THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 114

Appeal No. 2015/594

Finlay Geoghegan J.
Irvine J.
Hedigan J.

BETWEEN/

SOPHIE EVERARD (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, LISA EVERARD)

PLAINTIFF/

APPELLANT

- AND -

HEALTH SERVICE EXECUTIVE

DEFENDANT/

RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 7th day of April 2017

1. This is an appeal against the judgment and Order of the High Court (White J.) dated respectively the 24th September, 2015, and the 20th October, 2015, whereby he dismissed the plaintiff's claim for damages for personal injuries allegedly sustained as a result of the negligence of the defendant in and about the management of her birth at Our Lady of Lourdes Hospital ("the hospital"), Drogheda on the 23rd January, 2011.

Background facts

2. The appellant was born on the 23rd January, 2011. She was delivered by Dr. Chro Fattah, a senior obstetric registrar at the hospital. The day after her birth she was diagnosed with left sided Erb's palsy. This is a condition caused by injury to the left brachial plexus when the left shoulder becomes trapped and the angle between the shoulder and the head is increased resulting in a stretching injury to the nerves of the brachial plexus. It is accepted that this injury was sustained in the course of her delivery.

3. The appellant maintains that her delivery was complicated by shoulder dystocia, a condition which occurs when either the anterior or, less commonly, the posterior shoulder of a foetus impacts upon the maternal symphysis pubis or sacral promontory. A commonly accepted definition of shoulder dystocia is a delivery that requires additional obstetric manoeuvres following the failure of gentle downward traction on the foetal head to effect delivery of the shoulders.

4. Because of a failure to progress, an instrumental delivery was commenced. A kiwi cup was applied to the baby's head which was successfully delivered at 10.41 am. No complaint is made concerning the management of labour up to that point. It is alleged that having delivered the infant's head Dr. Fattah diagnosed shoulder dystocia and that consistent with that diagnosis deployed what is called the McRoberts manoeuvre. This manoeuvre involves the drawing back of the mother's knees towards her ears and retaining them in that position. It is also the first step of the protocol to be implemented where shoulder dystocia is diagnosed. The appellant maintains that Dr. Fattah then delivered her body and shoulders in a negligent manner by "pulling" her head downwards and that in doing so she applied excessive traction to the relevant structures as a result of which she developed Erb's palsy. Prior to delivering the shoulders it is alleged that she did not instigate the manoeuvres which are mandated by the hospital's guidelines governing the management of shoulder dystocia.

5. It is perhaps convenient at this point to note that the parties are agreed that while a combination of factors may raise a suspicion that shoulder dystocia may be present, the condition can only be diagnosed following the failure of gentle downward traction on the foetal head to effect delivery of the shoulders.

6. The respondent denies that the appellant's delivery was complicated by shoulder dystocia. It claims that following the delivery of the infant's head that Dr. Fattah, suspecting that shoulder dystocia *might* be present because the head was tight on the perineum, decided as a precaution to deploy the McRobert's manoeuvre. Prior to carrying out this manoeuvre she did not apply any traction to the foetal head as would have been necessary to reach a diagnosis of shoulder dystocia. Neither was any supra pubic pressure, another step which forms part of the protocol for dealing with shoulder dystocia, deployed. It was the respondent's evidence that having put the mother in the McRobert's position, the baby delivered on the next contraction approximately two minutes later with Dr. Fattah applying no more than normal traction to the infant's head. Nothing adverse was to be inferred from the fact that following the delivery Dr. Fattah wrote a clinical note to the effect that the baby had been delivered by "pulling" the head down. Such traction as was used did not cause the appellant's injury.

7. As to causation, the respondent, albeit somewhat late in the day, maintained that following the palpation of the mother's abdomen on admission to hospital the midwife had concluded that the baby was in the left occipito anterior position (LOA). Assuming that this finding was accurate, the injured left shoulder would have been in the posterior position as it descended through the birth canal. The obstruction for that shoulder would have been the sacral promontory, a structure much higher up in the birth canal, rather than the symphysis pubis which is lower down on the anterior side which is the prominence associated with shoulder dystocia. That being so, the appellant's injury was most probably caused by endogenous (maternal) delivery forces at a time when the left shoulder was caught on the sacral promontory, an injury unrelated to the obstetric management of the labour.

The appellant's claim
8. The personal injuries summons claims that Dr. Fattah made a diagnosis of shoulder dystocia following the delivery of the baby's head. Some 24 particulars of negligence are identified, all of which contend for the negligent management of the mother and foetus in the presence of shoulder dystocia. Accordingly, critical to the success of the appellant's claim was her need to establish, on the balance of probabilities, first that the condition of shoulder dystocia had occurred during labour and second that the injury to her left shoulder was caused by Dr. Fattah's mismanagement of that condition and in particular by her application of excessive traction to her head in order to deliver her shoulders.

9. As will be seen from the trial judge's summary of the expert evidence which I have outlined later in the course of this judgment, Mr. Pyper, the first of the appellant's two obstetric experts, was satisfied that the actions of those concerned with the delivery and the records made at the time rendered it probable that the injury concerned had been caused by excessive traction applied to the head and neck during a delivery complicated by the presence of shoulder dystocia and he supported that opinion by stating that there was no other reasonable explanation for the injury. Mr. Canty, the other obstetric expert retained by the appellant, was also of the opinion that the injury was caused as a result of the mismanagement of shoulder dystocia. Unlike Mr. Pyper, he accepted that there were occasions when Erb's palsy might be ascribed to endogenous maternal forces as might occur in the course of a prolonged second stage of labour. However, he was satisfied that it was more probable that Dr. Fattah's delivery technique of "pulling" the head was the mechanism of trauma and that the injury had resulted from incorrect management of shoulder dystocia. He did not suggest that negligence on the part of Dr. Fattah might be presumed because there was no other reasonable explanation for such an injury.

10. It is important in the context of the submissions advanced on the appeal to note that both of the aforementioned witnesses spent significant amounts of time explaining why they considered this to be a case of shoulder dystocia and how they had come to the conclusion that Dr. Fattah had applied excessive traction to the infant's head when she delivered the shoulders. Thus while Mr. Pyper in support of his opinion to the effect that this was a case of mismanaged shoulder dystocia sought to rely upon the fact that there was no other "reasonable explanation" for the injury, it was not contended that the appellant's claim was one of *res ipsa loquitur* or one which could be successful otherwise than by proof of negligence on the part of Dr. Fattah in the management of the delivery in the presence of shoulder dystocia.

11. I will shortly consider the judgment of the trial judge. However, before I do so I will briefly refer to two of the many grounds of appeal relied upon by the appellant. For reasons that will later become apparent I intend to summarise the submissions of the parties in relation to these grounds of appeal after which I will deal in some detail with the judgment of the High Court judge bearing in mind those submissions.

The appellant's submissions
12. The appellant refers to the final section of the judgment of the High Court judge and submits that it is to be inferred therefrom that he considered it necessary for the appellant to prove her case on the criminal standard of proof i.e. beyond reasonable doubt, rather than on the balance of probabilities. She relies on the fact that the he did not weigh the probabilities in relation to the allegations of negligence but rather went in search of evidence that might, in the context of criminal proceedings, defeat the prosecution's claim. He failed to make any finding, as a matter of probability, as to whether shoulder dystocia was present or whether excessive traction had been used.

13. The appellant submits that it is clear from para. 140 of his judgment that the trial judge proceeded on the basis that once the respondent had established that there was an alternative mechanism which could explain her injury that that was sufficient to defeat her claim. This was clear from the four paragraphs of his judgment which followed, where he canvassed the circumstances in which brachial plexus injuries could occur otherwise than as a result of shoulder dystocia. Once he had found that there was an alternative reasonable explanation for the injury he neglected to weigh the evidence advanced by the appellant in favour of the existence of shoulder dystocia and the use of excessive traction. It is to be inferred from the final two sentences of his judgment that he found there was no shoulder dystocia purely because there was, contrary to what had been asserted by Mr. Pyper, a more likely alternative cause namely injury to the posterior shoulder as it descended the birth canal in the posterior position. This was the only basis on which he had ruled out the presence of shoulder dystocia. He did not properly engage with the evidence on this aspect of the appellant's claim.

14. Further, insofar as the trial judge concluded that the more likely cause of the injury was damage sustained to the left shoulder when the foetus descended the birth canal with its left arm posterior in the womb, he had already concluded that the abdominal palpation test carried out by Midwife Dunne, whilst a reliable one, was insufficient, on the balance of probabilities, to satisfy him that the baby's left arm and left shoulder were in the posterior position as it went through the birth canal. That being so and in the absence of any note on delivery to say that the left shoulder was posterior, there was no evidential basis upon which he could have come to that conclusion.

The respondent's submissions
15. Counsel for the respondent submits that the High Court judge addressed each of the fact based arguments advanced by the appellant's experts to support her contention that this was a case of shoulder dystocia and that he explained his conclusions in each case. It cannot be inferred from the opening sentence of para. 150 of his judgment, which commences "I do not accept that the only reasonable cause…", that the trial judge had departed from considering the claim on the basis of the civil standard of proof. He had done no more that reject Mr. Pyper's evidence to the effect that the only explanation for the injury was shoulder dystocia managed by excessive traction.

16. Counsel submits that the majority of the trial judge's judgment was directed to the issue of whether shoulder dystocia was or was not present as in the absence of such a finding the excessive traction argument would fall away. He had made a finding that the phrase "delivered with pulling on the head" was not indicative of excessive traction and had expressly found that it was correct, after carrying out the McRoberts manoeuvre, to proceed to delivery the baby's shoulders with routine axial traction. It was the combination of these findings at paras. 136 and 138 which amounted to a finding that excessive traction had not been deployed and that the Court had accepted Dr. Fattah's evidence in that regard.

17. The respondent submits that the only evidence given of inappropriate traction was the medical note, which was rejected, the appellant's mother's evidence of feeling that the baby was pulled out, which was rejected and the injury itself, which was dealt with at para. 150 of the High Court judgment. Further, in the context of the overall judgment, which was that this wasn't a case of shoulder dystocia, it wasn't necessary for the Court to find that there was no excessive traction but nonetheless counsel submitted that it is in the judgment.

18. The respondent submits that taking the three causes of injury set out by the trial judge and the finding of LOA, which counsel notes the judge felt was probative although insufficient to establish the lie of the baby on the balance of probabilities, together

meant the most likely mechanism of injury was damage to the posterior shoulder due to maternal forces in the absence of shoulder dystocia.

The judgment
19. Having regard to the appellant's submissions that the trial judge adopted an impermissible approach to determining her claim, and that he had ruled out shoulder dystocia and excessive traction, not on the basis of having weighed the evidence in relation thereto, but rather based upon a causation conclusion that was not supported by the evidence, it is necessary to consider the Court's judgment in some detail. In particular it is necessary to identify whether or not the appellant is correct that he did not rule out shoulder dystocia and/or the use of excessive traction, on the balance of probabilities. If he did, even if the appellant is correct that there was no credible evidence to support the causation theory for which the trial judge ultimately elected, it could be said that in any event, he was satisfied that the appellant had not proved her case such that a retrial would not be warranted.

20. In his very detailed judgment the trial judge set out a summary of the evidence upon which he relied to reach his decision. He referred to the expert evidence given on the appellant's behalf by Mr. Richard Pyper, consultant obstetrician and gynaecologist, and Mr. S.H. Canty, also a consultant obstetrician and gynaecologist. He also dealt in considerable detail with the expert evidence given on behalf of the respondent by Prof. Fergal Malone, consultant obstetrician and gynaecologist and specialist in maternal-foetal medicine, Prof. John Morrison, consultant obstetrician and gynaecologist, and Prof. Michelle Grimm, a biomedical engineer who specialises in biomechanics. The trial judge further identified the documents and notes which he considered material to his conclusions on the liability issue, namely those which were made contemporaneously or shortly after birth as he did those which he considered immaterial and which he listed at para. 10 of his judgment.

Résuméi of the expert evidence as recorded in the judgment
21. What follows is a brief résuméi of the expert evidence as recorded by the trial judge in his judgment.

22. At paras. 20 to 31 of his judgment the trial judge dealt with Mr. Pyper's evidence. He noted his view that it was highly probable that shoulder dystocia had occurred in Mrs. Everard's case, even if it was not documented properly.

23. The trial judge next records Mr. Pyper's evidence that a number of risk factors for shoulder dystocia were present. The baby was big and there had been a delay in the second stage of labour resulting in an instrumental delivery. A further indication was Dr. Fattah's note that the head was "very tight around the perineum" and, while not recorded in the clinical notes, the likelihood that Dr. Fattah had called for help from extra midwives.

24. Mr. Pyper was satisfied that if more time had been allowed for the delivery and the other manoeuvres mandated in the shoulder dystocia procotol employed, the baby would likely have been delivered without injury. He relied upon the clinical notes to opine that the baby had been delivered by Dr. Fattah pulling on her head. He surmised that in circumstances where the delivery had been completed within two minutes of delivery of the head that panic could be inferred with excessive traction as the highly probable cause of the injury.

25. Material to the issue of causation, the trial judge noted that Mr. Pyper was of the view that the left shoulder was almost certainly anterior. Apart from mismanaged shoulder dystocia, there was, in his opinion, no other reasonable explanation for the injury.

26. As to the significance of the admission note which recorded the baby as being in the LOA position, Mr. Pyper first noted that neither of the respondent's experts in their reports had commented on this finding. Second, he was of the view that abdominal palpation was not a reliable way of determining the location of the baby's back, albeit that he accepted the conclusions of a study (Webb & Ors, "Abdominal Palpation to Determine Fetal Position at Labour Onset: A Test Accuracy Study", (2011) 90 Acta Obstetrica et Gynecologica Scandinavia 1259-1266) of over 600 women which had reported that the midwives concerned had been correct 69% of the time when they had determined that a baby was lying on its left side.

27. As to the respondent's claim that the injury was likely caused by endogenous maternal forces bearing upon the posterior left shoulder, Mr. Pyper was sceptical about the theory of posterior shoulder injury stating that "no one has ever provided a very good explanation of how it happens and what the mechanism is".

28. Mr. Canty criticised the failure of Dr. Fattah to perform the recognised internal manoeuvres required following a diagnosis of shoulder dystocia. He identified the mother's raised body mass index, a prolonged second stage of labour, a big baby and the description of the head as being tight on the perineum as very strong evidence of the presence of shoulder dystocia. He also considered that Dr. Fattah's actions were in keeping with such a diagnosis but that unfortunately she had not followed through with the protocol. While he was aware that the McRoberts manoeuvre was at times used as a precautionary measure, he felt it could not be regarded as precautionary in this case. He was satisfied that the baby was delivered as a result of Dr. Fattah pulling on the head to achieve delivery of the shoulders rather than by her employing the other recognised manoeuvres appropriate in a case of shoulder dystocia. She had performed the precise manoeuvre that was to be avoided, namely the application of excessive traction and it was this trauma that had caused the injury.

29. While Mr. Canty accepted that the posterior arm could be damaged by endogenous maternal forces if the posterior shoulder became caught on the sacral promontory, he stated that this was uncommon. Likewise he agreed that there were occasions when Erb's palsy could be ascribed to pressure on the anterior shoulder during a prolonged second stage of natural labour, again as a result of natural forces. However, in the present case, he felt it more probable that the delivery technique of pulling on the head in the presence of shoulder dystocia had caused the trauma.

30. Commencing at para. 85 of his judgment the High Court judge dealt with the evidence of Prof. Malone, the first of the respondent's expert witnesses. He recorded in some detail the sequence of events that had lead Prof. Malone to change his initial opinion which was to the effect that this was a mild case of shoulder dystocia to one where he was satisfied that shoulder dystocia had not occurred. The trial judge noted that the reason he had changed his opinion was that at the time he had prepared his first report he had not had available to him the evidence that would be given by the midwives and Dr. Fattah. Once he was advised of the fact that Dr. Fattah had not applied any traction to the baby's head between the time it was delivered and the mother being placed in the McRoberts position and that the baby was delivered on the next contraction, he was satisfied that this was not a case of shoulder dystocia.

31. The trial judge noted Prof. Malone's evidence that it was common practice to use the McRoberts manoeuvre as a precautionary measure, even if he would have not advocated such an approach. In his opinion, the fact that the baby's head was tight on the perineum was not indicative of shoulder dystocia and he did not attach any weight to the fact that Dr. Fattah had used the word "pulling" in her delivery note.

32. Next the trial judge referred to Prof. Malone's evidence to the effect that a significant percentage of Erb's palsy cases are due to posterior shoulder impaction and that in the majority of cases the baby's back is to the left in the mother's womb as was noted on Mrs. Everard's admission. It is only when the baby's back is on the mother's right that it's left shoulder will approach the pubic symphysis. If the appellant's left shoulder was injured in the course of her descent through the birth canal that injury could only have occurred as a result of endogenous maternal forces when the shoulder was impacted upon the sacral promontory. The trial judge further noted that Prof. Malone was satisfied that palpation of the mother's abdomen on admission could be relied upon as an accurate method by which to assess the position of the foetal back. He stated that the examination would be carefully carried out so as to ensure that when the CTG was attached it could be positioned close to the anterior shoulder of the baby. He referred to a particular academic article in support which noted an 82.5% accuracy in the palpation test as a method of determining the position of the back of the baby when assessed as being on the left side.

33. Commencing at para. 48 of his judgment the trial judge proceeded to summarise the evidence of Prof. Morrison. In particular he noted Prof. Morrison's opinion that this was not a case of shoulder dystocia. It was not unusual for the head, when delivered to a first time mother, to be tight on the perineum. The trial judge noted that like Prof. Malone, Prof. Morrison was not prepared to draw any adverse inferences from the use by Dr. Fattah of the words "delivery with pulling the head" in her clinical note. He considered that Dr. Fattah's decision to place the mother in the McRoberts position was good cautious practice in the presence of any factors associated with the risk of shoulder dystocia. However, the fact that the infant was delivered on the first contraction thereafter was a strong indication that shoulder dystocia was not present. He also relied upon the doctor's note which referred to the fact that precautions had been taken "but" that the baby had delivered with pulling the head, a note which suggested to him that while shoulder dystocia was suspected, this eventuality had not occurred. Further, the trial judge noted Prof. Morrison's opinion that there was no evidence to suggest that excessive traction had been applied and his evidence to the effect that the number of professionals in attendance was not indicative of the presence of shoulder dystocia.

34. Commencing at para. 62 of his judgment, the trial judge noted that Prof. Morrison was of the opinion that "it remained unclear if the damaged shoulder was anterior or posterior". However, the trial judge went on to note his evidence that it was well recognised that a significant number of brachial plexus injuries were unrelated to traction and occurred in the absence of shoulder dystocia. The literature, according to Prof. Morrison, suggests that 30% to 40% of brachial plexus injuries are not associated with traction. The trial judge in particular noted that Prof. Morrison was convinced that irrespective of whether the injured shoulder was anterior or posterior, it had not been damaged by excessive lateral traction because there had been no shoulder dystocia for seven reasons which he then listed at para. 65 of his judgment.

35. The trial judge concluded that section of his judgment, which deals with the evidence of Prof. Morrison, by recording this expert's opinion first, that on the balance of probabilities the left shoulder in this case was posterior, second, that abdominal palpation was a reliable tool for the purpose of determining which side of the mother the baby's back was on and third, that the accuracy of the test was in accordance with the paper published by *Webb* and others, earlier referred to.

36. Finally, in terms of the expert evidence, the High Court judge, commencing at para. 108 of his judgment, refers to the evidence of Dr. Michelle Grimm, biomedical engineer, whom he noted gave evidence as to how the brachial plexus might be stretched as a result of maternal forces as well as by forces applied by clinicians. The trial judge stated that he found that evidence to be of assistance as corroboration that brachial plexus injury might be caused by material propulsive forces but he did not consider it relevant in determining specifically if Dr. Fattah had, as claimed, applied inappropriate traction to the appellant's head.

Disputed facts

37. Commencing at para. 109 of his judgment the trial judge referred to the evidence in relation to a number of factual disputes between the parties and in the course of so doing spent some time considering the evidence of Mrs. Everard, Dr. Fattah and Leona Campbell, a midwife of eighteen years standing. He noted Midwife Campbell's evidence that the McRoberts manoeuvre was precautionary and that she had recorded this fact on the CTG. She stated that the mother's description of the pressure applied following the delivery of the head was not one of supra pubic pressure and she confirmed that it had not been applied. Had it been applied, it would have been documented. As to the criticism that a note had not been made to reflect the respondent's claim that the infant had been delivered either spontaneously or as a result of gentle traction, she stated that it was not common practice to use those words when making a clinical note.

38. In this section of his judgment the trial judge also recorded some of the evidence given by Dr. Fattah. He noted that she was a senior registrar with five years experience at a hospital which delivered 4,000 infants a year and was a member of a multi professional training team which involved training in obstetric emergencies including shoulder dystocia. In particular he referred to her evidence that she did not diagnose shoulder dystocia, that supra pubic pressure would never have been applied without a diagnosis being made, that the McRoberts manoeuvre was used as a precaution and that if the baby had not been delivered on the first contraction thereafter she would have initiated the shoulder dystocia drill. He also noted her evidence that when she referred to "pulling" in her note that meant she had applied routine gentle traction.

39. Having considered the evidence in relation to the aforementioned disputed facts the trial judge firstly concluded that no shoulder dystocia emergency had been called by Dr. Fattah, even if the mother may have heard somebody state that there was difficulty with the shoulders and body being delivered. Second he found that no supra pubic pressure had been applied. Finally he found as a fact that Mrs. Everard must have been pushing when the baby was delivered even if she may not have felt the pushing sensation because her pelvis was desensitised by the epidural. Thus he left over any decision as to whether shoulder dystocia was present or excessive traction deployed.

Disputed expert opinion evidence

40. I now propose to summarise by reference to paragraph numbers in the judgment a number of the trial judge's conclusions on matters which were in dispute amongst the expert witnesses. In doing so I will comment upon the significance of his findings in the context of the manner in which he ultimately resolved the liability issue and bearing in mind the submissions of the appellant to which I have earlier referred.

41. At para. 130 the trial judge concluded that the finding that the baby's head was tight around the perineum did not of itself warrant the instigation of the shoulder dystocia protocol. However, it is to be noted that he does not here address whether, in light of all of the evidence, as a matter of probability, shoulder dystocia was or was not present.

42. At paras. 131 to 133 the trial judge considered the evidence concerning the reliability of Midwife Dunne's finding, made on abdominal palpation, that the baby's back was in the LOA position on admission. He expressed his conclusions in the following terms at para. 133:-

> "I am satisfied that abdominal palpation to ascertain the place of the baby's back in the womb is a reliable examination, but not to ascertain the place of the baby's head. I do not regard it as a confirmed fact, nor would I go as far as saying it establishes on the balance of probabilities that the left arm and shoulder of the plaintiff were posterior at delivery and thus not damaged on the symphysis pubis."

43. It is clear from the aforementioned paragraph of his judgment that the trial judge has not yet made a finding of fact as to whether this was or was not a case of shoulder dystocia. However, of even greater importance, for reasons to which I will later refer, is his conclusion that he would not be prepared to rely upon the abdominal palpation carried out by midwife Dunne to find, on the balance of probabilities, that the left arm and shoulder were posterior as the foetus descended within the birth canal.

44. At para. 135 of his judgment the trial judge accepted the evidence of the respondent's experts that to place the mother in the McRoberts position as a precautionary measure, if the clinician considered there was a risk of shoulder dystocia, was a prudent approach to take and that its use as a precautionary measure was not uncommon. He also accepted that when such an approach is adopted it is not necessarily indicative of the existence of an actual shoulder dystocia emergency or the commencement of the shoulder dystocia protocol. While the trial judge discusses what he considered to be reasonable practice in the presence of signs that might suggest the risk of shoulder dystocia he does not reach a conclusion as to whether the concerns of the clinicians were borne out and in particular makes no finding on the appellant's claim that shoulder dystocia was, on the balance of probabilities, present. Further, the possibility of inferring such a conclusion from his endorsement of the use of a precautionary McRoberts manoeuvre is not open for two reasons. First, the performance of that manoeuvre is equally consistent with the presence or absence of shoulder dystocia and second, because of what he states in the next paragraph of his judgment concerning the use of traction. At para.136 the trial judge states:-

> "This Court cannot rule out the possibility that Dr. Chro Fattah mistakenly did not identify an actual shoulder dystocia and proceeded to use improper downward or lateral traction which resulted in the injury. The court is satisfied however that pulling as a word has been regularly used in maternity hospitals to describe traction. It is the word that is used for traction in instrumental delivery. The description of pulling on the head in a medical note of a delivery is not of itself sufficient evidence for a court to hold that there was excessive traction."

45. From this statement it is clear that the trial judge has as yet made no finding as to whether, as alleged on the appellant's behalf, this was a case of shoulder dystocia or excessive traction. Indeed, a consideration of excessive traction otherwise than in the context of shoulder dystocia would be relatively meaningless in the context of the claim made. Neither has he decided, on the balance of probabilities, whether excessive traction was or was not applied, even if it be the case that he was not prepared to decide that issue against Dr. Fattah based upon her clinical note. While the trial judge at that stage of his judgment might have determined as a matter of fact that the baby delivered easily with no more than normal traction and that he was therefore satisfied that there had been no shoulder dystocia nor any mismanagement of that condition, he did not do so. He chose instead to leave open the possibility that shoulder dystocia existed but had not been identified by Dr. Fattah and also did not make any decision as to whether excessive traction had been deployed.

46. The respondent in its submissions to this Court places significant reliance upon the following statement made by the trial judge para. 138 of his judgment:-

> "It was appropriate once the head was delivered and tight to the perineum, and after the McRoberts position was assumed to use appropriate axial traction to deliver the baby."

It is submitted that this statement can be relied upon to support the position that the trial judge arrived at a conclusion on the balance of probabilities that the baby was as a matter of fact delivered by the application of normal traction and that being so that he was satisfied, on a like basis, that there had been no shoulder dystocia.

47. It is true to say that had the trial judge added on one further sentence to paragraph 138 of his judgment to the effect that he was satisfied that Dr. Fattah had, as a matter of fact, delivered the baby on the next contraction with no more than normal pressure applied by axial traction that, arguably, would have provided the answer to the liability issue. However, not only did he not make such a statement, but in the very next paragraph he went on to explain that he could not rule out that the clinician had in fact "pulled too hard to achieve the delivery" even if the baby was delivered on the contraction which immediately followed the McRoberts manoeuvre, a contra indication for the presence of shoulder dystocia.

48. The trial judge did not consider further the factual issues in dispute as to whether Mrs. Everard's delivery was complicated by shoulder dystocia and that the appellant's delivery had been mismanaged by the use of excessive traction to deliver the shoulders.

Alternative causes of injury

49. The trial judge then moved to consider the possible alternative causes of brachial plexus injury in light of Mr. Pyper's evidence that most are the result of excessive traction and his scepticism concerning propulsive forces as an alternative explanation. After quoting at length from some of the medical literature produced in the course of the trial he expressed himself satisfied that brachial plexus injuries in babies could be caused by maternal propulsive forces particularly if a shoulder were to come into contact with either the sacral promontory or the symphysis pubis, albeit that he noted that it was statistically less frequent than brachial plexus injury resulting from shoulder dystocia and /or excessive traction.

50. As to the possible causes of injury in the present case, these were outlined by the trial judge as follows at para. 149 of his judgment, namely:-

> "• In accordance with the plaintiff's case that Dr. Chro Fattah instead of declaring a shoulder dystocia in accordance with the protocol decided to deliver the baby by traction and pulled too hard other than by gentle axial traction and injured the baby's left shoulder, which was at that time anterior to Mrs. Everard's symphysis pubis.
>
> • The baby's left arm and shoulder was always posterior to the symphysis pubis and thus the injury could not have been caused by the clinician.
>
> • The baby's left shoulder and arm was anterior and damaged in contact with the symphysis pubis, but by propulsive forces rather than by improper traction by the clinician."

51. Immediately after setting out these three alternative potential causes for the injury and notwithstanding his recitation of the appropriate test to be applied by him when considering the negligence alleged against the respondent the following is what the trial

judge stated in his concluding paragraph:-

> "I do not accept that the only reasonable cause of the injury to the plaintiff was excessive traction applied to the baby's head by Dr. Fattah. She was a very experienced practitioner who has denied using improper traction on the baby's head. The choice of pulling in her note was unfortunate but it is a term that has been used historically for traction. In my view the plaintiff is asking the court to apply a form of "res ipsa loquiter" by submitting that the injury occurred and the only explanation is the one put forward by the plaintiff. This is not the case. The defendant has established without doubt that there were other possible causes, and that in fact the more likely cause was injury to the left arm and shoulder of the plaintiff when it was posterior in the womb. In the circumstances I have to dismiss the action."

Decision

52. The careful approach of the trial judge to the many difficult issues in this case cannot be doubted. He was assiduous in his efforts to identify all areas of dispute between the parties, whether the same related to the facts as they occurred in the course of the delivery or those he was urged by the experts to infer from the actions of those involved in the delivery and the contemporaneous clinical notes.

53. The trial judge's task was particularly onerous having regard to the alteration by Prof. Malone of his original opinion in circumstances where he had furnished that opinion without having first considered the evidence to be given by the attending midwives and Dr. Fattah and his later strong reliance on the position of the baby's back (LOA) on admission to support his opinion on causation; namely that as the injured shoulder had been in the posterior position as it passed through the birth canal the injury could not have been caused by the accoucheur.

54. The burden faced by the trial judge was further complicated by a number of legal arguments and procedural objections made not only in the course of proceedings but also in closing submissions. These submissions, which sought first the exclusion of Prof. Malone's evidence and second that the defence be struck out need not be dealt with here for reasons that will shortly become clear. Suffice it to say that the issues raised in this regard by the appellant imposed a further and not insignificant burden on the trial judge which he dealt with in an appropriate manner and in accordance with the relevant legal principles.

55. Regrettably, however, I have come to the conclusion that notwithstanding his correct statement of the legal test to be applied i.e. as stated by Finlay C.J. in *Dunne v. The National Maternity Hospital* [1989] I.R. 91, it is not clear from his judgment that in dismissing the appellant's claim, that this is the test which the trial judge ultimately applied to the claim made.

56. The only matter considered by the trial judge after his reference to the decision in *Dunne* was the three potential alternatives causes of the injury referred to at para.50 above. Thus, in my view, it cannot be stated with sufficient certainly that he made his decision based upon the claim which was advanced on the appellant's behalf. He did not reach any specific finding as to whether as a matter of fact shoulder dystocia was, on the balance of probabilities, present and whether, having regard to his decision on that issue, Dr. Fattah had acted in a manner that no clinician of equivalent expertise would have acted if affording due care to the appellant.

57. It is true to say that the trial judge resolved almost all of the evidential issues in favour of the respondent. Further, at several points in his judgment, it appeared likely because of what he had earlier stated that he would proceed to find as a fact, on the balance of probabilities, that shoulder dystocia was not present or that he was satisfied that, notwithstanding indications to the contrary, such as Dr. Fattah's note referring to the delivery by "pulling" the head, no excessive traction was applied with the result that the claim would have to be dismissed. However, he did not do so.

58. Instead, as already stated, the trial judge appears to have been reached his ultimate conclusion on the liability issue based upon his consideration of Mr. Pyper's evidence that there was no other reasonable explanation for the appellant's injury other than a mismanaged shoulder dystocia emergency. However, this was just one aspect of Mr. Pyper's evidence and whilst relevant both to the issues of liability and causation, a finding of fact by the trial judge on this issue could not have disposed of the claim before him. It has to be remembered that Mr. Pyper and Mr. Canty identified a range of factors which they stated established that the likely cause of the injury was excessive traction in the presence of shoulder dystocia, one such example being Dr Fattah's note that the infant was delivered by "pulling on the head". The appellant's claim was not pursued on the basis that it was to be presumed from the fact that a braxial plexus injury had been sustained that there had been negligence on the part of the clinician, even if that was the professional opinion of Mr. Pyper. Unfortunately, however, Mr. Pyper's evidence appears to have enticed the trial judge to consider the liability issue by reference to the doctrine of *res ipsa loquitur*, which was not the basis upon which the claim had been advanced.

59. Given that the trial judge in the final paragraph of his judgment concluded that the plaintiff's injury occurred as she descended through the birth canal with her left arm and shoulder in the posterior position, it would appear that the trial judge must have been satisfied that this was not a case of shoulder dystocia. However, he made no express finding to that effect. He did not weigh up the conflicting evidence adduced concerning the presence or absence of that complication. The basis upon which he would appear to have ruled out shoulder dystocia was that he was satisfied that the injury was caused as a result of endogenous maternal forces exerted at a time when the left shoulder impacted upon the sacral promontory as the foetus descended through the birth canal.

60. Of even greater concern is the fact that the aforementioned causation finding, which appears to have led the trial judge to dismiss the claim, is one which is not supported by the evidence. It is important to remember that the evidence which favoured the injury occurring in this way was dependant upon a finding that the left shoulder was posterior as she descended the birth canal. That finding of fact was in turn dependent on the court's view as to the reliability of the abdominal palpation test carried out by Midwife Dunne following the mother's admission to hospital as a result of which she concluded that the foetus was in the LOA position i.e. with her left arm and shoulder in the posterior position. That this was so was because no note was made following the delivery recording which shoulder was anterior. Thus it was that the Court spent a great deal of time considering the expert testimony and learned medical articles concerning the reliability of the abdominal palpation test deployed by Midwife Dunne.

61. It is essential to contrast what the trial judge stated in the final paragraph of his judgment with the conclusion which he had earlier expressed at para. 133; namely that while the palpation test was a reliable one he did not consider it was sufficient in this case to establish as a probability that the left shoulder and arm were posterior such that they could not have been damaged on the symphysis pubis. That being so, and in circumstances where there was no other credible evidence which might have been relied upon to support this causation finding, the same cannot be upheld. Insofar as it was this finding that formed the basis upon which the trial judge appears to have ruled out injury caused by shoulder dystocia and excessive traction, it would be unsafe to uphold his decision to dismiss the proceedings.

62. Finally, I think I should explain why in the earlier part of this judgment I engaged in such detail with the trial judge's findings. I did so for the purpose of satisfying myself, that regardless of his conclusions as to which of the three possible mechanisms of injury was responsible for the appellant's injuries, it might nonetheless be concluded that he had in any event weighed the factual and expert evidence and come to the conclusion that this was not a case of shoulder dystocia or excessive traction such that this court could be confident that he had independently concluded that the appellant had not proved her claim as pleaded and pursued. However, having regard to the observations which I made when going through the judgment of the High Court judge, this cannot be stated with the confidence that would be necessary to uphold his decision.

Conclusion

63. As was made clear by Clarke J. in *Doyle v. Banville* [2012] IESC 25, a party to litigation is entitled to a judgment which will enable them know why they won or lost their case. To this end a trial judge should engage with the key elements of the case made by both sides and explain why one side is to be preferred over the other. That said, the court is not obliged to "rummage through the undergrowth of the evidence" for such purpose, but should analyse the broad case made on both sides.

64. In the present case the principal claim made by the appellant was that she was injured as a result of negligent management of a shoulder dystocia emergency at the time of her birth. Regrettably, the trial judge did not fully engage with the evidence adduced on her behalf in support of that claim and in particular failed to make an express finding as to whether or not shoulder dystocia was present or excessive traction deployed, thus somewhat falling short of what might have been expected of him under the *Doyle v. Banville* decision.

65. Further, even if that omission could be overcome in circumstances where it is to be inferred from the final paragraph of his judgment, where he found that the injury was caused as the appellant descended through the birth canal with her left arm and shoulder in the posterior position, a finding inconsistent with injury caused by excessive traction, that causation finding is one which is not supported by the evidence.

66. This is so because the trial judge at para 133 of his judgment rejected the results of the abdominal palpation test carried out by midwife Dunne as sufficient evidence to convince him on the balance of probabilities that the left arm and shoulder of the plaintiff were posterior at delivery. That being so and in circumstances where there was no clinical note made as to which shoulder was first delivered or other evidence available to support that finding, the dismissal of the plaintiff's claim based upon this causation finding cannot be upheld.

67. For these reasons and those earlier referred to in this judgment I am satisfied that the order of the High Court must be set aside and a retrial ordered.