It appears Simpson Millar were first sent the Dr Baysal letter of 5 March 2003 in May 2004 (and at the same time a letter from ALA enclosing all these documents dated 4 May 2004).

d. The complicated background to the provision of care, with the complicated and uncertain disposition of potential liability are not of the claimants making which means that, over and above any hardship to be suffered anyway, were German law to block the claim, it would in my judgement be disproportionate for the defendants to shut the claimant out. Further, this was care provision under the Military Covenant. Whilst I reject the submission that that itself is a bar under general public policy to German limitation in this case, it is not an irrelevant circumstance to consider the Roberts were, because of his service, compelled to accept treatment subject to a disadvantageous limitation period. I do not hold

that the hardship arises merely from the differential between the two limitation periods: England and Germany. However, the overlay of military service and the foreign language component provide an extra barrier to what was argued to be, the need for a very early realisation in the delivery room that things were going wrong.

As indicated this section should be read with that part concerned with analysing Mrs Roberts' actions below.

186. Accordingly, if and to the extent that I am wrong in my conclusion that Mrs Roberts is not out of time, I hold that the effects of the 1984 Act such that the claimant would suffer undue hardship and the German limitation period must be disapplied.

GERMAN LAW ISSUES

187. It is trite, and not in dispute in these proceedings, that any party who wishes to assert that foreign law should apply to a case must plead and prove that law by means of expert evidence on the balance of probabilities. (Dicey and Morris Part 2, Chapter 9). Where foreign law is admitted it need not be proved. Similarly, where experts agree about the effect of foreign law, the court ought not generally to go behind that agreement.

188. The claimants instructed a German qualified lawyer Miss Christine Thimm with particular experience in the field of medical law. The defendants instructed Christine Volohonsky, also a practising German lawyer specialising in contentious work, including professional negligence. The experts each produced a report for the court, and also a joint report.

189. Helpfully there has been agreement as to a number of important propositions of German law in this case. (See below).

190. There is no contention about the approach that I should take. The following propositions derive in large part from *Bumper Development Corporation v Commissioner of Police of the Metropolis* [1991]'s 1 WLR 1362 at pages 1368D -1371E. It is not the task of this Court to conduct its own research into foreign law and I do not approach foreign law as I would a disputed question of English law. Generally speaking it is appropriate for the court to accept agreements as to the effect of foreign law. Nonetheless, I am entitled to reject expert opinion as to meaning where it is obviously inconsistent with the text, for example, and not otherwise properly justified. In the event of conflict between expert witnesses as to the effect of German law I must, however, look at the German law materials and decide for myself as between the conflicting testimony. These uncontroversial propositions are set out in the *Rule 25 Commentary* and supported by authority which I need not set out here.

191. Further, the Commentary explains that this court is required to give considerable weight to the decisions of foreign courts as evidence of foreign law when they are referred to in expert evidence. I am enjoined against bringing my own interpretation to such cases when I have evidence before me from the expert witnesses as to the cases' interpretation. In instances of conflict however it will fall to this court to decide between them, if such a decision is necessary to resolution of the issues.

Consideration of German Law

The Agreed Position

192. No issues arise as to proving the relevant law but there was discussion about the effect of the case law concerning limitation issues in the context, in particular, of medical negligence. In the present case, the applicability of German law was pleaded by way of amendment on 31 July 2018.

193. As stated above, the purpose of this enquiry, is the necessity to determine whether, as the defendants assert the claimant's cause of action under German Law had accrued and limitation had expired by December 2004 when the claim was issued, which requires an understanding of how the German law of limitation operates in the field of medical negligence.

194. Given the agreement between the parties as to the relevant materials, I can deal very briefly with where the German Law is found. It is made up of statutes codes and regulations and, as explained in the expert report of Christine Volohonsky on behalf of the defendants, it is materially different from Anglo-Saxon common law in that civil law judges are not bound by precedent but in practice with the aim of achieving consistency, they generally consider and follow previous decisions of other courts particularly higher level courts. They will deviate only where the facts and circumstances provide compelling reasons to do so. I also accept, as set out in her oral evidence by Ms Thimm for the claimants, that the law has seen some development, and a tendency towards a more expansive approach in the case of medical negligence knowledge to the benefit of claimant patients. This much appears from the cases themselves.

195. The relevant legislation is the German Civil Code the Burgerlisches Gestezbuch ("BGB"). In 2002 there was a significant change to the BGB and to the Second Book governing the law of obligations. Any right of claim arising before 1 January 2002 is subject to the old BGB in force prior to that date, pursuant to Article 229 section 5 of the Introductory Act to the Civil Code (Einfuhrungsgesetz zum Burgerlichen Gesetzbuche) ("EGBGB"). Material changes to the laws affecting tortious claims were made.

196. As may be seen from the items of agreement, other aspects of the effect of limitation are to be judged by reference to new BGB in force after 31 December 2001.

197. A number of propositions of German law were agreed as arising from these materials. I proceed upon them; they are as follows:

    a. Limitation is a substantive issue.

    b. The primary limitation period is 3 years from the date of knowledge, with a longstop of 30 years from the tortious act.

    c. No special limitation period applies where the claimant is a minor.

d. Where the claimant is a minor, the knowledge of his parents (and legal advisers) will be attributed to him.

e. The defendants bear the burden of proof, subject to the claimant establishing when he knew of the damage and the person liable for the damage.

f. If the claimant acquired relevant knowledge on or before 31 December 2001 the limitation period commenced on the date knowledge was acquired.

g. This claim was issued out of time if relevant knowledge was acquired prior to 31 December 2001.

h. A limitation period may be 'inhibited', such that the period starts again when the inhibition ceases.

i. A limitation period may be 'suspended', such that it is paused until the suspension no longer operates.

j. BGB Old Version (in force until 31 December 2001) applies to determine whether there were any suspensions or interruptions of the limitation period up to and including 31 December 2001.

k. BGB New Version applies to determine whether there were any such suspensions or interruptions after 31 December 2001.

l. On the facts of this case only BGB NV is relevant to any inhibition as a result of assertion or legal rights, or suspension as a result of negotiations.

m. Negotiations may operate to suspend the limitation period. The term 'negotiation' is to be interpreted widely.

The taking of steps to assert legal rights may suspend a limitation period.

The area of dispute

ISSUE b(i) German limitation – date of accrual of cause of action?

198. It was a matter of agreement that if the claimant could be said to have had relevant knowledge before 1 January 2002, absent any suspension or interruption of limitation, the limitation period had expired by the time the writ was served on 31 December 2004. It is thus necessary to know:

a. What constitutes relevant knowledge in the context of medical negligence under German law?

b. At what date would the German court hold that relevant knowledge had been acquired and the cause of action (absent suspension or inhibition) had accrued?

Relevant knowledge

Claimants case

199. The claimant pleads that the applicable three year period runs from the end of the year in which the claimant or his statutory representatives:

a. knew or ought to have known without gross negligence of;

b. the matters giving rise to the cause of action; and

c. the name of the defendant.

The claimant pleads that:

d. knowledge means not only:

i. knowledge there was damage but also;

ii. knowledge it was caused by the negligent breach of an applicable standard of care; and

iii. knowledge of the person potentially liable for such damage, which means where more than one person may be liable "no reasonable doubts" persist about the identity of the person who is liable.

200. The claimants rely upon a date of knowledge in or about May 2004 when the initial decision of the Commission was communicated to Mrs Roberts which implicated Midwife Clelland. The defendants by contrast, argue that at or around the time of birth, and certainly by February 2001 and the trip to the paediatrician with Harry, the Roberts as his "knowledge representatives" had sufficient material for limitation to start to run.

201. The burden of proving the effect of German law falls upon the defendant who raises it. In the event, as observed by Mr Hollander QC there was not much distance between the parties as to the applicable test. The real discussion was as to how the German court would decide the issue on the facts of this case. A point of distinction between the expert was the particularity of knowledge required to fulfil the German principles.

Defendant's case

202. The defendant's representative Ms Volohonsky begins by saying, in unobjectionable terms, this that the law states in terms it was sufficient to know of:

a. the damage, that is, Harry's medical condition; and

b. the "identity of the persons who were potentially liable to him for such damage".

There is no requirement for a potential claimant to be aware of the appropriate legal conclusion to be drawn from the facts.

203. The applicable German instrument, Section 852 of the old BGB which applies to noncontractual claims indeed provides, in very similar language to that used by Ms Volohonsky, relevantly:

> "the claim… becomes time-barred three years from the point in time at which the injured person obtained knowledge of the damage and the person liable to reimburse him for the same, or regardless of this knowledge 30 years after the perpetration of this act."

204. This formulation of course, says little or nothing about the application of the law in any particular given set of circumstances and both parties are agreed that nuance as to the type and level of knowledge required is added by the jurisprudence and by academic commentary, to which the courts will resort.

205. Ms Volohonsky states the test to be found in the case law in several places within the body of her own expert report dated 26 April 2019, where she says in part C, paragraph 64, referring to Judgment 246/94 of 17 October 1995 (to do with infringement of property rights) in which:

> "the Federal Court of Justice held that for the purposes of section 852 of the BGP, the injured person… had to have a sufficient level of knowledge that he had been injured and therefore that he was potentially in possession of the right to bring a claim, which it would be reasonable for him to advance in order to avoid the claim becoming time-barred.… It confirmed that a negligent lack of knowledge would not be sufficient to meet this test, but that knowledge of the events giving rise to the claim would be sufficient. Knowledge of the underlying legal analysis of the claim was not necessary for these purposes.… Therefore the injured person must in principle simply be aware of the facts, which appear to him to make him an injured person and the owner of a right to claim damages"

She says, at one point in her report, German law does not require knowledge of who exactly had deviated or from which exact medical standard but the claimant need only know that the medical conditions might have been caused by medical malpractice by the persons involved in the birth process. In her expert report she also phrased the requirement of knowledge in the following terms:

> "a sufficient level of knowledge that he had been injured and therefore that he was potentially in possession of the right to bring a claim, which it would be reasonable for him to advance in order to avoid the claim of becoming time-barred."

206. Ms Volohonsky accepts that constructive knowledge is not relevant. Further, she also accepts that where the issue is medical error the position may be somewhat more complex.

207. She accepted, in the medical context that where it is known there has been an error it must then also be known by the claimant that the doctor in the course of this error has deviated from ordinary medical procedure, and that deviation resulted in failing to do something necessary to avoid and/or control birth complications. The case of 5 February 1985, 61/83 upon which she relies, indeed is support for this proposition. In that case which was a medical negligence matter involving a failure to carry out an ultrasound, the court said:

> "the parents had to have knowledge that the acts of the paediatrician had deviated from the ordinary medical procedure and that that deviation had resulted in a failure to take a step which was necessary in order to avoid and control complications connected to the birth which had occurred".

208. Mr Hollander QC submitted that in Harry Roberts' particular case, knowing the facts sufficient to start the limitation period is really rather straightforward since the facts relied upon as constituting knowledge are very simple and uncontroversial. Knowing the primary facts is sufficient and it is not necessary, both parties agree, to know the legal consequences. Both sides are agreed that the test is an objective one: it is not the case that if the claimant believed they had insufficient knowledge, no matter how unreasonably, that limitation would not begin to run against them.

209. In fact on analysis, the experts were agreed in most material particulars as to the effect of the law. In her expert report at paragraph 74, Ms Volohonsky having recorded that the claimant's medical condition was communicated to his parents shortly after Harry's birth and confirmed to them about eight months later says the following:

> "This alone however would not be sufficient to establish knowledge within the meaning of section 852… The Federal Court of Justice has made it clear that merely being told of the circumstances of the birth process and a medical diagnosis does not ordinarily establish sufficient knowledge that there has been a deviation from the ordinary medical procedure as opposed to an accidental or fateful mishap so as to provide the basis for a claim."

She continues:

> "However the Federal Court of Justice has also found that in certain instances, the precise type of medical procedure and the subsequent complications suffered mean that the claimant must have reasonably reached the conclusion that these complications in fact resulted from medical malpractice and it would have been unreasonable for an affected patient in his position to simply attribute the complications to an accidental or fateful mishap."

210. Her opinion is based in particular on two cases (VI ZR 246/94 = VersR 1996p 76, 17 October 1995, Federal Court of Justice; VI ZR 251/88 = N J W 1989 2323 et seq, and in the last proposition upon Case of ADD 35/82, N JW 1984p 1661, Judgment of 20 September 1983). In the event, I do not understand the defendants to take serious issue with this statement of principle.

211. Ms Volohonsky sets out some of the evidence upon which the defendant team relies from Mrs Roberts' statement and then, significantly, says this at paragraph 76:

> "The court will therefore have to decide whether the evidence given by the claimant's parents indicates that at this time they had sufficient knowledge of the potential deviation from the ordinary medical procedure during the birth process so as for it to have been reasonable for a claim to be commenced in order to protect the position on limitation. At the absolute latest by 24 June 2003 when Mrs Roberts received the letter informing her that according to Dr Baysal "both the doctor and the midwife bear the responsibility for the birth and accordingly Mrs Sheila McClelland should also be a party to your claim"… there can be no doubt that the sufficient level of knowledge had been obtained."

212. Ms. Thimm indicated that caselaw supported the proposition that the claimant must be aware from a layman's point of view of the importance of the relevant medical procedure for the success of any treatment. Accordingly, time does not run until a claimant has sufficient knowledge of facts indicating the doctor had deviated from the usual medical procedure or had not taken necessary measures, according to medical standards to avoid or control complications. This is consistent with how the matter was put, as I read it, in Ms Volohonsky's Report.

213. Ms Thimm notes that the limitation period runs when the claimant (or his legal custodian)

> " … has knowledge or ought without gross negligence to have knowledge of the damage and the identity of the person potentially liable to him for such damage…"

Further, she expresses her views thus in her report:

> "22. "**Knowledge of the damage**" 852 BGB has been interpreted by the German courts so that the claimant's "knowledge of the damage" requires, that he/she not only knew that there was damage but also needed to know that the other party acted negligently and the damage was caused by negligent acting. Therefore, the claimant needed to know not only the relevant facts about causation, but also such knowledge about the facts as allowed him, as a non-technical layman, an understanding that the author of the damage breached the negligence standard at the time the damage was caused.… In

> medical negligence cases this means that when the claimant knows that the doctor has broken the standard of care which is when he knows the result of an experts opinion informing him that this is the case (the decision of a panel of medical experts is also typically characterised as such an opinion)."

214. The claimant's expert particularly disagreed with any suggestion that the Federal Court of Justice had held that it was sufficient merely to know there was a deviation from standards but the claimant did not need to know who had deviated from what standard.

215. Importantly, Ms Thimm also said the following in her report:

> "23 "**knowledge of the defaulter**". The limitation period under paragraph 852 BGB only starts [to] run, if the claimant has knowledge of the damage as described above and the identity of the person potentially liable to him for such damage. The Federal High Court of Justice decided that this means where it is seriously possible, that there is more than one person liable, that the limitation period starts to run, when reasonable doubts about the person who is liable do not exist anymore (citing the 198/99 authority"

216. Ms Thimm was of the view that Mrs Roberts was aware of details of the medical action and did not know until she had received the first opinion of the Experts Commission in 2004, that the midwife had breached any standards. She says there is no way the claimant's mother could have known who should have taken what steps to avoid the consequences of Harry's hypoxaemia during birth.

217. The claimant relying on the 198/99 authority above says a claimant must be aware that the potential injuring party is technically responsible for the damage and must be aware that this person has committed a breach of duty. She paraphrases and says the test is:

> "the limitation period therefore begins to run when justified doubts about the person liable for compensation no longer exist"

she refers also to a decision of 24 June 1999 IXZ ZR 363/97; and a decision of 8 May 2001 VI ZR 208/00.

218. The manner in which the Claimant's expert expresses conclusions applying the German law to the facts is as follows:

a. At the beginning of 2002 Mrs Roberts did not know in the sense required by German law if Harry's cerebral palsy had been caused by substandard treatment around the time of his birth. She refers to the fact that Mrs Roberts statement used the word "suspicions", but that to would be inadequate.

b. It cannot be said simply because she was suspicious, knowing about the obstetrician and midwife upset, that she knew at that point Midwife Clelland

had broken a standard of care and that failure caused Harry's cerebral palsy. Ms Thimm deduces that Mrs Roberts called ALA to help her to find out whether Harry's cerebral palsy was caused by medical malpractice and who was responsible.

c. The date of knowledge was from May 2004 when she knew that Harry was suffering from cerebral palsy because midwife Clelland broke a standard of care.

d. Thus, limitation requires knowledge of the identity of the person potentially liable for damage and Mrs Roberts did not know if Midwife Clelland or Dr Baysal or someone else working for AKV Hospital might have made a mistake. In her opinion the German court would conclude the three-year limitation period did not start to run before she received a decision from the Commission.

219. Given the complex facts of the present case, the claimant's expert states the claimant did not have the requisite knowledge until the Commission produced its first assessment: they did not know who was technically responsible – that is, who had breached a recognised standard.

220. The defendant's expert states that in the present case, where Mrs Roberts knew the exact identity of Midwife Clelland at all times and was also aware of her involvement, she knew she was a potential tortfeasor well before the Commission reported in 2004 and that was sufficient to fix her with knowledge. In particular, the obstetrician's anger with the midwife when she came in at the birth, coupled with the knowledge of Harry's impairment in the course of 2001, was sufficient to fix knowledge either at birth, or in 2001 at the date of the consultation when the depth of Harry's injuries was appreciated.

Conclusion on German Law

221. I found the evidence of Ms Thimm and of Ms Volohonsky of considerable assistance. They both gave evidence with professionalism and displayed laudable erudition. It is the case that Ms Thimm has a currently somewhat broader practice in professional negligence, I deduce, than Ms Volohonsky and she clearly has a wider knowledge of the law of medical negligence. This is no criticism whatsoever of Ms Volohonsky the clarity of whose contribution was admirable. However, where there is any tension between the approaches of the expert witnesses, for the reason of experience and familiarity with the application of the German law in medical negligence cases, I prefer the approach of Ms Thimm.

222. Synthesising the evidence of both expert witnesses, in light of the authorities they rely upon, I find that in the context of medical negligence in German law, (as set out in the Judgement of 10 November 2009, 247/08 of the Federal Court of Justice) time will only start to run when:

> "The patient, as a medical layperson, acquired knowledge of facts from which it emerged that the doctor had deviated from the usual medical procedure or had not taken measures which, according to medical standards, would have been necessary to avoid or control complications [many case references are given].

> This knowledge only exists if facts known to the claimant are sufficient to arrive at the conclusion of culpable misconduct by the defendant and of the cause of this misconduct appear obvious for the damage or the necessary subsequent operation [further reference]. Only then would it be possible for the injured party to bring an action for damages – even if only in the form of an action for declaratory judgement – with reasonable chances of success, albeit not without risk [case law references]".

223. Both witnesses refer to this case and I find that it represents the core approach in cases of medical negligence.

224. Ms Thimm said in her oral evidence on this case:

> "this is the decision everybody relies on when knowledge is checked in medical malpractice cases. It is the one from 2009, it is not the old one."

She stated that between the years 1975 and 2009 the courts approach to the position of the patient had softened over time on the issue of lack of knowledge.

225. It was referred to as the case usually cited in medical negligence actions because it contained a survey of the learning on the application of the limitation period in cases of medical malpractice. I treat it as a useful summary of the law.

226. These principles have been otherwise expressed in an earlier case of 20 September 1983 of the Federal Court of Justice 20/82 in which the court said the following:

> "… It is a question of whether the fact known to the claimant was sufficient to make obvious the conclusion of culpable misconduct by the second defendant as the damaging party and of this conduct causing the damage; then it would have been reasonable to expect the claimant, also taking into account a remaining procedural risk, to file a claim… When such knowledge is to be assumed to be present with the damaged party will depend to a large extent on the circumstances of the individual case. Of course it is to be conceded to the appeal court in the second appeal court that the peculiarities of medical liability proceedings require not concluding prematurely from the fact that an injurious act leading to the damage is obvious that there is a culpable treatment error (or error in medical advice). The causal processes in medical interventions are often not clearly ascertainable either with regard to the future or retroactively, because in each case a different organism is affected, the condition and reaction of which are not reliably predictable. Failures and complications in the process of medical treatment therefore do not always point to misconduct by the treating physician. Sufficient knowledge by the patient of facts which suggest such misconduct therefore requires, for example, the knowledge of the main circumstances of the treatment process, and in particular any anatomical peculiarities, a medical

> procedure deviating from the norm, the occurrence of complications and measures taken to control them."

227. My attention was drawn to the earlier case of 23 April 1991, 161/90 of the Federal Court of Justice also in the medical liability sphere, and involving birth difficulties. It is referred to in the expert reports. This case supports the proposition that the patient is in medical terms, a layperson and has to have knowledge of facts indicating a physician's deviation from the medical standard. In that case it was said:

> "it is not enough for the patient to know the details of the medical act or omission, as in this case the omission of an ultrasound examination of the claimant's mother when she was admitted to the hospital. Rather, from a layman's point of view, the patient must be aware of the importance of the medical actions for the success of the treatment. Therefore the limitation period does not begin to run until the patient, as a medical layman, has gained knowledge of facts from which it follows that the doctor has deviated from the usual medical procedure or has not taken measures which were necessary according to medical standards to avoid or control complications."

228. For the limitation period to begin in that case, the parents would have had to know that with the omission of an ultrasound examination of the mother antenatally, there had been a deviation from the usual medical procedure and that the medical team thus omitted a measure which was necessary to avoid and control birth complications of the sort that occurred. In that case, in fact, initially, the claimant's suspicion was directed at potential mistakes by doctors in the paediatric clinic. Only later was the suspicion directed at the doctors in the birth clinic. The court held that not until the report of a professor was obtained could the parents know with clarity that the clinic doctors had committed a culpable misconduct because they failed to carry out the urgently required ultrasound examination, the absence of which had led to the failure to discover a twin birth and a consequent serious injury during delivery.

229. I take these expressions of the German law, together, where different, with those highlighted from the expert reports of both sides, to encapsulate the principles which I must apply in this current case, as they would be applied by the German court.

230. From these cases I take, in particular, the fact that the quality of knowledge required to fix a claimant with the commencement of a time limit is likely to be of a relatively detailed nature. I take also the fact that the German court respects the inability of a layperson, generally, to make technical deductions from stray pieces of factual information in a medical negligence context. It seems to me also that German law has been careful to preserve the notion of knowledge of misconduct, deviation from standards, as an essential component. By enjoining premature conclusions from an incident of damage that there has been negligence, the German court recognises the inherent complexity of the medical negligence sphere. I accept from Ms Thimm that there is a perceptible progression towards patient protection in the case law, such that

patients are protected, as the medical world becomes ever more complex, from being required to "join the dots" from pieces of information, events, or other evidence before it is fair for that to happen. However, I observe, it is possible to decide this case, without praying in aid any extension or development of the law from principles that appear to me to have been set out consistently in the case law in Germany, for some time.

Applying German Law to the Facts

231. The essential case put by Mr Hollander QC is that under German law, there is sufficient knowledge for the limitation period to begin in the present case if it were found:

    a. the parents knew the baby had been asphyxiated at birth; and

    b. that had led to brain damage; and

    c. the monitor had not been producing readings for the period before the birth; and

    d. that the obstetrician was making it clear the midwife was at fault in not contacting her earlier.

232. Ms Thimm fundamentally disagreed saying this was inconsistent with the Federal Supreme Court in 2009 Judgement 247/08.

233. She summed up the position in her answer in cross examination, as being:

> "I think… It is very clear. In medical malpractice cases, the mere negative outcome of treatment without any additional obvious indications of an error in treatment does not mean that patient would have to take the initiative to clarify the treatment process in order to avoid the limitation of his claim, because the lack of success of medical negligence does not necessarily have to be due to the inadequacy of medical efforts, but can be fateful [i.e. just a matter of chance] and due to the characteristic nature of the illness"

234. Ms Thimm's evidence was, when challenged, succinctly thus:

> "from my point of view, it is not enough when the claimant knows that the midwife should have called the doctor earlier. This is, what does it mean?"

235. Ms Thimm makes it clear that asphyxiation during the birth process can happen without medical malpractice, usually it does not but that is not to say that it does not happen without negligence. She was also of the view that the present case was much more difficult to understand, than the case of somebody who suffers, for example as in an

earlier case, a surgically severed nerve, the character of the unintended, negligent sequelae of which the court regarded as blatantly obvious from the outset.

236. Turning to what happened in light of the principles under German law.

237. The evidence of Mrs Roberts was given with compelling candour in my judgement. I observed her carefully in the course of her evidence and her answers struck me as thoughtful and as accurate as she could possibly make them. She answered straight questions with straight answers and did not speculate. Further it was clear to me in her recounting of the vigour with which she insisted her second child would be born by caesarean section, that she was a woman of considerable strength of mind and could put a point forcefully where necessary. It was clear to me that she gave answers that truly reflected her recollection, whether they appeared to be of assistance to her case as now put, or not.

238. Mrs Roberts is clear that she did not know whether or not Harry's condition was the result of somebody doing something wrong, and if so whom, or just terrible misfortune, for quite some time after the birth. I accept what she says and, objectively judged in the circumstances, there is insufficient material by a long way to support a submission that she was aware that the damage to Harry was due to the breach of professional standards in the course of 2001.

239. In my judgement the evidence she gives about how she was treated in hospital: that she did not understand what the obstetrician was saying at the time of the birth, she was having her first child and did not know what to expect or what was normal, rings true, and importantly is entirely reasonable for any first-time mother, let alone in the circumstances of a foreign hospital. The fact that the midwife was shouted at by the doctor is not a matter of significance in my judgement. Objectively judged, there was nothing to fix Mrs Roberts with knowledge that there was a treatment error at the time of birth, or whether either the damage to Harry was present because of one or had been culpably brought about. Objectively judged, it could not be said the birth process at the time provided Mrs Roberts with knowledge with which to commence legal proceedings.

240. Whilst obviously there was an occasion of anxiety, even panic in the delivery suite, this is not rare and it is well recognised, is wholly consistent with an absence of medical fault. Mrs Roberts, could not have judged, in my view, whether something untoward was taking place or not. Nor would she have had any idea that it was the fault of the midwife. The anger of Dr Baysal is wholly inadequate to fix her with knowledge. A medic shouting at a midwife is not a pointer to either a medical catastrophe or the negligence of one or the other. At the time that circumstance was neutral. With hindsight, it may have acquired more significance but to Mrs Roberts at the time, in my judgement reasonably, it was not suspicious. Nor in my judgement was there anything to elevate its significance before the end of December 2001.

241. The conversation with Midwife Clelland, takes the matter no further. As Mrs Roberts expressed pithily in evidence, "so Harry is my first child and he is alive. I am not bothered about Sheila." Mrs Roberts read midwife Clelland's distress, possibly accurately, as concern for her own upset and not as admission of fault.

242. Likewise, I do not characterise the exchanges of Mrs Roberts with Dr Baysal as having the character of an apology at any stage. Certainly, if they are to be regarded as such, they are reasonably interpreted, as an expression of regret that Harry Roberts had suffered injury. The case law, indeed common experience, make clear that medical accidents are particularly concerning birth, may take place without professional negligence.

243. I reject the evidence of Ms Volohonsky given in cross examination that the proper interpretation of these facts according to German law is that Dr Baysal pushing midwife Clelland and asking her to get out of the way was an instance of a doctor expressing a view about whether or not there was medical malpractice such that it was relevant to the question of knowledge.

244. When Mrs Roberts did seek advice in 2002 it is clear from the first correspondence on 18 July 2002 sent by a solicitor at the ALA requesting that the Commission investigate, the detail of concern to Mrs Roberts was the information she had given before the birth which she had expressed to the Wegberg doctors in which, as later explained in her written statement she felt they were not interested. There is no mention here of failures of the obstetrician at the time of the birth nor indeed of any midwife failures. This letter is consistent with Mrs Roberts' testimony in court that she did not know who if anyone was to blame.

245. Further, and significantly in my judgement, Mrs Roberts agreed to have her baby delivered by the same woman operating in the same hospital. Had Mrs Roberts had concerns about there being a case of negligence any of the operative personnel, which includes Midwife Clelland, and what had gone on with Harry in my judgement it is highly unlikely that she would have consented to have her second child delivered by this obstetrician at this place. Mrs Roberts said that the obstetrician had said it would help her if Mrs Roberts allowed her to deliver the second baby for her.

246. It was put to Mrs Roberts that the obstetrician had taken it very personally, which Mrs Roberts accepted. That the obstetrician said to her "if only Sheila had called her sooner" and really this meant she was saying the problem would not or might not have happened if nurse Clelland had called her sooner.

247. On the day after Harry's birth, Mrs Roberts recalled that the midwife had been upset , as set out above, but she felt she really did not have time to deal with her upset and said to her "it's okay, Sheila" when she mentioned that Mrs Roberts might want to ask questions about Harry's birth and started to cry. She also said on that occasion "it just went over my head. When she came to visit me, I was sat expressing milk in a nursery, so whenever Sheila was saying to me, with my baby brain, you know, I did not really have time or comprehend what she was saying. I was just happy that our son was alive." Mrs Roberts had explained how when they realised the doctors were worried at Harry's birth their first question had been was he alive? That was the focus of their attention. Observations of this nature, in such a context, are much diminished in their power by the setting. It is impossible to construe them singly or together as stepping stones to knowledge such as would affect the limitation period.

248. I accept that Mrs Roberts did not take anything that was said the day after Harry's birth, or thereabouts as pointing to facts sufficient to constitute knowledge of medical negligence within German law. This was wholly reasonable, objectively judged in all

the circumstances. She and her husband did not discuss the details of the birth in this context for a few years. They did not know, she said, whether what happened was normal. It was with hindsight that she accepted it was not right. But that was their first child and she did not know at the time. I accept this evidence. She thought that the obstetrician shoving the midwife was not nice, but when she mentioned it to her the midwife had said to her "oh, it's okay". And she thought no more of it.

249. She is asked as follows, in the present tense:

> "Q. it is pretty obvious, is it not, that what was happening was that Dr Baysal was angry with Sheila because Sheila had not done what she should have done and called her earlier?
>
> A. Yes"

In my judgement this answer was given entirely on a retrospective basis, after almost 20 years of accumulating pieces of knowledge about what went on and what was of significance. Mrs Roberts made clear that in retrospect she realised why, years later the reason the paediatrician strolled into the room and then shot into action was because when Sheila rang them it was like in a singsong voice, and when she saw her she was thinking she wondered who she was talking to. They burst into action, she realises, because they were not expecting what they found looking back, putting her statement together she said that was not right that was why they burst in. I accept her evidence. Furthermore, objectively judged, her state of knowledge, as she expresses it, which I have accepted, was reasonable in the circumstances of this case. The authorities make plain that some knowledge of a deviation from standards is required to fix knowledge in a medical negligence case. It is impossible to equate an angry obstetrician and a personally expressed regret that she was not called earlier by the midwife, with knowledge of a material departure from standards.

250. Mrs Roberts explained that suspicions came but did not come until later on. It was quite reasonable of Mrs Roberts not to harbour immediate suspicions as to the medical malpractice of either Dr Baysal or Midwife Clelland at the time of the birth, even though Harry was very poorly when he was born. Mrs Roberts was well aware, her evidence is that she had personal knowledge, of other cases of damaged babies without any negligence.

251. Mrs Roberts' subjective case is well expressed in a passage of her evidence that follows on from the passage cited in paragraph 48 above. Speaking about her receipt of the 2004 Commission Report blaming Midwife Clelland she said the following:

> "I always thought it was just one of those things, it was not – for example in the UK there are about 1700 kids born every year with cerebral palsy. It's not all negligence.… Sometimes it's just one of those things. I had a friend in Germany at the time his son had cerebral palsy. It was just one of those things, it was not negligence, so we just carried on. When these results [the December 2004 Commission Report] came back, I was just horrified. As I say, when we got the results, the first thing I did was ring Sheila, because I still did not realise the implications,

> because I was in effect telling Sheila that the arbitration had come back and she was found negligent…"

252. That that is reasonable is to an extent reflected in the case of A *(a child)* where the court says at paragraph 57 (also cited above)

> "It is a tragic fact that babies are quite often born with brain damage although all reasonable skill and care has attended the delivery. In order to get a claim off the ground against the MoD, assuming the existence of a duty of care, it was necessary to investigate what had happened at the birth. This A's parents were able to do by initiating the process that produced the investigation by the Gutachter Kommission…"

253. A flavour of the same sentiment may be seen in January 2005 after ALA have indicated a claim against the insurers of the AKV Hospital in respect of Dr Baysal. In writing back to the ALA, they explain they will require more than just an obstetric evaluation in order to support a case of medical malpractice:

> "Additionally, especially in the last 15 years it has turned out that an obstetric expert report alone is not sufficient to judge the cause of a child's impairment. This is because only in a very small proportion of cases can a connection be found at all between the birth and a child's condition. For this reason in addition to the obstetric evaluation in any case a paediatric neurological and neuro radiological evaluation of the brain is required, especially with an appropriate MRI examination and often also genetic checks and investigations into corresponding metabolic diseases."

254. Making all allowance for a robust insurer's response, this is quite consistent with the Roberts' evidence of what they knew at the time of Harry's birth. It supports my finding that, objectively judged, it was perfectly reasonable of Mrs Roberts not to consider malpractice at the time of Harry's birth.

255. In my clear view, and applying the law as set out, I am in no doubt that the knowledge reasonably held on behalf of Harry was insufficient to commence an action against Midwife Clelland until such time as the statement dated 5 March 2003 of Dr Baysal was made available in about June 2003.

256. The only other reasonable contender for the commencement of time was the receipt of the first Commission report in December 2004, in which it is formally stated that Midwife Clelland may be to blame. However, in my judgement, the earlier date gives sufficient information: it is accompanied by a chronology of events and a statement in terms that it was the action/inaction of Midwife Clelland that caused the damage, and nothing done by the doctor. In this communication two important features come together: the fact that what the midwife did, was unacceptable according to standards,

the fact that it caused the damage, in the opinion of the obstetrician, and the indication that at least, the midwife and possibly, the obstetrician were to blame. Although this is not an expert report, in all the circumstances I judge it is sufficient, being a medical view with some technical explanation, that put the Roberts' family on notice.

257. I accept, it was Mrs Roberts' subjective judgement that it was not until the 2004 First Report of the Commission that she realised that the midwife, her friend, was being held to blame. That is why, in my judgement, she picked up the phone to her and recalls vividly how that severed their friendship.

258. However, having regard to the requirement to judge objective reasonable knowledge, it was in my view appropriate to commence proceedings at the earlier date, when Dr Baysal's statement was received. It was at that point, that the requirements set out in the case law were met in my judgement.

259. I do not read the German authorities as compelling the provision of an expert medical report before a potential claimant may say that time starts to run against them. The correspondence from Dr Baysal was an authoritative statement with medical particularity and a clear indication of another defendant. As noted, it appears that the independent solicitor, handling the claim against the MoD, David Poole, received the Dr Baysal statement at the same time as the 2004 Commission Report.

260. I refer back to the description of events contained in earlier paragraphs for the detail to be gathered from the correspondence available to the court. In my judgement it is clear that Mrs Roberts initially believed that she had a case to make against the doctors in Wegberg: the German insurers ask more than once whether or not that is in fact what is being alleged (see letters from September to December 2002). It is striking that the answer given on her behalf is she is not in a position to say which doctors – which department even, just at the Hospital. The letter does not mention possible breach of standards by the midwife.

261. The issue as between Mrs Roberts and a potential defendant was at that time in her mind and, I deduce from the correspondence, was what she told the ALA (see the requests from the German insurers as to the involvement of Wegberg) as between her and the German hospital, or maybe hospitals if Wegberg were included. It is the hospital insurers with whom ALA correspond on her behalf. And it is it appears to me, at no point contemplated that there would be anything other than an action in respect of some liability by whomever amongst the German doctors, for which the insurers might be liable.

262. In truth, the relevance of SSAFA and the MoD to Mrs Roberts at that point, was as owing a non-delegable duty to her in respect of any negligence because they had set up the system of healthcare including for the dependence of those serving out in Germany. The case of *A (a child)* would decide that issue – hence the possibility of a claim against the MoD, in respect of which there appears to have been a standstill agreement pending the case of *A*.

263. They were not there at this time – that is to say, in my judgement there was no knowledge in Mrs or Mr Roberts during 2001 that anybody in particular had been at fault in respect of the injuries of their son Harry. Consistently with this, it was not until 2002, after the birth of Harry's sister Beau in October 2001, that Mr and Mrs Robert

turn their minds to the issue of whether or not Harry's injuries were the result of something untoward.

ISSUE b(ii) German limitation – is the period inhibited or suspended?

264. The claimant's primary case was that time had not begun to run before the issue of the writ on 31 December 2004. But, in any event, they said the limitation period had been suspended by other actions.

265. There was no dispute that a time limit imposed by German law could be "inhibited" and that time re-started, the clock went back to zero in such case. Otherwise, there could be an interruption or suspension of the period when the clock stopped and then, after such interruption or suspension, started again.

266. As part of that case, they say that the claimant had asserted legal rights pursuant to section 204 number 4 BGB to the effect that the limitation period was inhibited from running throughout the period of review by the Commission and remained inhibited until after the claim had been issued.

267. The claimant argued that there was in this case a negotiation such as suspended the running of the clock. There had been an assertion of rights to the same effect. This was represented by Mrs Roberts' engagement with the ALA and the referral to the Commission of the potential medical negligence case against the hospital. Similarly, asserting legal rights could suspend the limitation period. The claimant said that reference to the Commission was such an assertion of rights which suspended time. Reliance was put upon the communications from the ALA, and what were said to be representations about staying time.

268. Mr Sweeting QC's argument was that the MoD must have been aware of the claim being made by Harry Roberts. The MoD would dealing with the case on behalf of SSAFA, even aside from the allegation of vicarious liability, the MoD was the insurer, the indemnifier in fact and in respect of the claim against Midwife Clelland, the vicarious liability, indemnified by the MoD was also in issue. There is therefore no difficulty it is said in applying the German law as to suspension of the limitation period given the close involvement of the MoD in any event. Since the ALA notified the MoD in 2002, and since the case (then against the hospital) was awaiting a decision on the MoD's overarching liability in the case of A (child), they were aware of it. Later, once the Commission had reported, the case involved Midwife Clelland as well.

269. Ms Thimm put it also on the basis of the German concept of *venere contra factum proprium*, it is not proper to act contrary to your deed: you may not represent something and then change your mind. It is described as abusive contradictory conduct because it has given rise to an act of trust and made a contrary exercise of right, unfair.

270. In my judgement, given that Mrs Roberts had been directed towards an independent solicitor in respect of matters where a conflict-of-interest was perceived, albeit they were on different issues, it is not possible to spell out of Major Fryatt's letter a promise of the nature described by Ms Thimm. As Mr Hollander says, this cannot be construed as Major Fryatt saying "I confirm on behalf of the MoD" that there will be a standstill.

271. Against this background however the claimant submits that it is artificial to consider that there was no inhibition on the limitation period in respect of the midwife. Further, the fact is, that under German law, the obstetrician, Dr Baysal would have been liable for the negligence if any of Midwife Clelland. The submission is that the midwife's liability would have been comprehended within any reference to the Commission concerning obstetrics and the obstetrician and therefore, since Midwife Clelland would have had notice of the claim, by her insurers being on notice, the case against her was comprehended in the Commission arrangement.

272. The defendants' riposte is simple. They reflect that the wording of the relevant German instrument the mechanism of the Commission refers exclusively to a claimant and a defendant – the obligor and the obligee. The agreement in the current case was a negotiation with the AKV Hospital entity and was initiated on behalf of the claimant as against the German hospital by ALA, who conducted that side of the negotiations. It was not a negotiation with either of the defendants to this case.

273. In my judgement, even though Midwife Clelland would have had notice, since her insurers had notice, of a claim in respect of the obstetric case, she was not party to the Commission arrangement. Ms Thimm said that had not stopped the Commission making an observation about the liability of the midwife, but in my view that does not, and could not, condition whether or not proceedings against a person not a party, were stayed. Because she was not a party to the agreement to refer to the Commission, limitation in respect of any claim against her was not suspended. That is enough to put an end to the argument.

274. Turning to German law on this issue, which really is a matter of construction of the charter governing activities of the Commission. As Mr Hollander pointed out, it is purely concerned with the position of allegations of treatment errors made against doctors, and possibly involving a hospital. The case law provides no assistance on the notion that others apart from the accused and accuser are to be considered as within the scope of a Commission Report. I accept Mr Hollander QC's submission that any halt to the effluxion of time as against SSAFA or the MoD is vicariously liable for the torts of Midwife Clelland, does not run.

275. This conclusion does not mean there is no resonance for the set of circumstances that arose involving ALA, Mrs Roberts, and her claim, initially against doctors, and subsequently against Midwife Clelland that I should not take into account for the purposes of considering the whole circumstances of the case. In my judgement, there is some resonance in this factual matrix in respect of the undue hardship claim. There is no estoppel, nor waiver however, it is an aspect of the complexity of the interrelationships and of the various proceedings. And if, contrary to my primary finding, the circumstances are such that time has elapsed against Harry, these matters feed into the concept of hardship so as to disapplied limitation.

276. Thus, in my judgement, if and to the extent that the failure of the Commission reference to stop time from running against Harry Roberts shuts him out from a claim, under German limitation law, such is clear evidence of undue hardship in the present circumstances. Mrs Roberts, on her case, went to the ALA to seek help when she realised she might have a claim against somebody for the injuries her son had suffered. That help elicited her concerns which centred upon anti-natal examination, her weight loss and blood loss, and concern about the comment that her placenta had likely died

by the time of delivery. That this is the case may be seen as indicated above from the correspondence received from the Commission who wished to know against which doctors the potential case was to be run.

277. At this stage, towards the end of 2002, there was no suggestion in my judgement, other than that her concerns were of medical negligence involving doctors, and reasonably so. Her concerns had been centred on her ante -natal care in the beginning, and the placental insufficiency of which she had been told. In the event, she named the doctors at AKV Hospital as the likely defendants, but did not know whom.

278. My view is not changed by the fact that there is evidence to the effect that an obstetrician in Germany is *prima facie* liable for the acts and omissions of a midwife working under their control.

279. That the ALA requested Commission involvement in respect of the obstetrician, not mentioning liability for others, is consistent with Mrs Roberts' case that it was from the Commission, only, that she learnt of the potential negligence action against Midwife Clelland, however, as already set out, when analysed objectively, in my judgement sufficient knowledge was obtained when Dr Baysal's March 2003 letter was received.

280. The background to the MoD involvement and the potential for a case against them and/or SSAFA was at that point nothing to do with Midwife Clelland. It was all to do with the nondelegable duty of the MoD, in order to make them liable for medical negligence within German hospitals at this time. Which was argued unsuccessfully in the case of *A (child)*. To the extent that Mrs Roberts was to argue this point as well, her case would stand still, it appears, behind *A*. It was for this reason that the ALA, who were of course in effect the MoD, directed her towards Mr David Poole who was running the *A* cases – a solicitor in independent practice. Again, this is relevant to the application of the 1984 Act, since it is, in my judgement a gross hardship to Mrs Roberts if the absence of a stay were to take away her cause of action in the circumstances, because she cannot point to a party bound by the standstill of the Commission investigation in this case.

ISSUE b(iii) Estoppel /waiver

281. The case put on the letter of June 2003, written by Major Fryatt, is to the effect that the MoD cannot now be heard to say that time has run out against them since, a proper reading of that letter, shows a promise by the MoD to effect a standstill. The Major Fryatt letter to Mrs Roberts, was in respect of an aspect of her case in which they saw no conflict of interest. Mrs Roberts, reading the letter, used to the notion that the ALA were acting for her in the matter put before the Commission, is unlikely to have understood that no steps were promised on her behalf by the ALA in respect of a time bar against Midwife Clelland. However, I cannot construe that letter as constituting in some sense an estoppel against the time bar now raised in respect of Midwife Clelland's potential liability.

282. By the same token, to the extent that imposing the German limitation period is a consequence of the failure of this apparent assurance, this also is a matter which feeds into the hardship case articulated previously. If and to the extent that Mrs Roberts were

to need to rely upon this letter, and without it, time has elapsed against her, in the unusual circumstances of this case, to impose such a time limit would in my judgement, be evidence of hardship.

283. I must agree, with Mr Hollander QC also in respect of the estoppel/waiver argument. I do not see how, the correspondence read fairly from that time, points to a representation upon which the claimant may rely that time would be stopped in respect of a claim against Midwife Clelland, against SSAFA and the MoD. Nor indeed any representation as to a waiver of reliance upon which Harry can rely for the purposes of this action.

284. There is no doubt that the ALA strove to do their best to support Mrs Roberts when she went to them, understandably, for help. It is very difficult indeed to see the whole picture in the absence of all the material documentation which appears to have been lost or destroyed in the lapse of time. I do not place particular reliance upon this, but observe that it is in retrospect regrettable that Mrs Roberts had to deal with two streams of professional support. It is likely to have been materially confusing to her and unhelpful, though proper, that the ALA took a backseat once it was realised her case was to join in with the *A (a child)* case involving allegations against the MoD. They corresponded closely on her behalf with the Commission, then again stepped away, when the Commission brought the potential liability of Midwife Clelland to their attention.

285. Although ALA were still acting for her as to some matters because they were liaising with the Commission in order to obtain an expert report on the likely negligence case against the AKV Hospital doctors concerning Harry's birth, I do not believe it is possible to say that any letter from the ALA constituted a representation upon which the claimant could rely as against these defendants in respect of the claim against Midwife Clelland. It is not clear from the papers that there was reliance in any event.

286. I accept, as stated by Ms Volohonsky that for there to be an effective waiver, which takes effect under the new law, you would require a statement that the potential defendant says they will not raise the issue of limitation either until a certain date or until the outcome of the proceedings. Plainly there is no such agreement on the evidence here.

287. I do not accept that the papers demonstrate negotiations under German law. Again, as Ms Volohonsky said in evidence, if you do not talk about the liability or the amount of damages at all you are not talking about the claim and if you are not talking about the claim, that is not negotiation. Just discussing limitation is not "negotiation". The choice is between negotiating substantively, or filing a claim, as a lawyer she described. I accept this evidence. I do not see any material from which it could be deduced there was a negotiation in respect of a claim against Midwife Clelland. The discussion, as was pointed out, was concerning a waiver in separate proceedings: namely those that did not involve Midwife Clelland.

CONCLUSION

288. Accordingly, I reject each of the reliance and negotiation based arguments.

289. The result is therefore:

a. German law applies to this claim.

b. There is no limitation defence under German law available to the defendants, given that Harry acquired knowledge in about June 2003, and the claim issued on 31 December 2004 was within time.

c. If and to the extent that there is a limitation defence available to the defendants, the effect of German law is disapplied because it would have the effect of imposing disproportionate and undue hardship upon Harry.

d. No other inhibition to the German limitation period can be spelt out of the facts and circumstances of this case.