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Judgment: approved by the Court for handing down

Delivered: 11/10/12

(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN CY (A MINOR AND A PERSON UNDER A DISABILITY) BY HIS FATHER AND NEXT FRIEND FY

Plainitff;

- and -

WESTERN HEALTH AND SOCIAL CARE TRUST A SUCCESSOR TO ALTNAGELVIN HOSPTIALS HEALTH AND SOCIAL SERVICES TRUST

Defendant.

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GILLEN J

Application

[1] The next friend FY in this application seeks to set aside a judgment for £350,000 entered on behalf of the minor plaintiff following approval of an agreed settlement before me on 24 May 2011.

[2] Mr Fee QC who appeared on behalf of the plaintiff with Mr Boyle applied under the inherent jurisdiction of the court to set aside the judgment and to grant the plaintiff leave to proceed with the action against the defendant.

[3] At the outset of the case I invited the views of counsel as to whether there was any reason why I should not hear the matter. Mr Fee indicated that he was neutral and Mr Stitt QC who appeared on behalf of the defendant had already submitted at an earlier review that I should hear the case. In all the circumstances I considered that there was no reason why I should not hear this application.

[4] Having discussed the matter with counsel at the outset, I indicated that I would approach the case in the following manner. First, I would consider whether or not I had jurisdiction to exercise the inherent jurisdiction of the court in this instance to set aside a judgment properly entered. Secondly, even if I decided that I had no such jurisdiction, it would be preferable that I should continue to deal with

the case on the basis that I had and decide whether, if I did have such power, I would exercise the inherent jurisdiction to set this judgment aside on the grounds put forward by Mr Fee.

Background

[5] A report from Dr P Fogarty MD FRCOG, a specialist in obstetrics and gynaecology, who prepared a report on behalf of the minor plaintiff in this action dated 10 March 2005, summarised the background facts as follows:

> "The client CY's mother admitted herself in labour on 31 May 2004. Labour was augmented and during second stage of labour on 1 June 2004 fetal hypoxia developed and a vacuum extraction was performed. A very acidotic baby was delivered and subsequently was confirmed to have hypoxic ischaemic encephalopathy and went on to deliver cerebral palsy."

[6] Dr Fogarty indicated that he had been instructed to identify whether or not the ante-natal care afforded to the minor's mother fell short of that which should have properly been provided. In particular was there a failure to monitor the progress of the labour appropriately or a failure to recognise or act on signs of **foetal** hypoxia in a timely fashion such that it could be argued that the perinatal asthyxia was in all probability responsible for CY's hypoxic ischaemic encephalopathy and subsequent cerebral palsy.

[7] In his report Dr Fogarty concluded

- that profound foetal heart dardycardia occurred at 04.52.
- that there was delay in the management of this with the baby not being delivered until 05.34, 40 minutes later.
- this was an unnecessary delay and had contributed to the hypoxia and acidosis of the new born baby.
- there had been unnecessary delay in delivery of this baby which resulted in the catastrophic injuries to this child.

[8] Dr Woolfson LLM FRCOG in a report of 11 July 2006 confirmed

- that in his opinion "the obstetric care given to Mrs Y during her labour with CY was substandard in the length of time it took to deliver CY".
- he was critical of the 17 minute delay that he asserted it took from the Registrar's decision at around 05.17 on 1 June 2004 that urgent delivery was

required until delivery. (Mr Fee submitted that according to the notes the time perhaps should have been recorded as 05.14.)

[9] The defendant had retained Dr Malcolm Griffiths MD, FRCOG, FFSRH who concluded that "even by the most optimistic, but reasonable, timescale the plaintiff could not have been delivered any sooner than 05.32 – that is 2 minutes earlier than he actually was. He was therefore unable to criticise the performance of Dr Salim who had achieved delivery in the circumstances of the case.

[10] Dr Robert McMillen MPhil, MB, FRCOG, DCH, who also examined on behalf of the defendants, concluded that the standard of care in his opinion had not fallen below that practised in similar units at the time.

[11] As conventionally occurs in all clinical negligence cases, I case managed this litigation. In the course of 14 directions that I gave on 20 May 2010 I directed the parties to convene a meeting of the medical liability experts. At such a meeting a Scott schedule was to be drawn up and agreed between the experts setting out all areas agreed/in dispute. Meetings between witnesses prior to trial have now become a regular feature of the litigation canvas. The aim is to crystallise the issues at an early stage. It should not be used merely as an opportunity to engage in shopping for further experts and the withdrawal from the trial date especially where there has already been delay in the process. The trial itself was fixed for Monday 23 May 2011. Following my directions, Dr Woolfson and Mr Griffiths met in England where they are both based and produced a joint obstetric experts' report which is undated. In essence both experts maintained their contrasting positions.

[12] The meeting between the experts based in Northern Ireland – Dr Fogarty on behalf of the plaintiff and Dr McMillen on behalf of the defendant - took place on 17 May 2011 with a joint obstetric experts' report dated 18 May 2011. It is clear that as a result of this meeting Dr Fogarty changed the view which he had held and now concluded, jointly with Dr McMillen, that there was no evidence to support any failings in the care given to this plaintiff. In short, Dr Fogarty was now clearly of the view that there was no longer any evidence of negligence in the case.

[13] I had before me the affidavits of FY, his wife MY and Caroline Prunty, a solicitor in the firm Millar McCall Wylie, who is currently acting on behalf of the plaintiff in this matter. This is a different firm of solicitors from that which represented the plaintiff at trial.

[14] Mr Y, a quantity surveyor by profession, gave evidence before me and was cross-examined by Mr Stitt.

[15] In essence Mr Y made the following factual assertions:

- He had not been informed of the change of mind on the part of Dr Fogarty until he arrived at court on the morning of trial.

- He had not met his senior or junior counsel prior to this although he had known his own solicitor for several years. He was aware on the morning of trial that Dr Woolfson still supported his case.

- He was introduced to his senior and junior counsel at 11.30 am in a busy central hall in the RCJ and was told that as a result of Dr Fogarty's volte face, the case had "collapsed" and he was appraised by counsel of the Bolam principles.

- Both he and his wife were extremely upset and his wife was highly emotional.

- Dr Woolfson was present and told him that he had never seen anything quite so "weird or so unexplained" in the course of his years of practice. He did say, however, that he would listen to what Dr Fogarty was saying and if he was offering a logical reason for his change he would have to say this also.

- His legal team then met with the two doctors, namely Dr Fogarty and Dr Woolfson, and thereafter took the plaintiffs into a consultation room. Senior counsel informed Mr and Mrs Y that Dr Fogarty had changed his mind because of statistical evidence presented to him in a paper from a Professor Murphy and that Dr Fogarty's view was that whilst he would have delivered their son within 6 minutes he was not going to ridicule someone else for not doing this. Dr Woolfson was still of the view that there was a case of negligence to be answered. After lunch, in a consultation room, the plaintiff again met with senior and junior counsel and his solicitor. Senior counsel informed him, that if the case ran he would lose the matter. When requested by Mr Y to obtain an adjournment, senior counsel informed him that they would not be successful in such an application.

- Mr Y asked counsel whether or not they could get another expert but he was told that it was now too late and that they would not get an adjournment from the court.

- He was advised that the judge hearing the case "had not paid out a single penny in medical negligence cases in 13 years", if the case was run it would be lost and no adjournment would be granted.

- Shortly thereafter he was told that the defendant had made an offer of £200,000. Mr Y asserted that he had been told by his solicitor that the case, in the wake of a forensic accountant's report, had a potential of £4 million.

- Mr Y asserted that his wife was distraught and could not lift her head from the ground. He felt the same way.

- Senior counsel asserted that he had "more authority to act on his behalf than him" but that he had never gone against the wishes of parents. He did state, however, that he did have authority to overrule Mr Y.

- Mr Y insisted that he was not shown what it was that had changed the mind of Dr Fogarty.

- Many times he suggested to counsel that they must be able to adjourn the case but was told that the defendants would be very difficult about this. Mr Y asserted that senior counsel told him that if an application was made for an adjournment the offer would be withdrawn.

- This consultation lasted approximately 20/30 minutes.

- About 5-10 minutes later, both counsel and solicitor returned indicating that the offer was now £350,000.

- Mr Y asserted that he was "buckled" and "did not know what to do". He felt that he was bullied in circumstances where he was being told that he had no option on the basis that if he went to trial he would lose and get nothing.

- In those circumstances Mr Y gave authority to settle the case. However, counsel returned and told him that the defendant's authority was only £250,000 and that approval was needed which could not be obtained until the next morning.

- Overnight Mr Y attempted to enlist another solicitor but was told that he would have to go back through his own solicitors. He felt he was still in a state of panic.

- The next morning, Tuesday 24 May 2011, he was picked up from his home by his solicitor. He informed him that he was totally dissatisfied with what had happened.

- In the car journey he was shown Dr Murphy's report ie the report upon which Dr Fogarty allegedly had relied to change his mind. He found it difficult to understand whilst reading it in the car. The solicitor said that he should raise his concerns with counsel when they arrived at court.

- At the RCJ Mr Y spoke with junior counsel, informed him that he was totally dissatisfied, and asserted that "somebody had to do something".

- Mr Y asserted that he wished to have an adjournment. Junior counsel informed him that they could not guarantee that the £350,000 would still be on the table if the adjournment was sought.

- He was told that the judge was a safety net and if the money was not enough it would not be approved. Senior counsel then appeared and told him "it was now or never". Otherwise if he did not accept the case would run and he would lose. Mr Y asserts that he was told he had no option but to accept.

- In those circumstances Mr Y claims that he agreed to accept the offer. There is a transcript of the hearing before me in which the full content of what Mr Bentley put before the court is outlined and which I have set out in extenso later in this judgment. Mr Y asserted that senior counsel had placed a number of factual inaccuracies before the court and failed to make clear the full extent of the delay.

- After the court approved the settlement, Mr Y shook hands with senior counsel. He did not inform him of the inaccuracies which he had put before the court. He returned to his home with his solicitor. There was an outstanding issue about the CRU repayment. His solicitor indicated that it was his intention to appeal that aspect, that he felt that Mr Y was in no state to discuss the case and an appointment was made with him for about 7/10 days in advance. Mr Y told his solicitor at that meeting that he was unhappy with how he had been treated, that he felt that he had been bullied and he wished the judgment set aside. Thereafter, his solicitor contacted him to indicate that he could no longer act for him.

[16] Mr Y sought alternative legal advice on 8 June 2011.He has obtained through that new solicitor a further report from Dr Rodger Clements FRCS, FRCOG, now the fifth gynaecologist and obstetrician who has reported on the liability issues in this case. His conclusion was that a terminal bradycardia began at about 0510 and it was not until 0534 or 0536 that the baby was rescued. In his opinion the management of Mrs Y's labour was incompetent and directly responsible for the damage to the baby.

Transcripts of the hearing

[17] It is instructive at this stage to quote from the transcript of the hearing at which this case was approved. Senior counsel, having explained the background of the case and the change of mind of Dr Fogarty following the meeting between himself and Dr McMillen, is recorded as saying

> "And then My Lord, out of the blue, last Thursday, we received the findings of the meeting of the experts between Dr McMillen and Dr Fogarty, and lo and behold, completely as I say out of the blue, it now transpired that Dr Fogarty had seen fit to say that he no longer thought that this was culpable delay situation, but rather the delay in this case was within acceptable limits to quote his phrase. He went on to say that the ventouse system which obviously you

have to wait for pressure in the vacuum to build up whilst that would have engendered some delay (sic). He did not consider that to be negligent either because it was a legitimate choice to make at the time between that assisted delivery and the forceps. …

It was 3-1 My Lord and I insisted obviously that everybody come to court yesterday and I did my best to cross-examine if we can use that word Dr Fogarty and he produced the latest guidelines from the Royal College of Obstetricians and Gynaecologists which states that 15 minutes is the target figure for assisted delivery where there is evidence of foetal distress. Now 15 minutes being the target induced him in conjunction with Dr McMillen then to say that 18 minutes could not be criticised unduly as being negligent or sub-standard and even if it was a couple of minutes would then would not have had a significant effect on the eventual outcome. Now that is the position we have found ourselves in My Lord. Prior to Dr Fogarty's arrival, Dr Woolfson had suggested that the doyen in this field is now Professor Deidre Murphy of Dublin. The whole event My Lord is like a television script or something the way this panned out, because we then made a decision that perhaps it would be a good idea to try and involve her in this equation. Now that unfortunately meant that we would have to apply for an adjournment of this case. Mr Stitt for the other side My Lord was justifiably jumping up and down saying absolutely no way, the case would have to go on. His cross-examination may well have been limited to Dr Fogarty, a responsible obstetrician, and he has come to the conclusion, that, even though instructed by the plaintiff, the delay is not palpable (*sic*) here and therefore the plaintiff must inexorably lose under Bolam. Now My Lord coincidentally it transpired that Professor Deidre Murphy had conducted the research in over a thousand cases that on which this 15 minutes hung (*sic)* and we then managed to download or obtain a copy of the gist of her paper that was compiled in relation to that. It transpires she had dealt with a wide number of foetal distress cases and she came to the conclusion that the target figure for these cases between decision and delivery was 15 minutes, which she described as an achievable target

and she also talked about 30 minutes if it is in the operating room. Now My Lord this created a problem because number one there was no guarantee that Your Lordship or another judge would permit an adjournment in this case just to get a further opinion. Number 2 if, we obviously would have to tell the court what we were intending to do and who we were intending to involve. If a negative report came through from Professor Murphy, then the prospect of obtaining any sum whatsoever in this case would have been completely and utterly gone. I was totally convinced of that. At that stage yesterday we were hanging on by a thread so to speak. What happened next then My Lord was that Mr Stitt saw fit to call me to one side and spoke about the possibility that the Trust might see their way to producing a small sum by way of a buy off obviously in relation to the costs of this exercise running for two weeks in court. So I then engaged with him and Your Lordship knows the way these things happen. I should tell Your Lordship that we have obviously forensic accountants who report valuing the future and past loss at over £4m in this case and with general damages at £350,000 we are talking at about over £4,500,000.00. But My Lord we have still not received the defendant's report and I think to be fair to Mr Stitt he said he was so confident on the liability issue that he was parking the quantum issue until a later date and we basically agreed that the case would clearly have to run on liability. Not necessarily as a preliminary issue but first and foremost. So the position is we do not have their figures yet but from previous experience and from looking at the figures and the various things that are not correct and the calculations I took the view that the probable overall value in the case would pan out in the region of £3½m.

…..

All the defendants have to show is that there is a responsible body of medical opinion who would have found themselves in a similar situation and could not have achieved a different outcome. Even if Professor Murphy for example had come and said look the 18 minutes is too long in this case because the foetal distress was of a more profound nature and

> therefore an emergency was raised. We were still faced with the problem that Dr Fogarty had seen fit to amend his hand and that seemed to me to be a very powerful weapon in the hands of the defendant. In all the circumstances a decision had to be made and essentially I made it. I could not risk the prospect of a figure now being produced which would no longer be produced in the future and if the case was listed to go on today or this week or indeed in a future date."

Preliminary matters

[18] Before turning to my conclusion, four matters need to be addressed. First, it is important to remind myself that this case was to be determined according to the standard of care required of medical practitioners set out in Bolam v Friern Hospital Management Committee [1957] 1 WLR 582. This test has withstood the passage of time and it can be formulated thus:

> "A doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice."

[19] Accordingly it had to be remembered that counsel for the plaintiff was in possession of a number of reports from experts from the field of obstetrics and gynaecology. There were two from the defendant's doctors. Dr Griffiths had concluded:

> "I am unable to criticise the performance of Dr Salim in the time that he achieved delivery in the circumstances of this case. Even by the most optimistic, but reasonable, timescale the plaintiff could not have been delivered any sooner than 05.32 – that is two minutes earlier than he actually was. I believe that the causation experts will confirm that a saving of two minutes would have made little or no impact on his eventual outcome."

[20] Dr McMillen had concluded:

> "Overall I believe it was appropriate to recommend a trial for vaginal delivery, prostaglandin was used to ripen the cervix rather than augment labour, there was no uterine over-activity associated with the use of prostaglandin, the foetal distress was acute and was managed as promptly as possible. Can the Trust

> explain the fall in haemoglobin other than through an undiagnosed uterine tear and would they feel that if this was alleged to have happened, that the patient had been fully consented? My own view is that in 1999 the standard information discussed with a patient in these circumstances would not have majored on this complication given its rarity. Explaining probability and chance (especially the doubling of a very small risk which still results in a very small risk) to any patient is fraught with difficulties. At present I would suggest that the standard of care did not fall below that practice in similar units at the time."

[21] On behalf of the plaintiff Dr Woolfson had concluded:

> "I make no criticism of the standard of care up until the registrar's decision at around 0517 on 1 June 1999 that urgent delivery was required but I am critical of the 17 minute delay it took from then until delivery. If, as he should have, he had decided that CY should be delivered by forceps, it would have taken around 3 minutes to prepare Mrs Y for forceps delivery and then another 3 minutes or so to actually deliver him. The urgency of the situation may have required that traction with the forceps be applied earlier and more strongly than would normally be the case but in a situation such as this it would have been justified. CY would have been born at around 05.23 thus sparing him 11 minutes of continuing severe hypoxia."

[22] Finally, counsel for the plaintiff was, as I have indicated, now in possession of an agreed note from both Dr Fogarty, the plaintiff's expert, and Dr McMillen confirming that:

> "The registrar arrived at 5.14 am and would not have had to carry out a physical examination. If we allow 1-2 minutes for this and for him to make his decision, then he would have made his decision to deliver this patient at approximately 5.16 am. Delivery is then recorded 18 minutes later at 5.34 am. After full discussion and consideration, in our clinical opinion we both feel that this is an acceptable timescale in these circumstances. …. There is no evidence to support any failings in (the) care."

[23] Secondly, it is important to recognise the duty of counsel in the course of litigation. Much if not most of a barrister's work involves exercise of judgement .It is the realm of art not science (see Lord Wilberforce in Saif Ali v Sydney Mitchell and Company [1980] AC 198 at page 214f-g). Counsel has to advise on certain courses making that choice on the basis of his judgement. That judgement is fallible and may turn out to be wrong but so long as that judgement has been exercised on a reasonably well informed basis, it does not constitute negligence or improper behaviour. Barristers must not be inhibited from giving firm, unflinching and at times unpalatable advice to clients when that is considered being in their best interests. Counsel must be authentic rather than empathetic. The public will be ill-served if firm advice to settle cases rather than risk litigation was to be a casualty of an over-cautious profession. The matter was well summed up in the context of a negligence claim against a lawyer in the Canadian case of Karpenko v Paroian, Courey, Cohen and Houston [1981] 117 D.L.R. (3D) 383 by Anderson J when he said:

> "In my view, an important element of public policy is involved. It is in the interests of public policy to discourage suits and encourage settlements. The vast majority of suits are settled. It is the almost universal practice amongst responsible members of the legal profession to pursue settlement until some circumstance or combination of circumstances leads them to conclude that a particular dispute can only be resolved by a trial. … What is relevant and material to the public interest is that an industrious and competent practitioner should not be unduly inhibited in making a decision to settle a case by the apprehension that some Judge, viewing the matter subsequently, with the acuity of vision given by hindsight, and from the calm security of a Bench, may tell him he should have done otherwise. To the decision to settle a lawyer brings all his talents and experience both recollected and existing somewhere below the level of the conscious mind, all his knowledge of the law and its processes. Not least he brings to it his hard earned knowledge that the trial of a law suit is costly, time consuming and taxing for everyone involved and attended by a host of contingencies, foreseen and unforeseen. Upon all of this he must decide whether he should take what is available by way of settlement, or press on. …"

[24] Thirdly, the role of the court in approving a minor settlement must be considered. A consent order is an order of the court. Where a child is involved, the court, in making the order, is exercising a supervisory jurisdiction and should scrutinise the terms of the proposed settlement. It is not performing a mere rubber

stamping exercise. Information should be placed before it to enable it to fulfil its function. The order made reflects the view and decision of the court and is therefore something against which an appeal may lie. The court will require information as to matters such as:-

- Whether and to what extent the defendant admits liability.
- The age and occupation of the child.
- The litigation friend's approval of the terms of settlement.
- The circumstances giving rise to the claim.
- Relevant medical reports.
- If necessary a schedule of loss and damage.
- Details of the evidence on liability, if it is not admitted, and an appreciation of the perceived litigation risks, with an assessment of the discount against a full liability award considered appropriate having regard to those risks.
- In a complex case, a draft order.
- Suggestions as to investment.

[25] Until such time as approval has been given, it is open to either side to withdraw from the agreement (see Dietz v Lennig Chemicals Limited [1969] AC 170 at 190 per Lord Pearson).

[26] Thus the court can ensure that minors are protected from any lack of skill or experience of their legal advisors which might lead to a settlement of a money claim for less than it is worth. It also provides the means by which a defendant may obtain a valid discharge from such a claim.

[27] Fourthly, it cannot be overlooked that the defendant is blameless in this aspect of the settlement. It is entitled to finality in this long running case which has its genesis as far back as 1 June 1999. The plaintiff has the right to consider remedies against his legal advisers (Hall v Simons [2002 1 AC 615) and indeed his experts should he wish to do so (Jones v Kaney [2011]UKSC 13) but not a defendant once a settlement has been agreed. The concept of finality in litigation is an important one and parties must not be easily allowed to walk away from a bargain which has been struck provided reasoned advice has been given.

Summary of the plaintiff's case

[28] In a well-structured skeleton argument, augmented by oral submissions before me, Mr Fee submitted:

- Under its inherent jurisdiction to vary, revoke or consider orders, the court can set this judgment aside. There is no need to appeal the judgment.

- No proper consent was given by this plaintiff to settlement. Mr Y had felt bullied and intimidated and was in no fit state to come to a proper conclusion without the benefit of an adjournment. A judgment when entered by consent may nevertheless be set aside on any ground that would invalidate a compromise or agreement entered into. A lack of proper authority freely given by the next friend in this instance is such a case.

- The court was not provided with and did not seek a full and appropriate analysis of the liability issues arising. The case should have been adjourned so that the matter could be further investigated.

Summary of the defendant's case

[29] In the course of cross-examination of Mr Y and in a succinct and comprehensive skeleton argument, augmented by oral submissions, Mr Stitt made the following points on behalf of the defendant:

- Whilst Mr Y may have been in a state of shock upon learning of Dr Fogarty's change of mind, this did not prevent him being able to give full and proper authority to settle the case.

- Mr Y had ample opportunity to instruct counsel to apply for an adjournment if that is what he wished. It was only at a much later stage that he converted unhappiness at the outcome into a case of lack of consent.

- If the plaintiff's next friend is dissatisfied with the content and quality of the legal advice provided by his original legal team then that matter should be taken up with them and cannot in law impact upon the settlement terms reached between the legal representatives of each party in this instance where there was ostensible authority to enter into a settlement of the action.

- The defendants had a cast iron Bolam defence in light of the fact that 3 of the 4 experts found no negligence.

- The granting of an adjournment created the risk that Professor Murphy might have come up with a negative report in which case the prospect of obtaining any sum by way of a settlement figure would have disappeared.

- The court has no inherent jurisdiction to set aside its own judgment. The principle of finality of judgment must apply. The inherent jurisdiction of the Court to alter its own judgment is limited to "slip rule" cases. The only remedy open to a dissatisfied plaintiff as in this case is to appeal the judgment.

- Dissatisfaction with the plaintiff's original legal team cannot affect the decision of the court in approving the minor's settlement on the facts that then existed.

- The defendant was blameless in this matter and was entitled to finality.

Conclusions

Is there jurisdiction for this court to set aside the judgment following approval of the settlement on 24 May 2011?

[30] Mr Fee's submission was that, under the inherent jurisdiction of the court, I can vary, revoke or reconsider any judgment made. In the circumstances of this case I should rectify a substantial wrong suffered by the plaintiff.

[31] It is important to appreciate at the outset that a judgment and order is final in the proceedings in which it is made. There is no general power to vary a judgment or order once it is entered or drawn up although the court has an inherent power to vary its own orders so as to carry out its own meaning and to make its meaning clear. It cannot correct a mistake of its own in law or otherwise even though apparent on the face of the order (See The Supreme Court Practice 1999 at 20/11/1 and 20/11/7). The judge can change his mind before the judgment is drawn up if satisfied that it is wrong and that it is just and fair to the parties to do so, but thereafter it can only be altered by consent. The foundation of this principle lies in two aspects of public policy. First, the need for there to be an end to disputation (the maxim *interest reipublicae ut sit finis litium* applies) and secondly the desirability of parties being held to their bargains.

[32] There are of course exceptions to the rule of finality e.g. setting aside an irregular order under Order 2 r. 1, variation of injunctions by reason of subsequent events, where there has been failure to effect service and errors and mistakes in judgments can be corrected under the slip rule in Order 20 r. 11. Valentine on Civil Proceedings in the Supreme Court at paragraph 15.12 summarises the matter as follows:

> "…….the Court has an inherent jurisdiction to vary its own order to carry out or clarify its manifest intention and to correct errors on the court record. It must be a mistake, whether induced by the judge, the parties or the court official in expressing the manifest intention

> of the court. It can be an error in an order induced by mistake in the notice of motion, an arithmetical miscalculation, misnaming of a party and omissions of a provision which the judge would have put in the order but forgot and was not reminded by the parties. It does not allow a change of mind, nor a correction of a misapprehension of law or fact or of an error induced by misrepresentation or fraud; nor where the order made has unforeseen effects nor can it cure an excess of jurisdiction."

[33] The rules are different in other jurisdictions .In England the CPR at r. 3.1(7) is headed "The Court's General Powers of Management". By sub-paragraph (1) the various listed matters are stated to be in addition to any other powers which the court has, whether by statute, rule or otherwise. The powers listed in sub-paragraph (2) are typical case management powers such as varying time limits, adjourning hearings, conducting hearings by telephone, joining or separating trials and the like. Sub-paragraph (7) then provides:

> "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

[34] There is scant authority on r. 3.1(7) but such as exists is unanimous in holding that it cannot constitute a power in a judge to hear an appeal from himself in respect of a final order. (See Roult v North West Strategic Health Authority [2010] 1 WLR 487 at paragraph 15).

[35] Roult's case involved a severely disabled claimant who had secured a settlement, converted into a court order, that future costs of care would be quantified on the basis that he lived in a local authority group home. Subsequently the judge was asked to approve a schedule of damages based on his living in privately obtained accommodation as the group home was thought to be unsuitable. Affirming the decision of the judge that he had no power to reopen the order approving settlement and whilst not attempting to provide any exhaustive classification of the circumstances in which it may be proper to invoke r3.1(7), Hughes LJ said at paragraph 15:

> "It may well be, that in the context of essentially case management decisions, the grounds for invoking the rule would generally fall into one or other of the two categories of
>
> (1) Erroneous information at the time of the original order, or

> (2) Subsequent event destroying the basis on which it was made. The exigencies of case management may well call for a variation in planning from time to time in the light of developments. There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue – an interlocutory injunction may be one. But it does not follow that wherever one or other of the two assertions mentioned (erroneous information and subsequent event) can be made, then any party can return to the trial judge and ask him to re-open any decision. In particular, it does not follow I have no doubt, where the judge's order is a final one disposing of the case, whether in whole or in part. And especially does not apply where the order is founded upon a settlement agreed between the parties after the most detailed and highly skilled advice. The interests of justice and of litigants generally, require that a final order remains such unless proper grounds for appeal exist."

[36] No provision such as that of CPR r. 3.1(7) applies in Northern Ireland and certainly there was no precursor in England and Wales in the Rules of the Supreme Court.

[37] In my view, the grounds put forward by the plaintiff in this instance for setting aside this judgment – namely the lack of consent, provision of inaccurate information to the court by counsel and failure of the court to seek a full and proper analysis of the liability issues arising – require to be dealt with by way of an appeal and not by way of an application to the original court to set the judgment aside. I venture to suggest that even if Northern Ireland had the benefit of CPR r. 3.1(7) cases of this kind would still not come within its ambit. This application really amounts to a request for the court to hear an appeal against itself in respect of a final order. The objection to this is all the more compelling in circumstances where the order was founded on a settlement put forward in the presence of the next friend after detailed advice had been given by counsel to him.

Lack of consent

[38] Lest I am wrong in this conclusion, I now approach the case on the basis that I have jurisdiction to revoke the order that was made. I must first consider whether or not there was a lack of consent on the part of the next friend in that there was a lack of proper authority freely given. I am satisfied that there is no foundation for such a claim. My reasons are as follows.

[39] Obviously in the best of all worlds it would have been preferable if the next friend had known of the views of Dr Fogarty in advance of the day of trial and had had the opportunity to discuss it in the somewhat more sombre and less pressurised atmosphere of his solicitor's office or in consultation with counsel well before the trial date. This is one of the reasons why case management directions extoll the virtues of early joint expert meetings and joint negotiations thereafter. In this case in Directions as early as 20 May 2010 the court had directed the parties to consider both convening such a meeting of experts and a separate meeting of the legal representatives at least 6 weeks prior to the date then fixed for trial.

[40] On the other hand I recognise that the best of all worlds is not always possible for a myriad of good reasons. Expert meetings often occur at the last minute because of earlier unavailability of doctors etc and negotiations under our system regularly take place on the morning of trial because e.g. the views of the experts need to be addressed in more detail. Many pressures will be brought to bear in the course of negotiations which will be regarded as both common place and acceptable in our system of case resolution. Each case will depend on its own facts. It is in the very nature of negotiations on the morning of trial that parties will often have to make a determination within a relatively short span of time relying on the benefit of counsel's advice. Doubtless some regret the decision they made long after the case is settled. This can be a pressurised circumstance with clients having to take on board both factual and legal concepts which are foreign to their normal life experience. In this case the plaintiff faced the dilemma that countless plaintiffs have faced before and will continue to face in the future. An expert had retracted his earlier optimism. Experienced senior counsel with the assistance of junior counsel and solicitor must make an assessment of the strength of the case, the tribunal before which he is to appear and a judgment on what the likely outcome will be. It is not an easy task but counsel, armed with years of experience and his knowledge of the law, must be unflinching in the advice given to the clients.

[41] In this case, as it was clearly indicated to the court by senior counsel, the plaintiff was confronted by circumstances governed by the Bolam principle. Three doctors had now taken the view that the case fell outside the boundaries of likely success. Moreover counsel clearly had to take into account, and communicate to the next friend, the fact that an adjournment, even if granted, could prove fatal to the claim and a loss of the offer that was now on the table. Not only was the possibility of an adjournment highly uncertain or even unlikely, but the danger was that if an adjournment was granted and a further opinion sought which proved to be of no avail, the current offer could well have been withdrawn. Indeed even if, as proved to be the case, another doctor was favourable to the plaintiff, the fact remained that there were three doctors now against the plaintiff's case—all of whom could have been called to give evidence with the leave of the court - and in the circumstances of the Bolam principle, this presented a very formidable impediment to success.

[42] Therefore there can be no doubt that the defendant could well have withdrawn the offer in the event of this offer not being accepted. Based on his

experience of other litigation counsel in this case was entitled to form the view that the opposition counsel might well have done this. Albeit only perhaps 10% of the value of the case, £350,000 was a sum of money which could not be lightly dismissed. Counsel was duty bound to inform his client of his assessment of the situation in clear and unequivocal terms whilst, of course, leaving the ultimate decision to the client.

[43] I listened to Mr Y carefully in the course of his evidence. He is a mature and articulate professional man. He did not strike me as a man given to be easily bullied or intimidated. I do not believe that any discerning observer would conclude that his evidence leads to a conclusion that he was bullied in this case and insofar as he asserted it I do not accept it to be true. It was still open to him to have insisted on an application for an adjournment of the trial despite the advice of counsel that this would not succeed. Unlike many plaintiffs, he had the opportunity to consider the situation not only during the entire course of the day, but also overnight. He had the benefit of a solicitor that he had known for 8-9 years and at least three consultations with counsel before the case was finally settled on the second day. As I watched Mr Y I became convinced that with the passage of time and the removal of litigation pressures he had converted a sense of regret about the final outcome into a false conviction that he had not consented in the first place.

[44] I find no compelling evidence that the advice rendered by counsel, and the views which he presented to court, were other than reasonable in the context in which they were given. Different counsel will deliver advice with varying degrees of firmness and conviction. Licence must be afforded to the robust terminology that counsel choses as the appropriate channel for communication. However perusal of the transcript and indeed the evidence of Mr Y, reveals the care that counsel had invested in this case namely:-

- There were three consultations with the plaintiff ie. two on Monday and one on Tuesday morning before the settlement was placed before the court for approval. This was in a context where the next friend has a long association with his solicitor.

- Counsel was on top of the issues and had met with Dr Fogarty and "cross-examined him" about his change of view. Dr Fogarty had nonetheless remained committed to his change of mind. Counsel revealed to the court the full extent of his thinking on the matter and even a cursory reading of the transcript reveals that he had considered all the relevant issues both legal and factual.

- Counsel was aware that Dr Fogarty was relying on the latest guideline from the Royal College of Obstetricians and Gynaecologists. That report emanated from a Professor Murphy whom Dr Woolfson, according to the next friend, had indicated was the "doyen in this field". Research had been conducted on over a 1000 cases. Counsel considered extracts of that paper.

[45] In short, I have come to the conclusion that the next friend in this case did give a valid consent. The advice upon which he relied was doubtless unpalatable and the very antithesis of what he hoped would have happened. He was making his decision in a pressurised situation on the morning of the hearing but that is common place in the litigation system. In my view he had appropriate time to consider his options. He came to a perfectly reasonable decision in all the circumstances to give authority to his counsel to settle this case. I therefore reject the notion that there was a proper lack of authority freely given by the next friend in this case.

Information before the court

[46] Mr Fee further submitted that the court had been misled as to proper facts of the case by an inaccurate presentation on the part of counsel. He drew attention to the timings suggested by counsel and which appear in the transcript in the following manner:

> "The midwives called for medical assistance and a Senior House Officer arrived at 5.11 am and he applied a foetal electrode to help with the readings and that was done by 5.12 am and the Registrar was called a Dr Salim as I understand it and he arrived at 5.14. …. And the consensus of medical opinion was … it would have taken 2-3 minutes to assess the situation and make a decision on what to do. So essentially we are dealing with 5.16 am now. And what he decided to do was to go for a delivery as quickly as possible of this baby and he decided to use a method called ventouse suction or vacuum system and he had a choice of either that or forceps to assist in delivery. He has to wait then for the patient to be fully dilated which coincidentally occurred in and around that time at 5.16 am and he then proceeded utilising the contractions which would have occurred at about 2-3 minute intervals in order to assist in the delivery. The delivery he achieved was as I told Your Lordship at 5.34 am which is a delay of 18 minutes."

[47] Mr Fee contended that the hospital notes revealed that dilatation had occurred at 5.14 am and that the suggestion of 5.16 was wrong. He also contended that the notes revealed Dr Salim was present at 5.11 am. Minutes were vital in this situation.

[48] Mr Stitt drew attention to the fact that counsel's account coincided with the report of Dr Woolfson, who was acting on behalf of the plaintiff. He had referred at paragraph 16 of his report to the SHO being present at 5.11 (ie. not the Registrar),

that within two minutes the Registrar had attended and within a further three minutes he had established that the mother's cervix was fully dilated and he made the decision to proceed to ventouse delivery. Therefore he has recorded dilatation as being at 5.16 with a further 18 minutes to delivery. Dr Fogarty and Dr McMillan had indicated that the annotated times on the CIG paper were different from the times printed by the CTG machine itself which could shorten the decision to delivery time by up to four minutes.

[49] I am satisfied that counsel properly relied upon the evidence of his experts in putting the facts before the court. I do not believe that any alteration of these timings by him would have materially altered the thrust of the difficulties with which he was confronted and would not have altered the view of the court that this settlement should be approved.

The Role of the Court

[50] Turning to the role of this court, it is improper for a judge to review his decision after the judgment has been entered or to conduct an appeal against his own decision. That is the role of the Court of Appeal. I recognise, of course, that the court has a supervisory role in this matter and must protect the interests of the minor. Hence, as in this case, the judge will have read the papers closely prior to coming into court and presiding over the minor approval. This serves to make the hearing more effective as well as expediting the hearing in the context of a busy list. The court does not divest itself of long experience of clinical negligence cases and the role of counsel in what is after all an adversarial system. The judge will readily recognise that he has neither consulted with the witnesses nor been involved in the negotiations. He is entitled to repose a strong measure of confidence in experienced senior counsel and should be wary of trespassing on ground which is intimately within the knowledge of counsel. The transcript reveals the care that counsel had invested in this case and the difficult judgment that he had made in rendering advice to his client. Pending approval, the case is not settled. The court must always be acutely aware that an incautious rejection of an offer coupled with directions as to further liability steps to be taken contrary to the submissions of counsel could lead to an offer being withdrawn and the case lost. To suggest, as Mr Fee did in this instance, that the court should have chosen unilaterally to adjourn this case in order to give more time for reflection or to get further evidence in circumstances where counsel was inviting neither for the reasons set out would have been to invite that possibility. Once the court was fully appraised of all the facts of the case and had the basis of counsel's judgment explained, then I am satisfied that approval was appropriate. I therefore see no basis for setting aside the judgment in such circumstances.

[51] I have therefore come to the conclusion that this application must fail.