Neutral Citation Number: [2008] IEHC 62

**THE HIGH COURT**

**2002 No. 14742 P**

**BETWEEN**

**PAUL FITZPATRICK (AN INFANT) SUING BY HIS MOTHER AND NEXT FRIEND MICHELLE FITZPATRICK**

**PLAINTIFF**

**AND**

**NATIONAL MATERNITY HOSPITAL**

**DEFENDANT**

**Judgment delivered by Mr. Justice Herbert on the 7th day of March, 2008**

1. The plaintiff, Paul Fitzpatrick, (an infant) through his mother and next friend, Michelle Fitzpatrick, claims damages for personal injury, loss and damage caused by alleged negligence and breach of duty on the part of the defendant, its servants or agents. Particulars of this alleged negligence and breach of duty are set out in the Statement of Claim. However, the issue of negligence centred principally on the claim that the defendant its servants or agents failed to properly interpret the cardiotocograph record at and after 06.30 hours on the 26th December, 2001 and in particular at and after 07.10 hours and failed to act correctly in the light of that record especially by failing to call the duty Registrar, failing to discontinue the use of Oxytocin, failing to inform his parents that the plaintiff was in distress and needed to be delivered immediately and in delaying unduly in delivering the plaintiff. The plaintiff claims that his condition was caused or materially contributed to by this negligence on the part of the defendant, its servants or agents. The defendant pleaded a general denial and specifically pleaded that any undue delay in delivering the plaintiff was caused solely by the refusal of Mrs. Fitzpatrick to permit an episiotomy and her refusal to permit a forceps assisted vaginal delivery. Senior Counsel for the defendant abandoned at the outset the claim that Mrs. Fitzpatrick was guilty of negligence.

2. A quite extraordinary number of collateral issues fell to be decided during the course of the hearing of this case, almost all of which, in one way or another had important implications for the main issues. I do not think it an exaggeration to state that the matters upon which witnesses to fact, from the start of Ante-Natal classes to the delivery of the plaintiff, were able to agree, very few indeed. The Court had the assistance of number of experts in the disciplines of Obstetrics, Midwifery, Paediatrics, Paediatric-Neurology and Neonatology and was referred to a very considerable number of medical publications in relation to various pertinent aspects of the management of labour and in particular the interpretation of CTG Traces.

3. For logistical reasons, particularly because of unavoidable problems with the availability of expert witnesses from overseas, it was not possible during the hearing of this action to call the evidence always in correct sequence. It is therefore important, particularly to the proper understanding of some of the evidence and issues arising from it, that I start this judgment by setting out the actual order of appearance of the persons who gave evidence to the court: this was as follows:-

4. Mrs. Fitzpatrick, Professor Fleming, Mr. Clements, Professor Hill, Mr. Clements (resumes), Dr. McKenna, Midwife-Supervisor Dawn Johnston, Mr. Fitzpatrick, Ms. Johnston (resumes) Staff Midwife Murphy, Medical Midwife-Manager Fanagan, Senior Midwife O'Dwyer, Dr. Wiza, Professor Baker, Mr. Woolfson, Clinical Midwifery Manager Keenan, Professor Turner, Dr. Keane, Professor Turner (resumes), Dr. Keane (resumes).

5. Mrs. Michelle Fitzpatrick's pregnancy was entirely normal. The plaintiff was full term, full grown and healthy. This was her first pregnancy. The expected delivery date was 22nd December, 2001. Her condition and that of the plaintiff was regularly monitored by her own general medical practitioner and at ante-natal clinics held at the National Maternity Hospital. On advice given at one of these clinics she also attended all of the ante-natal classes conducted by Medical Midwife Manager Margaret Fanagan, which were held at the National Maternity Hospital. There were six such classes held between 31st October, 2001 and 5th December, 2001. Her husband Paul Fitzpatrick, a telecommunications engineer, accompanied her to all of these classes save one which was a physiotherapy class for mothers only. Paul Fitzpatrick had been present at the birth of both his children in a former marriage.

6. Medical Midwife Manager Fanagan gave evidence that she had been conducting such classes on a full time basis since 1987. She gave evidence as to the topics discussed by her at the classes attended by Mrs. and Mr. Fitzpatrick. There was a considerable difference in recollection between Mrs. and Mr. Fitzpatrick and Medical Midwife Manager Fanagan in this regard. Not all of the topics in respect of which there was disagreement were relevant to the events which occurred during the course of Mrs. Fitzpatrick's labour. Though I carefully considered all the evidence in reaching my conclusions, I consider it appropriate to deal only in this judgment with those matters in dispute which became relevant during the course of Mrs. Fitzpatrick's labour.

7. I find that Medical Midwife Manager Fanagan explained the terminology and the use of a Partograph, employing for that purpose a wall-mounted enlargement of the first page of that document. She explained the circumstances in which continuous fetal heart rate monitoring is used and demonstrated the instruments employed for that purpose. She explained that the fetal heart rate is usually between 130bpm and 140bpm and that the accepted lower and upper limits of normal were 120bpm and 160bpm respectively. Medical Midwife Manager Fanagan said that she informed the attendees at her ante-natal classes that if the midwife was not happy with the fetal heart rate, a fetal blood sample was taken to check the well being of the baby. She told the court that she did not show the instruments used in carrying out this sample to the attendees in case it might cause anxiety to the mothers. She explained that labour usually commenced for primigravids when the cervix was 1cm or 2cm dilated and, that full dilatation was achieved when the cervix was 10cm dilated. The desired rate of progress in labour was 1cm dilatation per hour. A natural hormone was, if necessary, used to achieve or to maintain this progress in labour. It was called Oxytocin. The maximum permitted number or uterine contraction was seventeen in any fifteen minute period.

8. I find that Medical Midwife Manager Fanagan told the attendees at these ante-natal classes that they should write down their concerns and wishes in what is generally called a "birthplan" and, discuss it with a doctor or with a midwife before the onset of labour. She told them that the National Maternity Hospital would accommodate their wishes if it was safe and possible so to do. I accept the evidence of Midwife Manager Fanagan that she was not aware, in December 2001, of a template for a birthplan available on a Voluntary Health Insurance Company website. I also accept her evidence that she did not tell the attendees at the ante-natal classes, to search the Internet for assistance in drawing up a birthplan. I also accept the evidence of Medical Midwife Manager Fanagan that she told the attendees, that in the National Maternity Hospital, mothers were not permitted to take food during labour as it would make them sick and that enemas were not used and had not been used in that Hospital since 1987.

9. I find that Medical Midwife Manager Fanagan demonstrated at her ante-natal classes the descent of a baby's head through its mother's pelvis, employing for that purpose a doll and a plastic pelvis. She explained to attendees that an episiotomy became necessary if a mother's perineum was not stretching sufficiently or, if the baby was stressed and if there was a need to have it delivered more quickly. She discussed assisted vaginal delivery by means of a ventouse and by means of forceps and demonstrated

with her hands how these worked. She explained the normal deliver position – sitting up with legs flexed at the knees, heels off the bed and thighs pressed close to the chest and also explained the use of "paddles" in instrumental delivery. She discussed caesarean sections, general anaesthesia and spinal blocks. She explained that a caesarean section was mostly needed if a baby was becoming stressed by labour and the mother's cervix was not fully dilated. She conducted a tour of the Labour Ward at the National Maternity Hospital, at which the attendees were shown the special delivery beds and the various other items of equipment used, including the cardiotocograph machine.

10. Medical Midwife Manager Fanagan told the court that she kept her notes for these ante-natal classes on her personal computer. She offered to and, did produce a printout of these notes during her evidence. She was not examined or cross examined on these notes. As I have already indicated she also brought into court and demonstrated during the course of her evidence all the various documents, instruments and other items which she used to illustrate her lectures – that is such of them as were capable of personal transportation. This witness was a very senior midwife with fourteen years experience of giving these ante-natal classes in December 2001. I am satisfied from her evidence that her lectures at these classes were comprehensively and carefully structured and prepared. I found this witness to be forthright and careful in her evidence: she did not seek to evade any questions and her answers were clear and devoid of equivocation and exaggeration. Her recollection was not, nor was her evidence shaken in any way by cross examination.

11. Mrs. and Mr. Fitzpatrick accepted that they took no notes during the ante-natal classes. There was no evidence that they had complained to anyone, in particular to the general medical practitioner, that these classes were uninstructive or lacking in detail or content. No evidence was led from other attendees at these ante-natal classes to support the recollection of Mrs. and Mr. Fitzpatrick. I find that a number of matters which Mrs. and Mr. Fitzpatrick said were not addressed at all by Medical Midwife Manager Fanagan at these classes were in fact addressed as otherwise these classes would be of no assistance at all to expectant mothers. If the classes were worthless it is more than probable that the ladies and their partners would very quickly complain or cease to attend them. Also, it seems to me, that even if for some inexplicable reason Medical Midwife Manager Fanagan did not deal with these topics during the classes, some one or more of the attendees would surely have raised them. On the balance of probabilities and, for these reasons, I am satisfied that the recollection of Medical Midwife Manager Fanagan as to these matters, is to be preferred to the recollection of Mrs. and Mr. Fitzpatrick. I am also satisfied that Mrs. and Mr. Fitzpatrick did not intend in any way to mislead the court: it is their recollection of these ante-natal classes and not their bona fides which is questionable.

12. The membranes ruptured naturally and Mrs. Fitzpatrick was admitted, with labour pains, to the National Maternity Hospital from home at 21.35 hours, on 25th December, 2001. She was subsequently admitted to the Labour Ward at 22.05 hours on that day. She was accompanied by her husband, Mr. Paul Fitzpatrick, who remained with her throughout both labour and delivery. A partograph was commenced at 22.05 hours by Midwife C. Roony. Midwife Roony also made the first entry in the Notes on Labour, which is a very important section of this partograph. This first entry recorded, that on a vaginal examination of Mrs. Fitzpatrick, she was found to be 2cm dilated. No cord or placenta was felt and, intact membranes were outruled. Clear liquor draining was noted. The lie of the fetus was longitudinal with a cephalic presentation. Following on this vaginal examination the fetal heart rate was noted at 105bpm, but it subsequently recovered to 134bpm. Mrs. Fitzpatrick was started on inhaled analgesia.

13. Staff Midwife Deirdre Murphy was appointed to care exclusively for Mrs. Fitzpatrick during labour on a one to one basis in accordance with National Maternity Hospital policy. Senior Midwife Clare O'Dwyer came on duty as Senior Midwife in overall charge of the entire Labour Ward and of all midwives on duty. Dr. Inusa Wiza was the Registrar Obstetrician on duty in the Hospital, with the status of Assistant Master. Dr. Declan Keane, Consultant Obstetrician and Gynaecologist and, then Master of the National Maternity Hospital, was the Consultant Obstetrician on call.

14. In December 2001 Staff Midwife Deirdre Murphy was 27 years of age. In December 2001 she held a Certificate of General Nursing and, a Higher Diploma in Midwifery, (having been awarded a silver medal for outstanding academic results). She had in excess of one years experience in Accident and Emergency Department Nursing and, six months experience in pre and post Operative Care, obtained both in this State and in Australia. In 1999 she became a student midwife in the National Maternity Hospital and on completion of her studies joined the defendant's staff in 2001 as a Staff Midwife.

15. In December 2001 Senior Midwife Clare O'Dwyer was qualified as a Registered General Nurse, (St. Vincent's Hospital Dublin, January 1985) and as a Registered Midwife (National Maternity Hospital, February 1988). Between 1981 and 1988 she had worked as a staff nurse in the following areas of medicine, Accident Emergency and Ambulance, Surgery, Paediatrics and Geriatrics. Between November 1988 and December 1990 she worked as a Staff Midwife at Queen Victoria Hospital, South Australia and at the Coombe Womens Hospital, Dublin, with particular emphasis on the delivery and care of sick and pre-term infants. She commenced working in the National Maternity Hospital in 1992 as a staff Midwife on the post-natal ward. From June 1993 to August 1995 she worked as a Staff Midwife in the delivery ward with an involvement in approximately 600 deliveries per annum. From August 1995 she has been Chief Midwife Manager, 2 in the Delivery Ward, with responsibility for approximately 1,600 deliveries per annum. In 1996 she obtained a Diploma in Management from the Royal College of Surgeons in Ireland. In 2000 she obtained a Higher Diploma in Health Care (Risk Management) from the Department of Legal Medicine at University College Dublin. In 2001 she became an occasional lecturer in Clinical Risk Management in relation to midwifery practice at University College Dublin (continuing).

16. From August 1995, Senior Midwife O'Dwyer has had responsibility for the following matters in the National Maternity Hospital:

Ensuring the highest quality of care for women in labour and their partners.

Anticipating, diagnosing and managing obstetric problems.

Teaching students of obstetrics, medical students and midwifery students.

Acting as preceptor-mentor to pre and post registration midwifery students.

Liaising with medical staff and with the Unit Nursing Officer.

Ensuring the effective and efficient utilisation of staff and resources.

Working as Team Leader and as a member of the Team.

17. Dr. Inusa Wiza is an Irish national born on 5th April 1960 in Nigeria. His wife is from Ireland and they have a family. In 1993 he obtained Membership of the Royal College of Obstetricians and Gynaecologists. From 1987 to 1992 he was Senior House Officer in Obstetrics and Gynaecology at Yola Specialist Teaching Hospital, Nigeria, at the National Maternity Hospital, Dublin and at Airmount

Maternity Hospital, Waterford. From 1993 to 1995 he was Registrar in Obstetrics and Gynaecology at Mayo General Hospital and at the National Maternity Hospital Dublin. From 1996 to 2001 he was Specialist Registrar in Obstetrics and Gynaecology at Horton General Hospital, Oxford, at Waterford Regional Hospital and at the National Maternity Hospital Dublin. From 1st January, 2000 to 30th June, 2001 he was appointed as temporary Consultant Obstetrician and Gynaecologist during the illness of one of the two permanent Consultants at Waterford Regional Hospital. Dr. Wiza obtained his Certification as a Consultant in Obstetrics and Gynaecology some years after the events at issue in these proceedings.

18. Dr. Wiza told the court that in 1996 he had attended lectures in doctor-patient communication and in litigation relating to Obstetrics and Gynaecology at John Radcliffe Hospital, Oxford. He further told the court that he had taught obstetrics and gynaecology to medical students at the National Maternity Hospital, at the American College in Dublin and at Waterford Regional Maternity Unit.

19. I am satisfied that the evidence in this case established that at about 00.10 hours on 26th December, 2001, the midwives decided to effect a change from periodic to continuous electronic fetal monitoring. This was because the plaintiff's heart rate had on a number of occasions fallen below 120bpm. I find, on the expert evidence given in this case that the cardiotocograph trace would have to be regarded not as abnormal but as "suspicious" from the outset. I find on the evidence that a classification system of "normal" "suspicious" and "pathological" was used in this State and in the United Kingdom in December 2001. I am also satisfied, from the evidence given by the expert witnesses in this case, that this classification of "suspicious" meant that the clinical team managing Mrs. Fitzpatrick's labour and particularly the midwives, would be required to be particularly vigilant in their monitoring and assessment of the cardiotocograph trace and of the other clinical signs.

20. Initially this continuous electronic monitoring was carried out using an external monitoring transducer (ultra-sound) and by an external tocodynamometer (which measures maternal uterine contractions). Both these pieces of equipment were held in position on Mrs. Fitzpatrick's body by abdominal belts. The two recordings are combined on a single CTG continuous paper printout. The upper section (cardiograph) provided a continuous recording of the fetal heart rate and the lower section (tocograph) gave a continuous recording of the maternal uterine contractions. The fetal heart rate is also shown digitally on a panel on the face of the CTG Machine which also produces an auditory warning signal. I am satisfied on the evidence that in this case the auditory signal was either turned off or was reduced to a very low volume so as not to cause annoyance to Mrs. Fitzpatrick.

21. A vaginal examination carried out at 00.10 hours, in accordance with the normal hospital routine of carrying out such examinations every 2 hours, showed Mrs. Fitzpatrick to be 7cm dilated. I find on the evidence that this represented very satisfactory progress in the labour, at least to this point.

22. It was common case between the parties that Mrs. Fitzpatrick and Staff Midwife Murphy, immediately after Mrs. Fitzpatrick was admitted to the Labour Ward, discussed the birthplan which Mrs. Fitzpatrick had prepared. I accept as reasonable the explanation given by Mrs. Fitzpatrick as to why she had not discussed this birthplan with Dr. Connolly, her General Medical Practitioner, despite the advice of Medical Midwife Manager Fanagan that she should. Her explanation was that she had reasoned that it related only to labour and delivery matters and Dr. Connolly would not be present or involved at these times. I also accept as reasonable, there being no evidence to the contrary, her explanation that at ante-natal clinics the medical staff were under such pressure of work that she did not feel that there was time to discuss the birthplan with them. I am satisfied on the evidence that when Mrs. Fitzpatrick discussed the birthplan with Staff Midwife Murphy, she was not in such pain or distress as not to be able to clearly and competently explain all aspects of the birthplan to Staff Midwife Murphy and hold a full and meaningful discussion with Staff Midwife Murphy in relation to them.

23. During the course of the evidence a considerable amount of time was devoted to the question of whether Staff Midwife Murphy and Senior Midwife O'Dwyer were or were not aware of the matters set out on the reverse side of the single sheet of paper on which this birthplan was printed. Mrs. Fitzpatrick told the court that she used her personal computer to write and to print the birthplan. Out of the six matters set out on the reverse side of the page, three are of great significance in this case. They declared that Mrs. Fitzpatrick did not wish to be given an epidural, that she did not wish to be given an enema or given Oxytocin or any other drug through intravenous infusion and, that she did not want an episiotomy at any stage.

24. There was no agreement between Staff Midwife Murphy and Mrs. and Mr. Fitzpatrick as to how the birthplan was held in place in the Hospital Chart. It was not punched and held in place by the same patent locking device as all the other documents and dividers in that Chart. I accept the evidence of Mrs. and Mr. Fitzpatrick that it was not stapled to the reverse side of the front cover of the Chart as it now is. There was no firm evidence from Staff Midwife Murphy or from Senior Midwife O'Dwyer to the contrary. Also, if it had been stapled in such a position it would cover and occlude the "Patient Label". Mrs. and Mr. Fitzpatrick gave evidence that they both saw Staff Midwife Murphy reading the reverse side of the page. Mrs. Fitzpatrick also recalled that Staff Midwife Murphy had assured her that enemas were not used in the Hospital and the fact that she did not wish to be given an enema was stated only on the reverse side of the page.

25. I find on the evidence that on the balance of probabilities the midwives did not become aware, until some time later, of the matters set out on the reverse side of the page containing the birthplan. From the evidence I am unable to conclude as to when exactly this occurred, other than that it occurred some time before Dr. Wiza was summoned to carry out an assisted vaginal delivery. The time of this summons is itself a matter of great controversy and of enormous importance in this case but on the evidence it was uncontrovertibly not before 07.20 hours on 26th December, 2001.

26. The layout of the birthplan strongly suggests that it is entirely contained on the front of the page. The paper is opaque and there is a gap of almost 8cm between the final item on the front of the page and the bottom of the page. There is no indication whatsoever in the text that the birthplan continues on the reverse side of the page. Above the fourth item on the front of the page, where Mrs. Fitzpatrick indicated that she would like to be able to eat/drink if necessary during labour, Staff Midwife Murphy wrote "explained" followed by her signature. I am satisfied on the evidence that shortly after the admission of Mrs. Fitzpatrick to the labour ward, Staff Midwife Murphy wrote under the final item on the front of the page, "discussed in L[abour] W[ard] on 25th 12th 01 [with] Michelle" and, then signed her name. At the request of Staff Midwife Murphy, Mrs. Fitzpatrick then wrote her named immediately under this note.

27. Staff Midwife Murphy told the court that the purpose of the interpolation was to signify that she had discussed with Mrs. Fitzpatrick her request to be allowed to eat and/or drink during labour. She told the court that she had informed Mrs. Fitzpatrick that eating was not allowed by the hospital during labour as it resulted in patients becoming ill. No comments or notes were made against any of the items, even potentially controversial items, on the reverse side of the page nor was it signed by anyone. Staff Midwife Murphy told the court, and I accept her evidence on this, that she tells every mother that enemas are not used in the hospital, because, from experience, she has learned that almost all labour ward patients are worried about this. I accept her evidence that her

remarks were not inspired by having seen the reverse side of the birthplan page. For the foregoing reasons, I find the recollection of the midwives, that they were not aware of the matters on the reverse side of the birthplan page shortly after the admission of Mrs. Fitzpatrick to the Labour Ward to be the more convincing.

28. However, I do not accept the evidence of the midwives that they were never aware of the matters on the reverse side of the birthplan page. During cross examination, Dr. Wiza stated that he knew that Mrs. Fitzpatrick did not want an episiotomy. He said that he knew this because he had been told by either Staff Midwife Murphy or Senior Midwife O'Dwyer that Mrs. Fitzpatrick had a birthplan which stated that she did not want an episiotomy. He recalled that he was told this as he was about to open the episiotomy set. He said that he then realized he would need a clear consent from Mrs. Fitzpatrick in order to proceed with the episiotomy.

29. Dr. Wiza then sought to resile from this evidence stating that it was incorrect and he had become stressed and mixed up in giving his evidence. He said he did not know about the birthplan at this time and must have learned about the birthplan somewhere along the way, perhaps at staff discussions after the event. Both Staff Midwife Murphy and Senior Midwife O'Dwyer had given evidence before Dr. Wiza. From my observation of Dr. Wiza giving evidence, I am totally satisfied that his initial evidence was correct. This evidence was clear and spontaneous and was unsolicited by any question from counsel for the plaintiff as to how he knew the Mrs. Fitzpatrick did not want an episiotomy, was part of a closely interconnected series of recollections and, was delivered calmly and convincingly without any evidence of or any occasion for stress or confusion on his part. Also, elsewhere in his evidence Dr. Wiza told the court that he was not aware of and was not invited to any hospital meetings concerning the events of 25th and 26th December, 2001. The midwives had also denied that they had attended any meetings or taken part in any discussions with Dr. Wiza about those events.

30. There was no evidence before the court that Mrs. Fitzpatrick other than by her birthplan had informed Staff Midwife Murphy, Senior Midwife O'Dwyer or Dr. Wiza, that she did not want an episiotomy, until this became an issue during the second stage of labour. I am satisfied on the evidence that the midwives were aware that Mrs. Fitzpatrick did not want an episiotomy before Dr. Wiza was called by Senior Midwife O'Dwyer to carry out an assisted vaginal delivery. Having regard to the evidence as to the course of events from 06.30 hours onwards on 26th December, 2001, I am satisfied on the balance of probabilities that it is altogether unlikely that after 06.30 hours the midwives had either the occasion or the time to locate and recheck Mrs. Fitzpatrick's Hospital Chart or to reconsider her birthplan which I find was enclosed in that chart.

31. At approximately 01.30 hours the midwives noticed from the appearance of the CTG Trace that the external ultra sound transducer was transmitting an unsatisfactory and unreliable signal. This was explained to Mrs. Fitzpatrick who, on being assured that it would neither hurt nor harm the plaintiff, agreed to the clipping of an electrode directly into the plaintiff's scalp. At 01.35 hours the CTG machine, automatically recorded this change in modality on the trace, (US 1 becomes DECG). Thereafter, the plaintiff's heart rate was continuously monitored through this fetal scalp electrode until 07.38½ hours, when the CTG machine again automatically recorded a change of modality back to the ultra sound transducer.

32. A National Maternity Hospital document with the title "Care of Patient in Labour (Primigravida/Multigravida)", hereinafter referred to as the "June 1996 Document" was produced in evidence. It is dated June 1996 and is signed by the then Matron and by the then Master of the National Maternity Hospital who was Dr. Peter Boylan. The correct status and the interpretation of this document was extensively debated and disputed between the parties during the course of the case. Under the subtitle "Primigravida" the document provides, *inter alia* as follows:-

> "Two hours following the diagnosis of labour, the patient is re-examined to assess progress in labour. If progress is not to the satisfaction of the examiner i.e. (1cm per hour) Oxytocin infusion is commenced to accelerate labour (see note on Oxytocin)."

33. As the diagnosis of labour in Mrs. Fitzpatrick's case was made at 22.05 hours, Senior Midwife O'Dwyer accepted that the re-examination at 02.45 hours was 40 minutes beyond the time indicated by this document. However, she insisted that this document was not binding on her as Senior Midwife. On behalf of the plaintiff it was submitted that this document was operative on 26th December, 2001 and was binding on all midwives including the Senior Midwife. It will be necessary to return later in the judgment to this topic of the status of the June 1996 document and the issue of whether or not it was binding on all midwives including a Senior Midwife. However, if find that this 40 minutes delay in carrying out the re-examination of Mrs. Fitzpatrick did not contribute either directly or indirectly to the injuries suffered by the plaintiff.

34. Even though Mrs. Fitzpatrick's progress in labour over the entire period of 4 hours and 40 minutes from 22.05 hours to 02.45 hours was satisfactory, the fact the cervical dilatation had remained at 7cm for 2 hours and 35 minutes from 00.10 hours onwards caused Senior Midwife O'Dwyer to suggest to Mrs. and Mr. Fitzpatrick that the use of Oxytocin was necessary if labour was to be progressed. It was common case between the parties that Mrs. Fitzpatrick was very concerned about receiving Oxytocin because she had been informed by acquaintances that Oxytocin caused uterine contractions to become stronger and more frequent resulting in increased pain and in breathing difficulties. Senior Midwife O'Dwyer told the court that it was not at all unusual for mothers, particularly primigravids to have these concerns and to hesitate about permitting the administrating of Oxytocin. Form this evidence and from the evidence of the experts, I am satisfied that it was rational and reasonable for Mrs. Fitzpatrick to want of think about accepting Oxytocin at 02.45 hours. It was common case between the parties that Senior Midwife O'Dwyer suggested that Mrs. and Mr. Fitzpatrick should discuss the matter between themselves and that she would re-assess the matter in 1 hour.

35. At 03.50 hours Senior Midwife O'Dwyer ascertained, by a vaginal examination that Mrs. Fitzpatrick still remained only 7cm dilated. The partograph Note on Labour made at 03.50 hours by Senior Midwife O'Dwyer and signed by her, states that Oxytocin was discussed with Mrs. Fitzpatrick at length. The fact that this discussion took place was not disputed by the Fitzpatricks nor was the fact that at 04.30 hours Mrs. Fitzpatrick agreed to the administration of Oxytocin. There was however, deep disagreement between the recollections of the midwives and the recollections of the Fitzpatricks as to how this agreement came about.

36. Staff Midwife Murphy recalled that Senior Midwife O'Dwyer had referred to the risk of a caesarean section being increased by prolonged labour. Senior Midwife O'Dwyer said that she had told Mrs. Fitzpatrick that without Oxytocin her labour would continue without her making any progress and that meant a higher risk of a caesarean section. Mrs. and Mr. Fitzpatrick both recalled that Senior Midwife O'Dwyer had warned Mrs. Fitzpatrick that unless she agreed to the administration of Oxytocin her labour would go on and on, hour after hour, and she would be still be there on the following day. Mr. Fitzpatrick said that when they heard this, his wife asked him what he thought about the matter and he replied that it was up to her and that his wife had then agreed to the use of the Oxytocin. Senior Midwife O'Dwyer gave evidence that she had left the room to allow them privacy to discuss the matter. After a while, she said, Staff Midwife Murphy had come to her and told her that Mrs. Fitzpatrick had agreed to the use of Oxytocin but that Mrs. Fitzpatrick was still very nervous and she was also afraid of needles. Staff Midwife Murphy recorded in the partograph Notes on Labour at 04.30 hours that Mrs. Fitzpatrick had consented to the use of Oxytocin and recorded in the same notes at 04.45 hours that

the administration of Oxytocin had commenced utilising a system set up for the purpose by the anaesthetist. Staff Midwife Murphy at 04.45 hours made the following note on the cardiograph, "30mls Oxytocin" and commenced to monitor uterine contractions by palpation.

37. It was suggested in evidence by Mr. Clements an expert witness called in the case for the plaintiff, that at the time she gave her consent to the use of Oxytocin, Mrs. Fitzpatrick's mental acuity may have been impaired because of an intra muscular injunction of 50mg of Pethidine, - an opiate – which she had been given at 02.50 hours after she had asked for something to alleviate the labour pains. I accept from the evidence given in this case that in general the administration of opiates to mothers in labour is not an approved practice in the National Maternity Hospital. This is so because of the danger of dulling maternal reactions and of making the fetus sleepy at a time when both these conditions are contra-indicated. However, I also accept on the evidence, that the amount of Pethidine administered on the occasion to Ms. Fitzpatrick was barely sufficient dull the edge of her pain without eliminating it and, would not in any way have impaired her capacity to make a rational decision regarding the use of Oxytocin.

38. I find that Senior Midwife O'Dwyer did not improperly induce Mrs. Fitzpatrick to permit the administration of Oxytocin by stating that her labour would otherwise be prolonged hour after hour into the 27th December, 2001. I find on the evidence that at the National Maternity Hospital no labour was permitted to continue beyond 12 hours. The practice of active management of labour which had been a cornerstone of obstetric policy at that Hospital for decades prior to December 2001 seeks to remedy arrested labour by the use of Oxytocin and if that is unavailing to deliver by caesarean section all within a 12 hour period. There was therefore no advantage to be gained in telling Mrs. Fitzpatrick what would have been a conscious and deliberate untruth when on the balance of probabilities the risk of a caesarean section would have weighed much more heavily with Mrs. Fitzpatrick whose overriding concern was to have the most natural delivery possible. I therefore accept the recollection of the midwives on this aspect of the case. I am satisfied on the expert evidence that the decision of Senior Midwife O'Dwyer to use Oxytocin was appropriate in the circumstances, despite the fact that the CTG Trace in Mrs. Fitzpatrick's case had to be regarded as "suspicious" from the commencement of labour.

39. In the 15 minute period after the commencement of the infusion of Oxytocin from 04.45 hours to 05.00 hours, Staff Midwife Murphy, by palpation, noted 8 uterine contractions. She entered this information in the appropriate section of the partograph. I am satisfied, on the evidence of Senior Midwife O'Dwyer, and on the expert evidence that the number of uterine contractions should not exceed 7 in any 15 minute period. At about 04.54 hours, Staff Midwife Murphy summoned Senior Midwife O'Dwyer to Mrs. Fitzpatrick's room. I am satisfied that she did so not because of the excessive number of uterine contractions but because between 04.45 hours and 04.53 hours, the cardiograph trace showed 4 successive decelerations in which the plaintiff's heart rate had dropped below 120bpm, to 100bpm, (twice) 90bpm and 70bpm respectively with a slow recovery back to the baseline. I find on the evidence of the expert witnesses including the evidence of Professor Turner who agreed that the Oxytocin might have been aggravating the situation, that the decision of Staff Midwife Murphy to summon Senior Midwife O'Dwyer was appropriate and correct in those circumstances. Senior Midwife O'Dwyer answered the call and reviewed the trace. I accept her evidence that she signed her name on the cardiograph at 04.54 hours to indicate that she was present and had examined the trace and for no other reason. Senior Midwife O'Dwyer decided to summon Dr. Wiza for a second opinion on the matter. I am satisfied from the expert evidence and I so find, that this response of Senior Midwife O'Dwyer was appropriate and correct. At 04.55 hours Staff Midwife Murphy wrote in the Notes on Labour in the partograph that the CTG was noted and that Dr. Wiza was to review the situation. She then signed this note.

40. At 05.00 hours Senior Midwife O'Dwyer made a note on the cardiograph that it was seen by Dr. Wiza. At 05.10 hours Dr. Wiza made and signed a note in the partograph Notes on Labour that he had reviewed the CTG Trace and had offered to do a fetal blood sample and, that the patient was thinking about the offer. I am satisfied on the expert evidence that this decision of Dr. Wiza to do a fetal blood sample at 05.10 hours was an appropriate optional response to the suspicious cardiograph. I am satisfied on the expert evidence, particularly the evidence of Mr. Julian Woolfson, Consultant Obstetrician and Gynaecologist, who gave evidence in the case for the defendant and also the evidence of Roger F. Clements, Consultant Obstetrician and Gynaecologist who gave evidence in the case for the plaintiff, that 3 of these decelerations, those which occurred between 04.46 hours and 04.50 hours were "early" decelerations. I accept the evidence of Mr. Clements that the deceleration at 04.52 hours is atypical of early decelerations and because of its amplitude might more correctly be described as a "Variable" deceleration.

41. Mr. Woolfson commenced practice as a consultant obstetrician and gynaecologist in 1984. He left the National Health Service in 2007, but remains in private practice at Blackheath Hospital. In 1980 he was a research fellow in perinatal medicine at John Radcliffe Hospital, Oxford. Of particular significance to the instant case is the fact that the nature of this research was to see if a more specific alternative could be found to the cardiotocograph: to try to discover when hypoxia in the fetus causes acidosis and to try to link the CTG Trace with the actual amount of oxygen in fetal blood. No workable alternative was found to the cardiotocograph. Mr. Woolfson was sometime trainer of Obstetricians and Midwives at Queen Mary's Hospital, London. Since 2006 he has been principal examiner and lead hospital visitor for the Royal College of Obstetricians and Gynaecologists (which includes proficiency in CTG analysis). He was a member of the advisory board of the Association of Litigation and Risk Managers in 1997. He has 15 years experience in giving evidence in birth injury cases.

42. Mr. Clements was Consultant Obstetrician and Gynaecologist at the North Middlesex Hospital, London for 21 years from 1973. From 1988 to 1991 he was Clinical Director of Obstetrics and Gynaecology at that hospital. He retired from the National Health Service in 1994 and retired from private practice as an Obstetrician in 2001 and as a Gynaecologist in 2006. He is a lecturer, examiner, and a prolific author in his speciality. He has a major interest in Clinical Risk Management. He is the author of "Safe Practice in Obstetrics and Gynaecology" [1984] and "Risk Management in Obstetrics and Gynaecology" (2001) and many other learned works in this field.

43. I found both these witnesses to be clear, concise, knowledgeable and non partisan in giving evidence. I found Mr. Woolfson's command of all aspects of the interpretation of the CTG Trace particularly impressive and illuminating.

44. I find on the evidence that early decelerations are usually associated with fetal head compression, particularly in the late stages of labour when descent of the head is occurring and, are rarely indicative of hypoxia or fetal acidosis. I find that it is significant that Dr. Wiza in these circumstances elected to carry out a fetal blood sample in order to measure Ph and blood gasses which is the only effective way of eliminating the possibility of fetal acidosis. The original Avlomni Measurement Report was proved in evidence. It states the date as 26th December, 2001 and time as 05.30 hours and gives a Ph reading of 7.389. On the expert evidence I find that this result was entirely normal and signified that the plaintiff was at this time non acidotic and was coping well with the stresses of labour. At 05.30 hours Dr. Wiza made and signed a Note on Labour in the partograph, that the fetal blood sample had been done and that the Ph was 7.38.

45. Staff Midwife Murphy and Dr. Wiza gave evidence that they were very surprised that Mrs. and Mr. Fitzpatrick were not prepared initially to accept the advice that a fetal blood sample should be carried out for the purpose of ensuring the well-being of the plaintiff, and had debated the matter at length between themselves. They said that they were further surprised that the Fitzpatricks had taken twenty minutes or more to give their consent, something which they had not experienced before. Mrs. and Mr. Fitzpatrick gave

evidence that the first and only occasion on which Dr. Wiza had spoken to either of them was some time after the delivery of the plaintiff, - which both parties in this case were agreed had occurred at 08.03 hours, - and after he had sutured a tear in Mrs. Fitzpatrick's perineum, at which time he advised her that the sutures might feel tight for some days. This was denied by Dr. Wiza and was also denied by the midwives. This raised a very serious issue between the parties with possibly profound ramifications for the entire outcome of this claim.

46. I am satisfied from the expert evidence that it was reasonable and, not at all unusual for mothers in labour and their partners to have concerns about permitting a fetal blood sample to be taken and to wish to think it over before giving consent. I find on the evidence that Mrs. and Mr. Fitzpatrick did not take much more than ten minutes to give their consent to the fetal blood sample.

47. It was agreed by all the obstetric experts who gave evidence during this case that the fetal blood sample procedure takes ten minutes to complete from start to receipt of the printout. Since the analysis machine automatically recorded the time of the printout as 05.30 hours and, this is corroborated by Dr. Wiz's own signed note in the partograph Notes on Labour and, as no suggestion was made that the internal clock in the analysis machine was inaccurate, by necessary inference the procedure must have commenced at 05.20 hours. The note written by Senior Midwife O'Dwyer on the cardiograph, that it was seen by Dr. Wiza, is at 05.00 hours. However, Dr. Wiza's own signed note in the partograph Notes on Labour in which he records that he reviewed the CTG and offered a fetal blood sample which the patient was thinking about, is timed 05.10 hours. There is no logical reason why Dr. Wiza would have delayed and no evidence that he did in fact delay, in making this note. I am satisfied from the expert evidence that these Notes on Labour and any notes written on the CTG Trace must be as contemporaneous as possible with the matters therein recorded and should be regarded as such in the absence of some express indication to the contrary. I find on the expert evidence that a failure in this regard would be substandard. For these reasons I am satisfied that there was no unreasonable delay on the part of Mrs. and Mr. Fitzpatrick in agreeing to permit the fetal blood sample to be carried out and they were not unreasonable in wishing to consider the matter before agreeing to the procedure.

48. Senior Midwife O'Dwyer told the court that she had explained to Mrs. Fitzpatrick that she was going to call the duty doctor because the plaintiff's heart rate was dropping with the contractions and then picking up in between. She said that she told Mrs. Fitzpatrick that the doctor might decide to do a simple test called a fetal blood sample, which involved taking a tiny drop of blood from the baby's head for analysis. She said that Mrs. Fitzpatrick asked would it hurt the baby and she had jocosely replied that she had never heard a baby to complain yet. In cross examination Senior Midwife O'Dwyer told the court that she was not in the room when Dr. Wiza came, or while the test was being done. He had come to her office and said that the Fitzpatricks wanted to think about the fetal blood sample.

49. Staff Midwife Murphy told the court that Dr. Wiza came a couple of minutes after he had been called. She heard him tell Mr. and Mrs. Fitzpatrick that he intended to do a fetal blood sample to check if the baby was ok. They replied that they would like to think about it and Dr. Wiza then left the room to let them talk. Staff Midwife Murphy told the court that she had said to the Fitzpatricks that she would not be doing her job if she did not encourage them to allow the fetal blood sample to be taken. She recalled that Mr. Paul Fitzpatrick, who was standing near the CTG machine, looked at it and said that he thought the baby's heart rate was fine. She had answered that the fetal blood sample was a more accurate way of checking if the baby was ok. She said that the Fitzpatricks had then continued to talk about the matter between themselves without involving her further in the discussion. After a few minutes Dr. Wiza had come back into the room and they agreed to permit the fetal blood sample to be taken.

50. In cross examination Staff Midwife Murphy said that the Fitzpatricks had definitely discussed the fetal blood sample with Dr. Wiza and not with Senior Midwife O'Dwyer who had left the room to call Dr. Wiza and who did not return. Staff Midwife Murphy said that she had got the special trolley for the test from an adjoining room. She recalled that Dr. Wiza had put on surgical gloves and told Mrs. Fitzpatrick that he would just scratch the baby's head and take a tiny drop of blood which would then be analysed in a machine. She could not recall if Dr. Wiza had spoken further to Mrs. Fitzpatrick during the procedure itself which, she accepted was a very invasive one. She said that she had put Mrs. Fitzpatrick in the correct position on her left side and had talked her through the procedure. I found Staff Midwife Murphy to be a genuine and responsible witness who tried to be as helpful to the Court as she could. However, her recall in relation to a number of vital issues was vague, as she readily accepted.

51. Dr. Wiza told the court that he was resting in his room and at about 05.00 hours he had received a telephone call from Senior Midwife O'Dwyer who had asked him to come and review a CTG Trace. He said he went at once as a call from the Labour Ward is always given priority. When he arrived Staff Midwife Murphy was in the room with two people who he now knew to be the Fitzpatricks. He said he had introduced himself. The Trace was showing signs of abnormality so he explained to Mrs. Fitzpatrick that it was possible that the baby was not getting enough oxygen and that the baby's heart rate was low. He said that he needed to do a fetal blood sample in order to check matters. He said that he had explained to Mrs. Fitzpatrick that he would have to put her on her side, raise her leg and introduce a metal cone to give him access to the baby's head. He would then make a tiny cut in the baby's scalp and take a tiny drop of blood to be analysed in a machine. The Fitzpatricks said that they wanted some time to think about it, so he said that he would wait in Sister's Office.

52. Dr. Wiza told the court that after about ten minutes he became worried and went back to the room. The Fitzpatricks asked him to wait another minute or so, so he went back to Sister's Office. Shortly after that Staff Midwife Murphy came to the office and told him that the Fitzpatricks had agreed. He said that he had asked Mrs. Fitzpatrick to move to the edge of the bed and to lie on her left side. He asked her to raise her right leg and asked Staff Midwife Murphy to hold it in place. He then told Mrs. Fitzpatrick what he was going to do. Dr. Wiza told the court that the perineal area can be very very sensitive at this time and the procedure is very invasive and uncomfortable for a mother. He had said to Mrs. Fitzpatrick "tell me if it hurts". He said that he gave the blood sample to Staff Midwife Murphy who took it to the adjoining room where the analysis machine was. He said that he had remained in Mrs. Fitzpatrick's room without removing the surgical gloves in case the sample was not sufficient and he had to repeat the test. He said that Senior Midwife O'Dwyer came back with the printout and that he told Mrs. Fitzpatrick that the result was very good and that the baby was getting enough oxygen.

53. It was put to Dr. Wiza that the Fitzpatricks had told the Court that he had never spoken to them at all and that Mrs. Fitzpatrick did not know what he was doing at the end of the bed. Dr. Wiza denied this and said that he found it quite extraordinary. He said he could do nothing of this test without her full consent and cooperation. It would be impossible, quite impossible to carry out the test without her full cooperation and without speaking to her. He had to manoeuvre her from lying on her back to lying on her left side at the edge of the bed. He had to get her right leg at the correct angle and be sure that Staff Midwife Murphy held it there. He said he then draped the area under Mrs. Fitzpatrick's buttocks with a sterile drape and introduced the surgical cone, which has a built in light, to keep the vaginal walls apart. He said that he had to talk Mrs. Fitzpatrick through all this as it was cold, invasive and uncomfortable. If he did not keep talking to her she might go into spasm and this would be a serious problem as he would then have to make use of an anaesthetic spray to redeem the situation. It was put to Dr. Wiza that it was Staff Midwife Murphy who had introduced him to the Fitzpatricks and who had explained to Mrs. Fitzpatrick what he was doing throughout the procedure. Dr. Wiza

denied that this was so and said that he had introduced himself and had himself explained what he was doing. He said that Mrs. Fitzpatrick was mistaken; he could not have been at the bottom of the bed because he had to be at the side of the bed in order to obtain the sample. It was put to him that Mr. Fitzpatrick had stated that he had walked away after taking the sample. Dr. Wiza denied that this was so and explained that one blood sample in three is rejected by the analysis machine so he had to wait in the room with the surgical gloves on until the sample had been accepted and processed by the machine. He said that he recalled telling Staff Midwife Murphy that she could relax Mrs. Fitzpatrick's leg to give her relief while they were waiting for the results. He said that after he had told Mrs. Fitzpatrick that the result was very good he had gone back to his room. He accepted that he had written the partograph Notes on Labour at 05.10 hours and at 05.30 hours.

54. In examination in Chief Mrs. Fitzpatrick said that she recalled the anaesthetist setting up the Oxytocin and her next recollection thereafter was of a doctor coming. She said that she did not know his name and she had no conversation whatever with him. She said the Senior Midwife O'Dwyer had told her that the doctor wanted to do fetal blood sample. She had asked why this was necessary and Senior Midwife O'Dwyer had replied that it was to make sure that the baby was ok. Senior Midwife O'Dwyer had explained that the doctor would take a small sample of blood from the baby's head. She asked if it would hurt the baby and Senior Midwife O'Dwyer jocosely responded that she had never heard a baby complain about it yet. She therefore agreed to the blood sample. She said that she did not know how long the procedure took. She was lying on the bed and the doctor was at the end of the bed between her legs, but she said that she thought someone had told her husband the result. In cross examination Mrs. Fitzpatrick said that Dr. Wiza did not speak to her or to her husband at any stage. It was put to her that Dr. Wiza would say that he told her that the baby might be running short of oxygen and getting tired and he needed to do a fetal blood sample to find out. Mrs. Fitzpatrick denied this very emphatically. She said that she and her husband had spoken only to Senior Midwife O'Dwyer about the fetal blood sample. She said neither she nor her husband had discussed the fetal blood sample with Staff Midwife Murphy. The partograph Notes on Labour at 05.10 hours and 05.30 hours written and signed by Dr. Wiza were put to Mrs. Fitzpatrick but she insisted that Dr. Wiza had never spoken to her or to her husband and they considered this to be very strange indeed. She said that no one on this occasion or at any later time had told them that there was anything at all wrong with the plaintiff. She said that Staff Midwife Murphy did not say to her that she would not be doing her job if she did not encourage them to permit the fetal blood sample to be taken. She said that Mr. Fitzpatrick had not made any comments about the plaintiff's heart rate being fine.

55. Mr. Fitzpatrick told the court that sometime after the Oxytocin drip had been set up a man in a white coat came into the labour room. No one said who he was. This man and Senior Midwife O'Dwyer examined the CTG Trace and discussed it for a while. Then Senior Midwife O'Dwyer told them that the doctor wanted to do a fetal blood sample. He said that he asked what that was and Senior Midwife O'Dwyer told him that a blood sample was taken from the baby's head with a needle. He said that he and Mrs. Fitzpatrick were very shocked at this and probably looked it because Senior Midwife O'Dwyer said that she would give them a minute or so to think about and she and the doctor left the room. Mr. Fitzpatrick told the court that after a little while Senior Midwife O'Dwyer had come back into the room and he asked her what the fetal blood sample was for, and she replied that it was to make sure that the baby was ok. At this stage he said Mrs. Fitzpatrick had asked would it hurt the baby and Senior Midwife O'Dwyer replied in a joking tone that she had not heard a baby complain about it yet and she laughed. Mrs. Fitzpatrick then said to go ahead with the test. The doctor came back into the room and opened a package. Mrs. Fitzpatrick had been lying on her back on the bed and she turned onto her left side. He said he was not certain if somebody had told her to turn into this position. He said he saw the doctor lean down but he could not see what he was doing. The doctor then got up and left the room and Senior Midwife O'Dwyer had followed him. One or two minutes later she came back and said that the baby was fine that everything was ok. He said that he did not know what had become of the doctor. That the doctor seemed methodical and deliberate, even gentle, but he had said nothing at all to them.

56. In cross examination Mr. Fitzpatrick insisted that Dr. Wiza had said nothing at all to them, that Senior Midwife O'Dwyer had done all the explaining. It was put to Mr. Fitzpatrick that Senior Midwife O'Dwyer would give evidence that she had told them both that she was going to get the duty registrar to look at the trace. Mr. Fitzpatrick denied that that was said. It was put to Mr. Fitzpatrick that Dr. Wiza would say that he did speak to them that he told them that the baby might be running short of oxygen and was tired so that he needed to do a fetal blood sample. Mr. Fitzpatrick was emphatic that Dr. Wiza never spoke to them and they did not speak to him. He said that Staff Midwife Murphy did not discuss the fetal blood sample with them, only Senior Midwife O'Dwyer had done so. It was put to Mr. Fitzpatrick that Dr. Wiza would say that they took twenty minutes to agree to the fetal blood sample. Mr. Fitzpatrick strongly denied this. He said that they had discussed the matter with Senior Midwife O'Dwyer and Mrs. Fitzpatrick had agreed to it once she had been assured that it would not hurt the baby. Mr. Fitzpatrick said that he and his wife felt it very strange that the doctor did not speak to them at all. He recalled that in Brussels the doctors had spoken only to his former wife and not to him, though he was present during the labour and delivery, but unlike Dr. Wiza they had actually spoken.

57. For reasons given at the time, I refused an application on behalf of the plaintiff to lead evidence from another couple who it was alleged had a similar experience with Dr. Wiza during the carrying out a fetal blood sample approximately two months after the events at issue here.

58. Professor Michael Turner, Consultant Obstetrician and Gynaecologist, Professor of Obstetrics and Gynaecology at University College Dublin, Assistant Master at the National Maternity Hospital from August 1987 to July 1990 and Master of the Coombe Hospital from 1992 to 1998, gave evidence in the case for the defendant. He told the court in cross examination that it was simply not possible to do a fetal blood sample without speaking to the mother in labour. He said that the obstetrician did not have to say much and it would be possible for an experienced midwife to talk the patient through the procedure but it would be most unusual. Mr. Clements, told the court that on a number of occasions while he was Consultant Obstetrician and Gynaecologist at the North Middlesex Hospital, London, he was obliged to reprimand junior overseas doctors for failing to communicate properly with mothers in labour because they felt socially out of place. He said that to carry out a fetal blood sample the obstetrician or a midwife would have to place the mother on her left side with her knees drawn up. He said it was very important that she be given a step by step explanation of what was taking place as it was actually happening. It was put to Mr. Clements that Dr. Wiza would say that he told Mrs. Fitzpatrick that the plaintiff might be running short of oxygen and getting tired and he needed to do a fetal blood sample to check – to see if the plaintiff was getting sick from lack of oxygen. While recalling that Mrs. Fitzpatrick had told the court that Dr. Wiza had said nothing at all, Mr. Clements told the court that he considered this alleged statement to be very strange because he said the first part only suggested a possibility that there might be a problem and did not suggest any urgency while the latter part of the alleged statement was very different and changed everything suggesting a real urgency. Mrs. Fitzpatrick in her evidence was adamant that no one had said at any time that there was anything wrong with the baby and there was no mention whatever of the baby being tired until just before 08.03 hours.

59. The acceptance by Mrs. and Mr. Fitzpatrick that Senior Midwife O'Dwyer had made the remark that she had never heard a baby complain yet indicates that she had been previously asked if the fetal blood sample would hurt the plaintiff. This in turn indicates that she had already explained the procedure and, she would not have done this unless she had said that the doctor might think that a fetal blood sample was necessary. Logic and common sense both demand that she would have explained why this was so, though, I doubt very much that she employed for that purpose the rather daunting technical terminology of her evidence to the court.

60. I accept the evidence of Staff Midwife Murphy, Senior Midwife O'Dwyer and Dr. Wiza that he entered Mrs. Fitzpatrick's room alone. As confirmed by Dr. Wiza in his evidence Senior Midwife O'Dwyer would have explained to him on the telephone why she wished him to come to the room. Staff Midwife Murphy was the "one to one" midwife caring for Mrs. Fitzpatrick exclusively so that she would have remained in the room. There was absolutely no necessity for Senior Midwife O'Dwyer to remain to discuss the CTG Trace with Dr. Wiza – it was entirely self explanatory to him as Specialist Registrar. I believe that it would be contrary to the norms of ordinary social convention for the court to find that Staff Midwife Murphy who was after all in charge of the room, did not introduce Dr. Wiza when he joined the group in the room and that, as he contends, he introduced himself. There were no medical, technical or other reasons shown why Senior Midwife O'Dwyer would be required to remain in the room while the procedure was being carried out. Mr. Fitzpatrick accepts that Dr. Wiza left the room and that a discussion then took place between him and his wife as to why the fetal blood sample was necessary and whether Mrs. Fitzpatrick should allow it. Apart from the dispute as to whether or not Senior Midwife O'Dwyer was present, this corroborates the recollection of Dr. Wiza, Senior Midwife O'Dwyer and Staff Midwife Murphy that Dr. Wiza left the room to enable the parents of the plaintiff to discuss whether or not to permit the carrying out of the fetal blood sample.

61. Staff Midwife Murphy said that the Fitzpatricks definitely discussed the fetal blood sample with Dr. Wiza and not with Senior Midwife O'Dwyer. She said the Dr. Wiza was a very articulate and nice person and was not diffident or shy. On the evidence, Dr. Wiza certainly does not fall within Mr. Clements category of a shy junior overseas doctor. I found Dr. Wiza to be a competent, well spoken professional, self assured, calm and composed, with clear, precise barely accented English. Dr. Wiza was then an experienced Specialist Registrar who in the course of his studies had attended a series of lectures at John Radcliff Hospital, Oxford on Doctor – Patient communication and who was very much a part of Irish society. In my judgment it is totally improbable that the Obstetrics Registrar and Assistant Master of the National Maternity Hospital, called by the Senior Midwife on duty to review the situation would, if he decided that he should carry out a fetal blood sample, immediately launch into the procedure without first explaining to the mother what he was about to do, (even if he surmised or had been told by Senior Midwife O'Dwyer that she had already explained the procedure to the mother), and obtaining her consent. When Mr. and Mrs. Fitzpatrick said that they wished to discuss the matter between themselves it would be natural that Dr. Wiza would leave the room to enable them to do so.

62. I do not accept that Dr. Wiza at this time said anything to the Fitzpatricks about the plaintiff running short of oxygen or getting sick for lack of oxygen or being tired. The CTG Trace at this time would not necessarily warrant such assumptions. I am satisfied on the balance of probabilities that the recollection of Staff Midwife Murphy is correct and that what Dr. Wiza told the Fitzpatricks was that he wished to do the fetal blood sample to check that the plaintiff was ok. In my judgement Dr. Wiza is confusing events which occurred at 05.10 hours with events which may have occurred sometime after 07.20 hours. I am however satisfied that Dr. Wiza did discuss the carrying out of the fetal blood sample with the Fitzpatricks, but that the Fitzpatricks have only remembered the earlier discussion with Senior Midwife O'Dwyer, probably because of her memorable quip about never having heard a baby complain yet, and have forgotten their subsequent discussion with Dr. Wiza. Having regard to the evidence of Professor Turner and because Staff Midwife Murphy as "one to one" midwife, had established a good rapport with Mrs. Fitzpatrick, I find on the balance of probabilities that Dr. Wiza probably said very little to the Fitzpatricks while carrying out the actual procedure, other than perhaps to encourage Mrs. Fitzpatrick to tell him if it hurt and otherwise had, allowed Staff Midwife Murphy to position Mrs. Fitzpatrick and to talk her through it. I find Dr. Wiza's explanation as to why he did not leave the room after he had obtained the blood sample result wholly logical and convincing and I am quite satisfied that the recollection of Mr. Fitzpatrick to the contrary is mistaken. I find on the balance of probabilities that he did give the blood sample to Staff Midwife Murphy to take to the adjoining room where the analysis machine was and that the printout results was brought back to Mrs. Fitzpatrick's room by Senior Midwife O'Dwyer. I find it improbable that it was Senior Midwife O'Dwyer and not Dr. Wiza who informed the Fitzpatricks that everything was fine and that the plaintiff was ok. In the circumstances I do not think that Senior Midwife O'Dwyer would ignore the Registrar and take it upon herself to interpret the printout, even though she may have been perfectly capable of so doing and, announce the result.

63. At 05.30 hours, Senior Midwife O'Dwyer increased the dosage of Oxytocin from 30mls/ph to 60mls/ph. A note recording this increase was made on the cardiograph by Staff Midwife Murphy. Mr. Fitzpatrick recalled that at this time there were a lot of contractions, which seemed to be coming quicker and stronger, but no one passed comment on this. Mr. Fitzpatrick recalled that once the Oxytocin was started his wife was unable to speak very much. I am satisfied on the evidence that the decision to use Oxytocin, to determine the level of the dosage between 30mls/ph minimum and, 180mls/ph maximum, to increase or reduce the dosage or to stop using Oxytocin altogether was primarily a matter for the decision of the Senior Midwife.

64. The sequential series of recorded palpated uterine contractions which commences at 04.45 hours is broken after 05.30 hours and resumes again at 05.35 hours. Between 05.30 hours and 05.50 hours, I find, on the evidence that the palpated uterine contractions recorded by Staff Midwife Murphy in the Partograph box are totally inaccurate. Staff Midwife Murphy accepted this in cross examination and Senior Midwife O'Dwyer accepted that she did not notice the error on the occasion, or at any time on 26th December 2001.

65. It was claimed on behalf of the plaintiff that the tacograph section of the cardiotacograph record shows eight contractions in the 15 minute period between 05.35 hours and 05.50 hours and this, it is said, is evidence of hyper-stimulation caused by the Oxytocin. Staff Midwife Murphy and Senior Midwife O'Dwyer considered that only seven uterine contractions are shown in this period. There was disagreement between the expert witnesses in this regard. Mr. Woolfson, Professor Baker and Clinical Midwifery Manager Aideen Keenan, all defence witnesses, were very certain that there were eight contractions, clearly indicating hyper-stimulation caused by the Oxytocin and which may have interfered with the fetal blood supply, Midwife Supervisor Dawn Johnston, a witness in the plaintiff's case in cross examination said that there was no hyper-stimulation as of 06.30 hours. In cross examination, Mr. Clements agreed that apart from the first period of 15 minutes after Oxytocin was commenced at 04.45 hours, when there were eight contractions, there were never more than seven contractions in a 15 minute period during Mrs. Fitzpatrick's labour. However I find that Mr. Clements was referring exclusively to what appears in the Partograph box chart maintained by Staff Midwife Murphy and was not purporting to interpret the tocograph record at all.

66. Professor Baker became a Consultant Obstetrician and Gynaecologist in 1990. In 1998 he was appointed to the Chair of Obstetrics and Gynaecology at Nottingham University Medical School. In 2001 he became Professor of Maternal and Fetal Health at Manchester University. He is presently Associate Dean of Research Faculty of Medical and Human Sciences, University of Manchester and Hon. Consultant Obstetrician of St. Mary's Hospital of the University of Manchester, one of the largest teaching hospitals in Europe. He is visiting Professor of Obstetrics at Yale and Toronto Universities. Professor Baker has outstanding academic qualifications. He is a teacher and writer of great standing in his profession. He has written and edited more than 12 leading textbooks, including the two leading undergraduate textbooks in the United Kingdom, "Obstetrics by 10 Teachers" and "Midwifery by 10 Teachers". The volume and scope of his peer publications is simply enormous. As a witness I found Professor Baker to be thoughtful and careful, almost too scrupulous at times. Every question put to him was answered thoughtfully, patiently and without any indication of bias or intransigence.

67. Ms. Dawn Johnston qualified as a nurse in 1982 and as a midwife in 1985. In 1995 she was appointed Supervisor of Midwives for

the Counties of Kent, Surrey and Sussex. She lectures in Midwifery Practice and Management. She received training in the interpretation of Cardiotocograph Traces by lectures in Obstetrics and Midwifery and through "in ward" experience.

68. Ms. Aideen Keenan is a Registered Midwife (Dublin – Kent). She holds a B.Sc degree in Midwifery Management (U.C.D.), and a Diploma in Management Project, and a Diploma in Management Studies (University of London). Since 1996, she has been Clinical Midwifery Manager 3 at the Rotunda Hospital, which is the rank next below that of Assistant Director. From 1990 to 1993 she was, Senior Midwife in the Delivery Unit and is Chairperson of the Senior Midwives Committee of that Hospital. From January 2002 to January 2003 she was Midwife Representative on the Coombe and Rotunda Information Sharing Programme. In 1998 she attended Professor Arulkumarans's Lectures on Fetal Monitoring including all aspects of CTG Trace interpretation. The Professor is an acknowledged leading expert in this field and is co-author of one of the leading texts on the subject. In 2005 she completed a "K2" training programme on CTG Interpretation using a "Real Time Simulator".

69. Senior Counsel for the plaintiff pointed out that Mr. Clements had expressed this opinion before there had been any detailed examination of the CTG Trace, which detailed examination started during the evidence of Staff Midwife Murphy. This was undoubtedly the case, an unavoidable consequence of having to call expert witnesses, particularly those from overseas, out of proper sequence as and when they were available. However, Mr. Clements at all times had the CTG Trace available to him and, no explanation was forthcoming as to why he did not himself carry out a detailed analysis of the Tacograph trace. I find that the matter comes down to whether the tacograph trace between 05.30 hours and 05.38 hours is to be regarded as showing one or two contractions. However, I am satisfied on the evidence and, I so find, that Senior Midwife O'Dwyer and Staff Midwife Murphy could not be held to have acted in a substandard manner in considering that this part of the Trace should be read as indicating one and not two contractions. At 05.50 hours, the Oxytocin was increased by Senior Midwife O'Dwyer from 60mls/ph to 90mls/ph and, at 06.05 hours was further increased by her to 120mls/ph.

70. At 06.05 hours Mrs. Fitzpatrick had been eight hours in labour. The June 1996, document provides that:-

> "If delivery is not imminent after eight hours in labour the patient is examined by the Assistant Master. Electronic fetal monitoring is commenced."

71. Dr. Wiza, who was Assistant Master on the occasion, was not asked to examine Mrs. Fitzpatrick, nor was he informed that she had been eight hours in labour and delivery was not then imminent. The Partograph Note on Labour for 06.05 hours states as follows "In labour eight hours, only on Oxytocin for 1 hour 15 minutes, reassessment at 07.00 hours". I accept the evidence of Staff Midwife Murphy and Senior Midwife O'Dwyer that Staff Midwife Murphy wrote this note and that they both signed it to indicate that they had assessed the situation and that Senior Midwife O'Dwyer had decided to depart from the terms of the June 1996 document for the reason given. It was contended on behalf of the plaintiff that Senior Midwife O'Dwyer exceeded her authority in so doing and, that the provisions of this guideline were mandatory and binding on all midwives at all levels. Senior Midwife O'Dwyer, while accepting that generally all midwives of whatever level should abide by the provisions of this June, 1996 document, stated that the Senior Midwife in Charge retained a discretion to depart from those provisions if she considered that this was necessary in the best interests of either the mother or the fetus.

72. I find that the above provision of the June 1996 document supplants, in the circumstances to which it relates, the immediately previous provision of this document which provides that, "it is at the discretion of the Sister on duty as to the time interval of the next examination once the patient is established on Oxytocin". This provision in its turn clearly relates to a still earlier provision and addresses the question of whether the routine of two hourly vaginal examinations should be maintained regardless of the time at which the infusion of Oxytocin was commenced. I have already cited the terms of this still earlier provision when dealing with the events which occurred at 02.45 hours. On the evidence I find that the older historical title of "Sister" has been replaced by that of "Senior Midwife".

73. In my judgment the proper construction of this June 1996 document is that the eight hour provision requires the immediate intervention of the medical team at this time entirely regardless of what had previously been done by the midwives. The wording of the provision is such that it could not reasonably be interpreted as meaning that this intervention was in any sense discretionary. In a system which requires that delivery take place within twelve hours of the diagnosis of labour this was an important check and safety precaution. In a Guideline of equal date entitled, "Monitoring of Fetus in Labour – indication for continuous fetal monitoring", subparagraph 4 states that this should be done, "after eight hours in labour – regardless of cervical dilatation." The then Master of the National Maternity Hospital, Dr. Peter Boylan and the then Matron, Maeve Dwyer, clearly attached great significance to the fact that a mother had been eight hours in labour.

74. However, though not so stated in the June 1996 document or in any other document discovered by the defendant, I find on the evidence that the established practice in the hospital was to reserve to the Senior Midwife on duty a discretion to postpone the carrying out of this examination by the Assistant Master in circumstances, where she considered that such postponement was reasonably necessary in the best interests of the mother or the fetus. Dr. Wiza gave evidence that this was by no means a routine occurrence and it was normal for the doctor to be called in accordance with the June 1996 document. I am not satisfied that the reason given in the 06.05 hours Note on Labour was a sufficient reason to postpone the examination of Mrs. Fitzpatrick by Dr. Wiza. While I accept that it was the general practice in the National Maternity Hospital in December 2001 to assess post Oxytocin progress at intervals of two hours and, while I accept that pelvic examinations are unpleasant for the mother and can cause fetal stress, nonetheless in my judgment there were not sufficiently grave reasons in this case for deferring the examination by the Assistant Master. This was particularly so because as of 06.05 hours Mrs. Fitzpatrick had been treated with Oxytocin for over one hour and, it was therefore a matter of considerable medical significance if the normal pattern of dilatation had not been resumed.

75. However, I am satisfied on the evidence that there is no causal link between the failure to have Mrs. Fitzpatrick examined by Dr. Wiza at 06.05 hours and the subsequent injury to the plaintiff. The measure of acidity in the fetal blood at 05.30 hours was normal, the tacograph (for reason I have already stated) and the cardiograph traces had been reviewed and were seen to be normal and the other clinical signs recorded on the Partograph were normal. I am satisfied on the evidence and I accept that the constant blood staining of the liquor was correctly recognised as being due to the rupturing of minor capillaries which is a common feature of cervical dilatation and therefore not a matter for any concern. I find on the evidence that it is and, was in December 2001, a generally though by no means a universally approved practice amongst obstetricians in the State and in the Untied Kingdom to regard a normal blood gas analysis, particularly the Ph, as providing reassurance for a period of up to one hour, unless the suspicious CTG Trace which led to the sample being taken, persisted or disimproved. Dr. Wiza gave evidence that if this occurred, even five minutes after the foetal blood sample, the doctor should be called back. Extrapolating backwards from 06.30 hours when Mrs. Fitzpatrick was found to be 9cm dilated, it is reasonable to infer that at 06.05 hours the normal patter of dilatation would have been seen to be restored. I am satisfied therefore that had Dr. Wiza examined Mrs. Fitzpatrick at 06.05 hours he would not, nor was there any reason why he should, have changed the management of her labour in any way.

76. Between 06.10 hours and 06.26 hours a series of important changes occurred on the cardiograph. The plaintiff's heart rate fell to and below the minimum normal level of 120bpm. I find on the expert evidence that the decelerations, at 06.24 hours and 06.26 hours were small late decelerations, in their entirety out of phase with the uterine contractions which had caused them and, while the others were early decelerations, those at 6.10 hours were significantly deep. I find on the evidence that from a neurological viewpoint there was no need for anxiety at this time. However, I find on the expert evidence, particularly the evidence of Mr. Woolfson, Mr. Clements and Dr. McKenna that this Trace pattern was indicative of a fetus that was still well, but was now enduring hypoxic stress, or as Midwife-Supervisor Johnston put it "the fetus was feeling the pinch". I find on the evidence that this Trace should have signified to the midwives that the situation now required careful watching. Though the Partograph Notes on Labour at 06.05 hours stated that Mrs. Fitzpatrick was to be reassessed at 07.00 hours, these changes did in fact cause Staff Midwife Murphy to summon Senior Midwife O'Dwyer back to Mrs. Fitzpatrick's room at approximately 06.23 hours. Senior Midwife O'Dwyer signed the CTG Trace at 06.25 hours. I find on the evidence that she did so in order to record that she was present at this time and had seen this trace.

77. I am satisfied on the evidence that Senior Midwife O'Dwyer very appropriately decided to carry out a vaginal examination of Mrs. Fitzpatrick. The result of this examination was noted by her in the Partogtraph Note on Labour at 06.30 hours and, signed by her. It reads as follows:-

> "Vaginal examination to re-assess longitudinal lie cephalic presentation no cord or placenta felt – cervix 9cms dilated – clear liquor, CTG noted FHR 112bpm – Oxytocin to remain pro – tem. at 120mls/hr."

78. At 06.30 hours Senior Midwife O'Dwyer wrote on the cardiograph, "Vaginal Examination – cervix 9cm," and placed an "X" on the Dilatation of Cervix Graph in the Partograph. She then left the room.

79. I find that between 06.30 hours and 06.47 hours the cardiograph trace deteriorated significantly. I find on the expert evidence that during this period it is very difficult to identify any convincing baseline but nonetheless there seemed to be a general consensus amongst the expert witnesses that one could be fixed at 130bpm. Mr. Woolfson told the Court that this drop in the baseline should have been seen as a worrying sign. The decelerations are becoming more frequent and deeper and longer with an increasingly slow rate of recovery. I find on the expert evidence that this was a sign of developing hypoxia in the plaintiff attributable to the effects of the Oxytocin.

80. At 06.40 hours the fetal heart rate dropped to 80bpm. Staff Midwife Murphy was correctly concerned and called Senior Midwife O'Dwyer who returned immediately. Between 06.47 and 06.50 hours there occurred a severe deep (95bpm) and prolonged (2½ - 3 minutes) deceleration or bradycardia. At the same time, in the period of 15 minutes between 06.35 hours and 06.50 hours I find that uterine contractions as shown on the tacograph exceeded again the maximum permitted number of seven in 15 minutes. I find on the evidence that all of these phenomena were caused by Oxytocin hyper-stimulation.

81. I find on the expert evidence, particularly with reference to the evidence of Mr. Woolfson that the decelerations at 06.30 hours, 06.32 hours, 06.44 hours and 06.45 hours were also significant and severe. I accept the evidence of Mr. Woolfson that at this point the Ph would have started to fall off and become acidotic, because the fetus due to the hyper-stimulation was unable to regenerate its oxygen reserves between contractions. He considered that from 06.40 hours onwards the CTG Trace should have been seen as "pathological" in the classification system.

82. There was disagreement between the expert witnesses as to whether the number of contractions involved was eight or nine during this 15 minute period. This depended upon whether or not one regarded the wave at 06.42 hours and the wave at 06.49.30 hours as indicating genuine contractions. It is unnecessary for me to resolve this problem. I find on the evidence that the number of uterine contractions was excessive and I find on the balance of probabilities that as no other causative factor was identified that this hyper-stimulation was due to the Oxytocin. Despite the evidence that counting uterine contractions by palpation produces a more accurate result than the external tocodynamometer, I find that the entry by Staff Midwife Murphy in the Partograph box, of six contractions in the 15 minute period between 06.35 hours and 06.50 hours could not be objectively correct and must indicate either a break in the continuity of the palpation, as had occurred earlier, or the selective disregarding by her of events which she decided were not genuine contractions. As on the previous occasion also, Senior Midwife O'Dwyer does not appear to have noticed this error.

83. I find on the evidence that the cardiotocograph record as it evolved in real time between 06.30 hours and 06.50 hours should have been a cause of "grave concern" to senior midwife O'Dwyer. This was the term used by Professor Turner, who I find was, throughout his evidence, gallantly endeavouring to defend the midwives. According to the uncontradicted evidence, she had remained present in Mrs. Fitzpatrick's room from approximately 06.40 hours onwards until she left to summon Dr. Wiza for the second time. The expert witnesses were unanimous in their agreement that the decelerations shown on the cardiograph between 06.23 hours and 06.50 hours were Variable Decelerations. I find on the evidence that this trace indicated that the contractions were too powerful and too frequent, making the plaintiff potentially vulnerable and this should have given rise to anxiety and concern in the midwives.

84. I find on the evidence that the increasing depth and duration of these Variable Decelerations from 06.30 hours onwards, culminating in the prolonged and deep deceleration between 06.47 hours and 06.50 hours should indicate to a senior midwife acting with reasonable care, that the plaintiff was no longer responding well to the stresses of labour, was experiencing increasing difficulty in recovering between contractions and was becoming hypoxic and probably acidotic. I find on the evidence that a Senior Midwife, acting with reasonable care, would have concluded that the oxytocin had caused the uterine contractions to become too frequent and too powerful and that this was either the sole cause of or was contributing significantly to the plaintiff's distress. I find on the evidence that a Senior Midwife, acting with reasonable care, ought to have concluded that this trace was abnormal and very unreassuring and that the immediate intervention of the Duty Registrar was necessary in order to assure the plaintiff's future health and safety. I find on the evidence that the failure of Senior Midwife O'Dwyer to summon Dr. Wiza to review the situation at 06.50 hours was seriously substandard, and was negligent and in breach of the duty of care which she owed to the plaintiff. In the words of Mr. Clements, this was no longer a midwives case. From the evidence, Dr. Wiza was in his room and was freely available. I accept the evidence of Dr. Wiza, which was not questioned or contradicted, that a call from a labour room is always treated as a matter of priority in the National Maternity Hospital, so that if he had been called by Senior Midwife O'Dwyer, he would have come at once. I find on the expert evidence that the decision of Senior Midwife O'Dwyer at 06.50 hours to reduce the titrated levels of Oxytocin, - and then only from 120mls/ph to 90mls/ph - rather than to turn it off, was also substandard and negligent. I find that Senior Midwife O'Dwyer negligently and in breach of duty continued to administer Oxytocin to Mrs. Fitzpatrick from 06.50 hours to 07.15 hours or 07.20 hours during which time the level of distress being suffered by the plaintiff increased and, after 07.10 hours, increased dramatically.

85. I find on the evidence that at 06.50 hours, while the situation as clearly indicated on the CTG Trace was a matter for serious concern, it had not yet become an emergency. In this regard, I find that at 06.50 hours, it was not reasonably open to any midwife or obstetrician, acting with reasonable care in interpreting this trace, to consider that the CTG machine was possibly giving an

exaggerated picture of the situation, something which on the expert evidence, appears to be a generally recognised difficulty with this very valuable diagnostic tool. I accept the evidence of Dr. Wiza that the midwives must look at the Trace and how it had developed, and if the fetus might be at all in danger to call the doctor. Observing and listening to Dr. Wiza giving evidence, I am satisfied that he did not believe that this had occurred in the instant case. I am satisfied on the expert evidence that at 06.50 hours, there was still sufficient time for remedial medical action to be taken to fully safeguard the health and safety of the plaintiff. However, I find on the expert evidence that the decision as to what measures should properly be taken at this time, was a decision for the Duty Registrar only and was no longer a decision which could reasonably and responsibly be taken by the midwives, even by a very experienced Senior Midwife, such as Senior Midwife O'Dwyer. I find that the decision of Senior Midwife O'Dwyer to continue to manage this labour herself was substandard and negligent, and a decision which no midwife of equivalent training and experience acting with reasonable care would have made.

86. It was clear from the evidence that Staff Midwife Murphy and Senior Midwife O'Dwyer both accepted that the CTG Trace was abnormal and Senior Midwife O'Dwyer responded at 06.50 hours by reducing the infused level of Oxytocin from 120mls/ph to 90mls/ph and, by turning Mrs. Fitzpatrick onto her left side. The Partograph Notes on Labour are silent in this regard, there being no note whatever between those at 06.30 hours and 07.10 hours. Mr. Woolfson stated that he was very surprised at this. In my judgment once these measures were taken, there was sufficient time for one of the midwives to maintain the vital continuity, accuracy and integrity of these Notes on Labour, something which, on the face of the Partograph, appears to have been done at 07.10 hours, 07.15 hours and 07.20 hours, despite the far more serious events then occurring. The entry in the Oxytocin/Contractions Box Chart on the Partograph by staff midwife Murphy, gives 06.50 hours as the time when the Oxytocin dosage was reduced to 90mls/ph. The evidence to this court clearly and unequivocally established that the dosage was reduced and Mrs. Fitzpatrick was turned onto her left side at 06.50 hours, even though Senior Midwife O'Dwyer noted the former on the cardiograph in the vicinity of 06.45 hours and the latter in the vicinity of 06.47 hours. She also signed the cardiograph at 06.51 hours. I find it very significant that Dr. McKenna, despite his eminence and enormous experience as a consultant obstetrician and Master of a leading Maternity Hospital, was misled by these entries on the cardiograph and by the lack of any Note on Labour in respect of them, into considering that the deep and prolonged deceleration appearing on the CTG Trace between 06.47 hours and 06.50 hours may have been a response to Mrs. Fitzpatrick being turned on her left side, even though the exact opposite was the true situation. Professor Baker was also confused at least initially by these matters and for the same reason.

87. I find on the expert evidence that while these measures initiated by Senior Midwife O'Dwyer were in themselves and, as far as they went, an appropriate response to what was being indicated by the CTG Trace between 06.30 hours and 06.50 hours, they were entirely insufficient and consequently substandard for the reasons I have already set out. An unfavourable comparison was sought to be drawn by Senior Counsel for the plaintiff between the CTG Trace at 04.45 hours and the then appropriate response of Senior Midwife O'Dwyer in calling Dr. Wiza and, what I find to be the far more abnormal trace between 06.30 hours and 06.50 hours and her failure to summon Dr. Wiza at 06.50 hours immediately after the deep and prolonged deceleration. I am not, however, satisfied on the evidence that such a simple and straightforward comparison can validly be made, because of the very different stages in the labour at which these events occurred and, these decision were made.

88. With the sole exception of Professor Turner, all the obstetric and midwifery experts on both sides of this tragic case were agreed that Dr. Wiza should have been called by Senior Midwife O'Dwyer at 06.50 hours. Up to that point, while there was universal acceptance that from 06.45 hours onwards there was clear cause for concern on the Trace, there was disagreement, for reasons which I find to be entirely justified and bona fide, between the expert witnesses as to whether Dr. Wiza should have been called and the Oxytocin turned off. Mr. Clements was very strongly of the opinion that medical intervention should have occurred and the Oxytocin should have been turned off between 06.00 hours and 06.15 hours. Professor Baker, stated that he personally would have intervened and would have turned off the Oxytocin at 06.30 hours, but added that he was cautious in such matters and that other obstetricians might not have acted in this way. Dr. McKenna stated that the Oxytocin should have been turned off and Dr. Wiza called at 6.40 hours. Professor Turner said that if there was a disimprovement in the CTG Trace after 06.50 hours the Oxytocin should have been turned off and Dr. Wiza called, but that it was reasonable to wait 10 to 15 minutes to see how the Trace would develop. Dr. Wiza himself was also of this opinion. Mr. Woolfson and midwives Johnston and Keenan were of the opinion that the necessity to call Dr. Wiza, (Mr. Wolfsan said "inform" but I was satisfied on the evidence that the practice in this country is, and was in December 2001, to call rather than inform the Duty Registrar) and turn off the Oxytocin did not arise until 06.50 hours.

89. I accept, on the evidence of the expert witnesses and from citations from very reputable text books and other pertinent publications in the field of obstetrics, that it might be an appropriate option for a midwife encountering some types of Variable Decelerations towards the end of first stage labour, to reduce rather than to terminate the administration of oxytocin. But in the instant case, having regard to the nature of the Variable Decelerations, occurring between 06.30 hours and 06.50 hours, to the accompanying uterine over-stimulation and to the fact that on a vaginal examination carried out at 06.30 hours, Mrs. Fitzpatrick was found to be 9cm, or almost fully dilated, I am satisfied that no senior midwife, acting with reasonable care, would have pursued this particular option. Mr. Woolfson gave evidence and, I accept his evidence which went unchallenged and was supported by Professor Baker that once 9cm dilatation has been achieved, the cervix can slip away on a further vaginal examination. Depending upon whether one accepts the "X" mark on the Dilatation of Cervix graph on the Partograph or the Note on Labour on the Partograph with the time of 07.10 hours, both the work of Senior Midwife O'Dwyer, as correctly recording the relevant time, Mrs. Fitzpatrick became fully dilated at 07.00 hours or 07.10 hours or somewhere between. However, reference to the opinions of experts and to reputable medical publications for the purpose of ascertaining what Senior Midwife O'Dwyer should have done in relation to the oxytocin at 06.50 hours appears to me to be of academic interest only.

90. Two documents setting out procedures for the use of oxytocin in the National Maternity Hospital were listed in their affidavit of documents by the defendant and were produced and proved in evidence. The first in order of time of these documents is dated 17th/18th September, 1996 and is entitled "Procedure for Use of Oxytocin". It is signed by the then matron, (Maeve Dwyer) and the then Master (Dr. Peter Boylan). Paragraph 6 of this document provides as follows:-

> "If at any time, the contractions exceed 7 in a 15 minute period in a primigravida . . . Sister is informed. At Sister's discretion, the infusion may be altered by reducing the rate or reviewing accordingly".

91. The second document in time is dated 6th November, 1996 and is signed by Dr. Peter Boylan only. It is entitled, "Protocol when Number of Uterine Contractions exceed seven in a 15 minute period. This must be reported to Sister or Acting Sister". The first section of this Protocol which contains two numbered paragraphs bears the sub-heading, "When Patient is on Electronic Fetal Monitoring". This was the situation in the instant case. These paragraphs provide as follows:-

> "(i) If more than seven contractions are reported in a 15 minute period and the CTG Trace is reassuring, the oxytocin infusion should be increased according to normal protocol.

(ii) If the CTG Trace is unreassuring, leave the oxytocin at reported rate. The Assistant Master/or Registrar should review the CTG. Fetal Blood sample should usually be performed. Oxytocin may then be altered, depending on the result."

92. It will be recalled that the modern title of "Senior Midwife" has replaced the historical designation "Sister".

93. In another document, also listed on discovery of documents by the defendant and produced and proved in evidence, entitled "Fetal Blood Sample (FBS)", and dated 17th September, 1996, and signed by Matron Dwyer and Dr. Peter Boylan (Master), it is noted that, "oxytocin is not turned off routinely during this procedure".

94. I find that the aforecited paragraphs of the Protocol of 6th November, 1996 were intended to, and did supersede, the provisions of paragraph 6 of the Procedure of 17th/18th September, 1996. I find on the evidence that a designated Protocol of this nature must be regarded as mandatory by all to whom it is addressed. It was therefore mandatory on any midwife below the rank of senior midwife to report uterine over-stimulation to the senior midwife. Since electronic fetal monitoring was being employed in the labour in the instant case, the senior midwife was obliged to comply with the afore-cited paragraphs of the Protocol. I do not accept that these paragraphs were intended to be in the nature of guidelines only from which a senior midwife could depart if she considered it to be in the best interests of the mother or the fetus. I am unable to accept the evidence of Dr. Keane that as of December 2001, the afore-cited paragraphs of the Protocol of 6th November, 1996 had been informally abandoned or rescinded and paragraph 6 of the Procedure of 17th/18th September, 1996, reinstated and that this would have become known to all senior midwives through staff meetings. I am further satisfied on the evidence that it is the policy of the defendant to actively manage labour and delivery according to standard procedures and I find that it is altogether improbable that a Protocol as significant as that of 6th November, 1996, would be so informally discarded, while at the same time being left on the record with the resultant risk of serious confusion and the possibility of grave consequences.

95. I find on the evidence that Staff Midwife, Murphy, and Senior Midwife O'Dwyer, both regarded this Protocol as fully operational and applying to them, even though Senior Midwife O'Dwyer considered that senior midwives retained a discretion to depart from its terms. Significantly, there is no express reservation of such a discretion in the Protocol of 6th November, 1996, and, I find that the language employed and the internal structure and purpose of its provisions are inconsistent with an implied reservation of such a discretion. I am satisfied on the evidence that once a CTG Trace is unreassuring, a fetal blood sample is the principle way of obtaining positive and reliable reassurance that the fetus has not developed, and is not developing, metabolic acidosis. It is further very significant that the evidence established that this document of 6th November, 1996, remained in December 2001 on the active list of midwifery and medical staff instructions and was the only document thereon to be designated a "Protocol". Dr. Wiza gave evidence that he considered that the Senior Midwife was obliged to comply with the terms of the Protocol unless some critical situation arose when it could be departed from in the best interests of either the mother or the fetus. Professor Baker and Mr. Woolfson agreed with this and considered that there was no discretion "as such" in the Senior Midwife.

96. Without prejudice to the foregoing findings, the action taken by the midwives at 06.50 hours did undoubtedly result in an improvement in the CTG Trace. However, this improvement was very brief and was an improvement relative only to the very bad pre 06.50 hour position. The CTG Trace did not in any sense return to normal. In the words of Dr. McKenna, to say that the Trace improved after 06.50 hours is only half true, it was a step in the right direction but it was not nearly enough.

97. I find that from 07.00 hours onwards to 07.10 hours, a new CTG Trace pattern could be seen to be evolving and becoming clearly established. The baseline was now rising – an ominous sign - and, though no longer as deep or as prolonged as between 06.30 hours and 06.50 hours, the onset nadir and the recovery of the decelerations were now all out of phase with the contractions – an ominous sign. I find it impossible to understand how Senior Midwife O'Dwyer could reasonably, if acting with reasonable care, have decided, which she now claims she did, that the Trace had returned to normal. Unfortunately, I found Senior Midwife O'Dwyer's recall of events after 06.50 hours increasingly unreliable, at times contradictory and on a number of occasions manifestly inaccurate.

98. In my judgment a great deal of unprofitable discussion took place during the course of the hearing as to the correct terminology to be employed to describe these decelerations: whether they were properly described as "variable", "variable with a late component" or "late". Senior Midwife O'Dwyer gave evidence that she regarded these decelerations as variable with a late component. Professor Turner considered that 4 out to 5 were late decelerations. Dr. McKenna was of the same opinion. In my judgment this latter is the vital element and, I am satisfied that she fully recognised and appreciated its significance in relation to this Trace pattern. Mr. Woolfson had no doubt whatsoever that these decelerations were clearly late decelerations and I find his evidence totally convincing on this point. He said that when you see late decelerations you don't test anymore, you deliver. There was no need for "crash tactics" at this point, but there was no reason why the plaintiff could not have been delivered by 07.25 hours. Professor Baker said the he considered that they were "variable" but added, very significantly in my judgment, that he would not criticise anyone for calling them late decelerations and that it was important that disputes concerning terminology must not be seen as altering the appropriate reaction to the possibilities arising from this Trace. I find on the evidence that this Trace pattern could only be regarded as ominous and that such a Trace pattern always signifies, particularly in the case of a primigravid, that the fetus was probably, (since the CTG Trace is non specific and a diagnostic aid only) suffering from hypoxemia and though still healthy and still able to rally was being seriously stressed. Yet Senior Midwife O'Dwyer decided that the plaintiff was not necessarily hypoxic and it was sufficient to keep a close eye on the Trace.

99. I find that at 07.06 hours at the latest, it would have been apparent to any senior midwife exercising reasonable care and, should have been very obvious to Senior Midwife O'Dwyer that this ominous pattern was firmly established and that this was not a case of an isolated late deceleration only. Even if I accepted the stand-alone opinion of Professor Turner, - which on the evidence I cannot, - that it was an option reasonably open to the midwives to wait 10 or 15 minutes after reducing the level of oxytocin and turning Mrs. Fitzpatrick on her left side, to see if the CTG Trace will return to normal, I find that by 07.06 hours it must have been totally obvious to them that this was not going to happen and that this Trace was indicating that the fetus was being compromised and that Dr. Wiza should have been called immediately. He was not called. I accept the clear and unequivocal evidence of Mr. Woolfson that the CTG Trace between 06.50 hours and 07.10 hours showed that the plaintiff was undoubtedly suffering hypoxia and though still able to recover, the process which would cause irreversible brain damage has started to occur so that desperate measures were now needed. He said that as Mrs. Fitzpatrick was almost fully dilated immediate preparation should have been made for a ventouse or a forceps assisted delivery.

100. At 07.10 hours the CTG Trace changed again and produced a new pattern. In her evidence in chief Senior Midwife O'Dwyer described this pattern as "grossly abnormal" and said that she was very shocked to see it, and did not expect it.

101. I find on the evidence that by 07.12 hours it must have been very obvious to Senior Midwife O'Dwyer that a pattern of very deep decelerations with no baseline variability was established. Dr. Wiza in his evidence told the court that this indicated a clear emergency involving the plaintiff. Professor Turner agreed and called it a "severe emergency". I find on the evidence that there can

be no shadow of doubt whatever about this. It was vital now that the plaintiff should be delivered as quickly as possible if irreversible brain injury was to be avoided. I find on the expert evidence that even in an emergency situation such as was here indicated, once a mother was fully dilated it would require no more than 15 minutes from the arrival of the obstetrician in the delivery room, to affect the delivery. I find on the expert evidence that after 07.10 hours a vaginal assisted delivery by ventouse or forceps would have been quicker than caesarean section.

102. Even faced with this emergency, Senior Midwife O'Dwyer still did not summon Dr. Wiza, despite the fact, as she admitted in evidence, that she did not know what was causing it. I find that at this time the CTG Trace was grossly pathological and that while the plaintiff had some reserves left not just minutes, but seconds now counted if there was to be a good outcome for the plaintiff. Without prejudice to my earlier findings that her failure to turn off the oxytocin and to call Dr. Wiza at 06.50 hours was substandard and negligent, I find that her decision at or just after 07.10 hours not to call Dr. Wiza but to carry out a vaginal examination, and at 07.15 hours or 07.20 hours to turn off the Oxytocin and then wait and see whether the CTG Trace would return to normal, while encouraging Mrs. Fitzpatrick to give a number of active pushes, completely incomprehensible in the circumstances, totally unjustifiable and, a decision which no senior midwife acting with reasonable care would have taken. She told the court that she thought the Trace indicated progress and the Mrs. Fitzpatrick would deliver soon. On the evidence particularly the evidence of Dr. Wiza this was wrong and delivery was not imminent. Dr. Wiza told the Court that the CTG Trace at 07.13 hours clearly indicated an emergency and that the plaintiff was in difficulty for at least 10 minutes before that. Mr. Woolfson said that at 07.15 hours there was a dire emergency, the CTG Trace was grossly pathological and pre-terminal and there was no excuse whatever for not getting the plaintiff delivered by whatever means was fastest. Professor Baker and Dr. McKenna were of the same opinion. Mr. Clements told the court that at 07.12 hours there was no justification whatever for any further delay in delivering the plaintiff who was in immediate danger of irreversible brain damage and that Senior Midwife O'Dwyer had absolutely no right to wait and see if the CTG Trace would improve after the Oxytocin was turned off.

103. I reject entirely the submission that the change in the CTG Trace pattern after 07.10 hours was not reasonably foreseeable by Senior Midwife O'Dwyer and Staff Midwife Murphy. Professor Baker, Professor Turner and Mr. Woolfson all gave evidence, that they had never previously encountered such a sudden and catastrophic change in a cardiotocograph recording as occurred in the instant case at 07.10 hours and, that such a change could not have been foreseen from the pre 07.10 hours Trace. While I accept, as I must accept having regard to this uncontradicted evidence, that the swiftness and extremity of the change could not have been reasonably foreseen by the midwives, I find on the evidence that a change of this sort was clearly foreseeable, indeed inevitable in the short term unless some specific test such as a fetal blood sample, demonstrated that the plaintiff had not become and was not becoming acidotic. Once the fact of such a change was reasonably foreseeable, in my judgment it does not matter that the person charged with the act or omission could not have reasonably foreseen the exact time or the exact severity of the change. Though none of the expert witnesses could explain the exact aetiology of the catastrophic collapse which occurred at 07.10 hours, I am satisfied on the evidence, on the balance of probabilities that it was caused by unrelieved hypoxic stress, increasing acidosis and by the inevitable exhaustion of the limited fetal reserves. Professor Baker conceded that it was a reasonable hypothesis that the continued use of the Oxytocin may have caused the 07.10 hours change. Mr. Woolfson found it difficult to link Oxytocin with the post 07.10 hours CTG pattern. I find on the evidence that there is an unbroken causal connection between the plaintiff's condition prior to 07.10 hours as signalled by the cardiotocograph recording from 06.30 hours onwards and, his post 07.10 hours condition as indicated by that recording. Mr. Clements said that this was the very thing you would be worrying might happen. Mr. Woolfson agreed, but with the rider, that one could not foresee what actually did to happen or when exactly it would happen. Mr. Woolfson told the court that the process which would ultimately result in irreversible brain damage to the plaintiff had started at 06.55 hours and that at 07.10 hours all the signs were flashing, – hyper-stimulation, late decelerations, a long deep deceleration of almost 3 minutes and a pathological trace. This issue of foreseeability has no relevance whatever to the issue of why Senior Midwife O'Dwyer did not call Dr. Wiza at 07.12 hours.

104. It was submitted on behalf of the plaintiff that from after the 06.30 hours onwards, the Partograph Notes on Labour and the comments written on the cardiograph by Senior Midwife O'Dwyer and by others with her co-operation, were wholly unreliable, and save as to the acknowledged retrospective Note on Labour written by her at 08.45 hours, were not written at the times stated in those notes. It was admitted by Senior Midwife O'Dwyer during the course of her evidence that the comment, "Ventouse applied" written on the cardiograph at 07.38 hours was written at her direction by Midwife Heather Helen sometime later on the morning of the 26th December, 2001 when they were going over the Trace together. Midwife Heather Helen did not give evidence. No issue was taken that the comment, "Dr. Wyza called" appearing on the cardiograph at 07.20 hours and, "Dr. Wyza present" appearing on the cardiograph at 07.30 hours were in fact written by Senior Midwife O'Dwyer herself, even though on all other occasions she correctly wrote "Wiza" which is the correct spelling of his name. However, it was put to Senior Midwife O'Dwyer that these comments were not written at 07.20 hours and at 07.30 hours respectively but were written by her later on the morning of the 26th December, 2001 most probably at 08.45 hours when the acknowledged retrospective Note was written by her. Senior Midwife O'Dwyer denied this. Senior Counsel for the plaintiff asked Senior Midwife O'Dwyer why of all the comments written by her and by Staff Midwife Murphy on the cardiotocograph print-out only these three comments were written in a direction opposite to all the others. I find that one would have to be writing with one's back to the CTG Machine with the print-out scrolling away from one. Unlike all the other comments, written on the cardiograph in particular the comment, "stopped pushing" which Staff Midwife Murphy gave evidence she wrote on the cardiograph at 07.28 hours, and therefore just before the comment "Dr. Wyza present", Counsel pointed out that these three comments would appear upside down as the paper print-out unscrolled from the machine. Staff Midwife Murphy said she did not know who wrote the comments "Dr. Wyza called" and "Dr, Wyza present" on the trace.

105. Senior Midwife O'Dwyer said that the cardiotocograph machine was positioned against the wall of the room at the head of Mrs. Fitzpatrick's bed on the left side as one looked up from the bottom of the bed and she had not moved it, so therefore she must have just written the comments at 07.20 hours and 07.30 hours in that particular way. Senior Midwife O'Dwyer said that she would think that she wrote the comment "Dr. Wyza called" after she had come back into Mrs. Fitzpatrick's room having called him. She told the court that she wrote the comment "Dr. Wyza present" on the cardiograph at 07.30 hours to signify that he was then present in the room, because of the seriousness of the matter, even though he was actually present much earlier, - three or four minutes after 07.20 hours. Without prejudice to the important and very contentious issue as to the accuracy of this evidence and though I have very considerable reservations in the matter, I am not satisfied that the plaintiff has discharged the onus which lies on him of establishing on the balance of probability that these comments were not written by Senior Midwife O'Dwyer at 07.20 hours and at 07.30 hours respectively.

106. I find on the evidence of the tocograph record, particularly in the light of the very clear and unshaken evidence of Mr. Woolfson, that Mrs. Fitzpatrick gave five definite active and controlled pushes at approximately 07.15 hours, 07.17 hours, 07.18 hours, 07.20 hours and 07.21 hours. The pattern of the tocograph then changed and I find on the same basis that the pushing as recorded at approximately 07.23 hours, 07.24 hours, 07.25 hours and 07.27 hours was exhausted involuntary pushing something over which Mrs. Fitzpatrick had no control whatsoever. I find on the expert evidence that the tocograph pattern from 07.28 hours onwards does not indicate maternal pushing. I find on the evidence, with particular reference to the evidence of Professor Baker, that the comment,

"stopped pushing" written by Staff Midwife Murphy on the cardiograph at 07.28 hours was accurate and entirely correct and is totally consistent with the evidence provided by the mechanical tocograph print-out of the CTG machine. Mr. Fitzpatrick gave evidence that after they had been told that Mrs. Fitzpatrick was fully dilated, Staff Midwife Murphy began encouraging her to push. He said that Senior Midwife O'Dwyer had told her to push with the contractions and then to relax and breathe. This he stated went on for a while before the doctor came. He said that he was holding one of Mrs. Fitzpatrick's legs and that Staff Midwife Murphy was holding the other. Senior Midwife O'Dwyer agreed that this was so but only, she said, until the bottom section of the bed was removed. Mr. Fitzpatrick thought that Mrs. Fitzpatrick had given six or seven pushes during this time.

107. I find on the evidence that at 07.28 hours the cardiotocograph record changed again. The trace now indicated that the plaintiff's condition was terminal, that he was dying and, unless delivered immediately he would suffer irreversible brain injury and die.

108. I find on the evidence the Senior Midwife O'Dwyer did not call Dr. Wiza at 07.20 hours and, did not in fact call him until 07.30 hours or very shortly thereafter. Dr. Wiza gave evidence that he was resting in his room on the floor above Mrs. Fitzpatrick's room and came immediately on hearing from Senior Midwife O'Dwyer on the telephone that the CTG Trace was shocking with very bad decelerations. He gave evidence that he arrived within 2 or 3 minutes at most. I am satisfied on the evidence that Dr. Wiza is mistaken in his recollection that he first went to Senior Midwife O'Dwyer's office. Senior Midwife O'Dwyer told the court that she was surprised at how quickly he came: she thought he came within 3 or 4 minutes of her calling him. Staff Midwife Murphy agreed that Dr. Wiza came very quickly. All of the obstetricians who gave expert evidence were agreed that this was a remarkably rapid response on the part of Dr. Wiza, - less than a third of what they believed would have been a reasonable response time in the circumstances. Dr. Wiza gave evidence that Mrs. Fitzpatrick had stopped pushing before he arrived in the room and, thereafter only pushed when he instructed her to push. Despite the very strong, indeed almost indignant, evidence from Mr. Clements that a further vaginal examination was wholly unnecessary and undesirable in the extreme emergency prevailing, (even at 07.20 hours), Dr. Wiza insisted that he had no option, none whatsoever, but to carry out a vaginal examination himself and, that he could not have done so had Mrs. Fitzpatrick been pushing. Dr. McKenna, Professor Baker, Professor Turner and Mr. Woolfson all agreed that it would have been substandard in Dr. Wiza not to have examined the CTG Trace, carried out an abdominal examination and also a vaginal examination before proceeding any further. Staff Midwife Murphy, Senior Midwife O'Dwyer and Dr. Wiza all gave evidence that when he arrived in Mrs. Fitzpatrick's room he first examined the CTG Trace, then immediately carried out an abdominal examination and immediately after that had put on surgical gloves and carried out a vaginal examination of Mrs. Fitzpatrick. While it is very difficult not to have considerable sympathy with Mr. Clement's opinion, nonetheless I am satisfied on the overwhelming majority of the expert evidence that Dr. Wiza was entirely justified in considering that he could not, even in the face of such dire emergency, safely deliver the plaintiff without first carrying out these preliminary procedures. For these reasons I am quite satisfied that Mrs. Fitzpatrick stopped pushing at 07.28 hours. Therefore, on Dr. Wiza's evidence he could not have arrived in her room before that time.

109. Staff Midwife Murphy gave evidence that at the same time as Senior Midwife O'Dwyer decided to turn off the Oxytocin, (that is at 07.15 hours or 07.20), hours, Senior Midwife O'Dwyer decided also to call the doctor. However Staff Midwife Murphy told the Court that she could not recall when Dr. Wiza was actually called other than by reference to the Partograph Notes on Labour and the comments on the cardiograph, written, it was accepted, by Senior Midwife O'Dwyer. Senior Midwife O'Dwyer was asked why she did not leave Staff Midwife Murphy to assist Mrs. Fitzpatrick in her active pushing and to go herself to summon Dr. Wiza. Senior Midwife O'Dwyer told the court that she could not do so as the plaintiff might be delivered and it was essential that she be present. It therefore seems highly improbable that Senior Midwife O'Dwyer, regardless of any earlier decision to call Dr. Wiza did in fact do so before Staff Midwife Murphy had marked "stopped pushing" on the cardiograph at 07.28 hours, as this would have necessitated her leaving the room.

110. I find on the evidence that after Mrs. Fitzpatrick had stopped pushing, Senior Midwife O'Dwyer informed Mrs. Fitzpatrick that she needed an instrument delivery and, that she was going to call the doctor. I find on the evidence that the two midwives then set about making the necessary preparations for an assisted vaginal delivery and that there was a limited conversation between Senior Midwife O'Dwyer and Mrs. Fitzpatrick as to what an assisted delivery might involve. These two matters most likely proceed simultaneously. As with almost every other aspect of this case there was disagreement between the parties on both these matters.

111. Mrs. and Mr. Fitzpatrick told the court that nothing was said to Mrs. Fitzpatrick about the doctor being called and that the bottom portion of the delivery bed was not removed and placed against the wall and her legs were not placed in paddles. Staff Midwife Murphy told the court that when Senior Midwife O'Dwyer told Mrs. Fitzpatrick that she needed an assisted delivery, Mrs. Fitzpatrick had asked what that involved and Senior Midwife O'Dwyer had said that it probably involved a ventouse but it was a decision for the doctor to take. Staff Midwife Murphy was certain that she and Senior Midwife O'Dwyer had removed the lower portion of the delivery bed which is designed to be so disassembled in order to facilitate an instrument assisted vaginal delivery. Senior Midwife O'Dwyer told the court that she told the Fitzpatricks that she was going to call the doctor as the baby showed signs of being tired and that Mrs. Fitzpatrick needed an assisted delivery. Mrs. Fitzpatrick, she said, had asked what this meant and she had replied that it probably meant a ventouse or forceps, but that it was a decision for the doctor. She told the court that Mrs. Fitzpatrick then asked her what a ventouse was and she replied that it was suction cup. Senior Midwife O'Dwyer told the court that she then assisted Staff Midwife Murphy in removing the bottom part of the bed and placing it against the wall. She then left the room to call Dr. Wiza.

112. In find on the balance of probabilities that the detachable lower portion of the delivery bed was removed by the midwives. Dr. Wiza had no doubt during his evidence that it had been removed before he arrived. I am satisfied on the evidence, particularly the evidence of Medical Midwife Manager Fanagan, and the uncontradicted evidence of Professor Turner, that while a ventouse assisted delivery could be carried out, though with considerable inconvenience, with the delivery bed intact and, that paddles were not employed in this procedure, a forceps assisted delivery could not possibly be carried out with the lower portion of the delivery bed in situ unless the obstetrician placed the mother in a transverse position across the bed, something which frequently has to be done in home delivery cases. Professor Turner told the court that paddles or stirrups when available are always employed for a forceps assisted delivery. It was common case between the parties that Dr, Wiza had abandoned his attempt at a ventouse assisted delivery and was intending to carry out a forceps assisted delivery when the plaintiff was born. There was however, no evidence that Mrs. Fitzpatrick was in the meantime moved into a transverse position across the bed or that the detachable lower portion of the delivery bed was removed, (which on the evidence causes the foot rests or "paddles" to swing automatically into place).

113. I also find on the balance of probabilities that the midwives recollection that there was an exchange of remarks, as indicated, between Senior Midwife O'Dwyer and Mrs. Fitzpatrick is more likely to be correct. In this regard, I find that Senior Midwife O'Dwyer had historically always offered some explanation to Mrs. Fitzpatrick as to what she was about to do. I do not believe however that Senior Midwife O'Dwyer said anything at all at this time about the baby showing signs of being tired and I prefer Staff Midwife Murphy's recollection of the conversation between Mrs. Fitzpatrick and Senior Midwife O'Dwyer. Having regard to the cardiotocograph record at 07.20 hours to say that the baby was "tired" would have been a totally extraordinary and altogether unwarranted interpretation of the then appalling CTG Trace and at 07.30 hours it would be been a barefaced untruth and a deliberate deception.

114. I find on the evidence that these preparations took approximately 2 to 3 minutes to complete. All the necessary equipment for an assisted vaginal delivery was ready prepared on a trolley and Staff Midwife Murphy simply fetched in this trolley from the adjoining room. While the special delivery bed is designed to permit the lower section of the bed to be easily removed I find on the evidence that the removable footend and separate mattress are somewhat heavy and cumbersome. In these circumstances it is very probable that Staff Midwife Murphy did ask Senior Midwife O'Dwyer to assist her in removing these items and stacking them out of the way against a wall of the room. It is altogether improbable that these activities would have been going on while with Mrs. Fitzpatrick was being encouraged to push. I find therefore on the evidence and the balance of probabilities that Senior Midwife O'Dwyer in fact called Dr. Wiza not at 07.20 hours as claimed by her, but at 07.30 hours or very shortly thereafter. I am satisfied on the evidence, particularly the evidence of Professor Baker which was clear emphatic and unequivocal on this point, that it was substandard and negligent on the part of Senior Midwife O'Dwyer not to have called Dr. Wiza until 7.30 hours.

115. It was accepted that the inverted comment "Dr. Wyza called" was written by Senior Midwife O'Dwyer on the cardiograph at a point on the horizontal time scale equivalent to 07.20 hours. The Partograph contains the following Note on Labour written and signed by Senior Midwife O'Dwyer:-

> "07.20 hours. CTG noted – prepared for assisted delivery – Dr. Wiza called. Paed[iatrician] called."

116. The paediatrician Dr. Kennedy was not called in evidence though I find that the evidence established that she came to Mrs. Fitzpatrick's room shortly after Dr. Wiza and remained somewhere in the room or at the door of the room throughout the delivery of the plaintiff who was then given immediately into her care. It is therefore probable that she would have been in a position to give important evidence to the court not only regarding the time at which she was called by Senior Midwife O'Dwyer but also with regard to the highly controversial events which the defendant claims occurred during the second stage of labour up to the delivery of the plaintiff. This failure to call Dr. Kennedy or to explain her absence is something to which I am entitled to attach some weight in arriving at my decision in this tragic case.

117. It was submitted on behalf of the defendant that the court must accept this Partograph Note on Labour as a contemporaneous and fully accurate record of what occurred as therein recited because the plaintiff had not put specifically to Senior Midwife O'Dwyer that it was a fraudulent misstatement, an unavoidable conclusion should the court hold that Dr. Wiza was not in fact called at 07.20 hours. On behalf of the plaintiff it was accepted that all the matters mentioned in this Note on Labour did in fact occur and issue was taken only with the stated time of 07.20 hours as being the time when these matters occurred. Senior Midwife O'Dwyer was cross examined at length with a view to establishing that these events did not occur at 07.20 hours but at 07.30 hours or even later. It was further put to Senior Midwife O'Dwyer that this particular Note on Labour and also the two preceding Notes on Labour timed by her at 07.15 hours and 07.10 hours were not in fact written at these times but were written at 08.45 hours, the same time as she wrote the identified retrospective Note on Labour. It was put perfectly clearly to Senior Midwife O'Dwyer, the admitted author of this note, that it was not a contemporaneous note and that the events described in it did not occur at 07.20 hours as stated by the Note. In these circumstances, I find that it would be absurd in this court to hold that the Note must be regarded as an accurate and contemporaneous record merely because it was not put directly to Senior Midwife O'Dwyer that she had deliberately and fraudulently written 07.20 hours for the purpose of counterfeiting the record. I am quite satisfied that it was very clearly and unequivocally put to Senior Midwife O'Dwyer, but without being unnecessarily offensive, that the time recorded for these events was wholly incorrect and that to this extent the record was inaccurate. The weight to be given to this evidence is of course a matter for the court. As appears from the aforecited evidence of Staff Midwife Murphy the decision to call Dr. Wiza and the implementation of that decision may not have been simultaneous and Senior Midwife O'Dwyer's recollection of when she wrote this Note on Labour may not be accurate. I find that this Note on Labour is inaccurate and misleading as to the time when the events described in it occurred, but that is not necessary for me to find, and I do not find that the record was deliberately falsified by Senior Midwife O'Dwyer.

118. Though it is abundantly clear from the evidence that very significant and worrying changes were occurring in the cardiotocograph record between 06.30 hours and 07.10 hours, there is not even the most cryptic reference to these changes in the Partograph Notes on Labour, a matter particularly remarked upon by Mr. Woolfson. I find on the evidence of the expert witnesses that these Notes on Labour are, for a number of reasons, such as medical audit and medico-legal considerations, to be regarded as documents of the utmost importance and should present as complete and accurate a picture as possible consistent with their nature, the circumstances in which they are written and the fact that they are notes and not intended to be exhaustive narratives.

119. The Note made and signed by Senior Midwife O'Dwyer and timed by her 07.15 hours states as follows:-

> "Oxytocin turned off – FHR 60BPM same recovered 135BPM."

120. This statement with regard to the fetal heart rate is a total misrepresentation of the very shocking reality at this time. Senior Midwife O'Dwyer made the valid point that the original cardiotocograph print-out is kept as part of the Patient Chart and is always available and, that attention to the patient must always take priority over note taking. However, it has been pointed out these traces are fragile documents which are all too often lost or damaged. In my judgment writing an accurate and informative Note on Labour takes no more time than writing a misleading and inaccurate Note. Moreover, in my judgment neither of these considerations could possibly justify such a distorted and unrepresentative picture of the plaintiff's health as that presented by this Note on Labour timed 07.15 hours. It is simply not acceptable to say that it was justified, without any qualification or reservation, because it was an accurate record of what had appeared on the digital display on the face of the CTG monitor for a second or part of a second at 07.15 hours.

121. The Partograph Note on Labour made and signed by Senior Midwife O'Dwyer and timed by her at 07.10 hours reads:-

> "CTG noted – V[aginal] E[xamination] to assess, longitudinal lie, cephalic presentation, no cord or placenta felt, cervix fully dilated, clear liquor draining, FHR 132bpm."

122. In a space reserved for that purpose in the bottom left hand corner of the first page of the Partograph marked "Full Dilatation", I find on the evidence that Senior Midwife O'Dwyer wrote "07.10". However, on the Dilatation of Cervix Graph on the same page of the Partograph, Senior Midwife O'Dwyer placed an "X" mark in front of the 9 hours in labour, (07.05 hours) line. In cross examination she said that this mark was "a bit off", while accepting that all the other "X" marks corresponded with the times recorded on the Notes on Labour. Senior Midwife O'Dwyer, Mr. Woolfson and Professor Turner all gave evidence that the written record should be regarded as correct and this chart was intended as a progress chart only to provide continuity, and in absence of sub-divisions of the 1 hour spaces into minutes, the position of the "X" was not meant to be and could not be totally accurate. This suggests itself as a logical and reasonable explanation of the problem. However, in another document in Mrs. Fitzpatrick's Chart entitled "Active 2ND Stage Fetal Heart Record", which I find on the evidence was also completed and signed by Senior Midwife O'Dwyer, the "Start Time" is given as 07.10 hours but the actual graph which ends with the birth of the plaintiff at 08.03 hours, covers a period of 63 minutes on the

horizontal time scale, thereby giving a starting time of 07.00 hours. When Senior Midwife O'Dwyer was questioned about this she said that the graph must be incorrect. Neither Senior Midwife O'Dwyer not Staff Midwife Murphy could explain the presence of, or say who made the faint "X" mark on this Graph at 02.05 hours. Despite the very controversial circumstances surrounding the plaintiff's birth and the meeting on 16th January, 2002, the carbon copy of the Partograph was very surprisingly destroyed in accordance with routine hospital procedure.

123. In the Note on Labour made and signed by Senior Midwife O'Dwyer and timed 07.15 hours, it is stated *inter alia*, "Oxytocin turned off". I find on the evidence that Senior Midwife O'Dwyer wrote on the cardiograph at 07.15 on the horizontal time scale, "Oxytocin off". Yet, when one looks at the Oxytocin/Contractions Box Chart on the Partograph, which the evidence established as kept throughout by Staff Midwife Murphy, next to the legend, "Oxytocin off" is written "07.20" which appears to have been altered from "07.15". Staff Midwife Murphy gave evidence that she erroneously continued to palpate Mrs. Fitzpatrick and to enter contractions in this Box after the Oxytocin had been turned off. She said that when she realised her error she drew a horizontal line through the last four entries, Nos. 72 to 75 inclusive and wrote the word "error" over them.

124. I am satisfied for all these reasons, that this Court could not rely on the accuracy of the Partograph from the 06.30 Note on Labour onwards with any degree of assurance and could not accept that in this period it provides any sort of reliable corroboration of the evidence of Staff Midwife Murphy and Senior Midwife O'Dwyer as to the fact or the timing of events stated by them to have occurred from 06.30 hours onwards.

125. There is a break of just over 1 minute in duration in the cardiotocograph record from 07.38 hours to approximately 07.39.5 hours. The evidence established that at 07.38.5 hours the cardiotocograph machine automatically changed the notation format which is printed automatically every 10 minutes from "DECG" (Direct Electrocardiograph) to "US2" (Ultrasound/External Probe). I find on the evidence that this signalled the removal of the fetal scalp electrode from the plaintiff's scalp. I find on the evidence that this was done to enable the silastic cup of the ventouse, (a vacuum extractor) to be applied to the leading part of the plaintiff's scalp. I reject the suggestion that it was removed by Dr. Wiza to enable him to carry out a vaginal examination. I accept the evidence of Dr. Wiza and Senior Midwife O'Dwyer confirmed here by the total cardiotocograph record, that the fetal scalp electrode is always left in place when carrying out a vaginal examination because it does not hinder the carrying out of the procedure in any way and the midwife or obstetrician does not wish to interrupt the vital flow of accurate information concerning the fetal heart rate provided by it. No challenge was made during the hearing of this action to the accuracy of the internal time keeping mechanism of this cardiotocograph machine. I find that the importance of this mechanically indicated change of modality is that it fixes 07.38.5 hours beyond argument as the time when Dr. Wiza, having completed his preliminary examinations removed the fetal scalp electrode from the plaintiff's head in order to apply the ventouse cup for the first time. On Dr. Wiza's own evidence and, on the evidence of the obstetricians who gave expert evidence in this case, I find that Dr. Wiza after he had arrived in Mrs. Fitzpatrick's room took about 2 minutes to examine the CTG Trace, 1 or 2 minutes to carry out the abdominal examination and 2 or 3 minutes to put on surgical gloves, carry out the vaginal examination and inject the perineum with a local anaesthetic. Working backwards this corroborates the other evidence indicating that Dr. Wiza was called at 07.30 hours or shortly thereafter and was present in Mrs. Fitzpatrick's room at 07.32 hours or 07.33 hours, as noted by Senior Midwife O'Dwyer on the cardiograph at 07.30 hours.

126. Senior Midwife O'Dwyer recalled that Dr. Wiza, after he had completed the vaginal examination told the Fitzpatricks that the plaintiff needed to be delivered and he was going to use a ventouse. It will be recalled that Mrs. and Mr. Fitzpatrick gave evidence that Dr. Wiza did not speak to them at all until after the plaintiff and the placenta had been delivered, when he advised Mrs. Fitzpatrick that the stitches which he had inserted in her perineum might appear tight for some days. I have already found that Mrs. and Mr. Fitzpatrick are mistaken in this recollection as regards the carrying out of the fetal blood sample. I shall defer until later in this judgment a decision as to whether Dr. Wiza spoke to Mrs. and Mr. Fitzpatrick during the second stage of labour up to the delivery of the plaintiff. Meanwhile, I find that if Dr. Wiza did speak to Mrs. and Mr. Fitzpatrick at this time it is highly probable that he made the remark recalled by Senior Midwife O'Dwyer.

127. In giving evidence in chief Dr. Wiza told the court that after he had completed the three preliminary examinations and advised Mrs. Fitzpatrick that he needed to do a ventouse assisted delivery, it had taken between 6 and 8 minutes to persuade Mrs. Fitzpatrick to give her consent to this procedure. Senior Counsel for the plaintiff objected to this evidence on the basis that this critically important matter was not pleaded, had not been raised with any of the witnesses, lay or expert, who had given evidence in the plaintiff's case over the preceding twenty seven days of the hearing nor had any application been made to amend the pleadings in this regard. He also adverted to the fact that there was no reference to this alleged delay in any of four reports furnished to the defendant by Midwife Keenan, in any of two similarly furnished by Professor Turner or in a report furnished to the defendant by Dr. MacMenamin. (not called in evidence). In a report of March 2003, Professor Baker referred to the obtaining of consent "taking several minutes". In his reports Mr. Woolfson merely stated that Mrs. Fitzpatrick had "ultimately agreed" to the procedure. These reports had been furnished to the plaintiff's solicitors in accordance with the provisions of S.I. 391 of 1998 Rules of the Superior Courts No. 6. Senior Counsel for the defendant responded that he had referred to this delay in addressing the Court. No criticism of Mrs. Fitzpatrick was intended. She was, he said, entitled to take time to consider the position and Dr. Wiza was merely explaining why he had not proceeded to carry out the assisted vaginal delivery of the plaintiff sooner. The defendant did not wish to seek an amendment of the pleadings in its defence to plead this matter.

128. I am fully satisfied on the evidence that Dr. Wiza is totally mistaken in this recollection and that no such 6 to 8 minutes discussion or delay took place. It is only if Dr. Wiza was called by Senior Midwife O'Dwyer at 07.20 hours and had arrived at 07.22 hours or 07.23 hours that this issue could arise at all. If, as I find, Dr. Wiza was not in fact called by Senior Midwife O'Dwyer until 07.30 hours or very shortly thereafter, and arrived in Mrs. Fitzpatrick's room at 07.32 hours or 07.33 hours, then, by reference to the unassailable fixed point of the first application of the ventouse at 07.39 hours, there could be no time for any alleged 6 to 8 minute discussion with Mrs. Fitzpatrick in order to convince her to permit a ventouse assisted vaginal delivery. I find on the evidence that on a Standard Form Report Sheet with the title "Operative Vaginal Delivery/Repair of Perineum" completed by him at 08.30 hours, only 27 minutes after the plaintiff had been delivered, Dr. Wiza wrote *inter alia* the following:-

> "Ventouse assisted delivery for poor CTG. (silastic cup) … procedure explained to patient. Cup applied and checked … etc."

129. I find that it is significant that this important Report does not record the time at which Dr. Wiza was called by Senior Midwife O'Dwyer or the time at which he arrived in Mrs. Fitzpatrick's room. There is no reference in this Report to a resistance or disinclination on the part of Mrs. Fitzpatrick to consent to a ventouse assisted vaginal delivery nor is there any reference to 6 to 8 minutes spent persuading her to agree, even though the same note makes reference to attempts to persuade Mrs. Fitzpatrick to agree to other procedures. It will also be recalled that as regards the fetal blood sample, Dr. Wiza wrote in the Partograph Notes on Labour at 05.10 hours, "FBS offered – patient thinking about the offer". It seem to me improbable, that if it had occurred, that Dr. Wiza would not have made a similar note with regard to the much more serious matter of a very significant and very crucial delay on the part of Mrs.

Fitzpatrick in agreeing to permit a ventouse assisted vaginal delivery, at a time when on the expert evidence Dr. Wiza and Senior Midwife O'Dwyer must have known that the plaintiff was dying.

130. Nothing at all appears in the Partograph Notes on Labour, even in the retrospective Notes on Labour, which I find on the evidence was written by Senior Midwife O'Dwyer at 08.45 hours on the morning of the 26th December, 2001 that Dr. Wiza had explained to Mrs. Fitzpatrick that he needed to do a ventouse assisted delivery, that Mrs. Fitzpatrick had declined and that it required a period of between 6 and 8 minutes to persuade her to give her consent. Significantly in my view, remarks of this nature do appear in this retrospective Note on Labour regarding an episiotomy and a forceps assisted delivery. Dr. Wiza told the court that his examination of the cardiotocograph record showed him that an emergency involving the plaintiff had existed since 07.13 hours, and that the plaintiff had been in difficulties for at least 10 minutes before that. When, on the expert evidence with particular reference to that of Professor Turner not just minutes but even seconds counted if the plaintiff was to be saved from death or from irreversible brain injury, in my judgement it is altogether improbable, given the virtual certainty of some form of future inquiry if the plaintiff died or suffered such brain injury, that if Dr. Wiza was forced to spend 6 to 8 minutes convincing Mrs. Fitzpatrick of the need for a ventouse assisted vaginal delivery at his time, that he or Senior Midwife O'Dwyer but most probably both, would not have recorded this fact in his Report written later or in the retrospective Partograph Note on Labour or in some other contemporaneous record.

131. Further, having seen and heard Dr. Wiza giving evidence and having observed at first hand the reaction in the court to this evidence I am entirely satisfied that this alleged 6 to 8 minute conversation with Mrs. Fitzpatrick never took place, but was most probably something of which Dr. Wiza had convinced himself in retrospect between December 2001 and April 2007, probably in the context of re-examining the cardiotocograph record with the comments written thereon. Professor Baker who gave evidence in the case for the defendant was critical of this practice of writing comments on the cardiotocograph print-out.

132. To recapitulate, I find on the evidence that Dr. Wiza was not called by Senior Midwife O'Dwyer at 07.20 hours but was called by her at 07.30 hours or very shortly thereafter. I find Dr. Wiza arrived in Mrs. Fitzpatrick's room at 07.32 hours or 07.33 hours and having examined the CTG Trace, carried out an abdominal examination and a vaginal examination and infiltrated the perineum, had removed the fetal scalp electrode at 07.38.5 hours and applied the ventouse silastic cup at 07.39 hours. There was no criticism on the part of any of the obstetricians who gave expert evidence of Dr. Wiza opting for a somewhat slower ventouse assisted rather than a forceps assisted vaginal delivery.

133. I find on the evidence of Professor Fleming CBE Consultant Neo-Natologist and Professor of Infant Health and Developmental Physiology, University of Bristol and, Professor Hill Consultant Paediatric Neurologist and Professor of Pediatrics, University of British Columbia whose qualifications and experience I found to be particularly pertinent and impressive, both of whom gave evidence in the case for the plaintiff, that the plaintiff, to the point of almost total certainty suffered a hypoxic-ischemic injury to his brain. I find on this expert evidence that this injury has caused his present levels of gross neurological dysfunction. I find on the evidence of these expert witnesses that the plaintiff's liver, kidneys and blood forming system are also affected as a consequence of this injury.

134. I find on the evidence of these experts that this hypoxic-ischemic injury started to occur at 07.10 hours and continued occurring thereafter until the plaintiff was delivered at 08.03 hours. I find on the evidence that between 07.10 hours and 07.30 hours the plaintiff was getting oxygen for 20 or 30 seconds only between the uterine contractions. Though a fetus can for a time sustain metabolism without oxygen, lactic acid builds up and the heart rate starts to fall in the recovery period. I find on the evidence of the obstetricians who gave expert evidence, that this picture of serious fetal compromise was exactly the picture shown by the cardiotocograph trace between 07.10 hours and 07.20 hours. Professor Hill and Professor Fleming both agreed that they would defer to the opinion of an obstetrician on the interpretation of a CTG Trace.

135. I find on the evidence that between 07.20 hours and 07.30 hours the falling peaks and troughs seen on the CTG Trace indicated unequivocally that the plaintiff was not getting oxygen, that lactic acid had built up and that the plaintiff could not continue to compensate. The plaintiff was now close to suffering irreversible brain injury. I find on the evidence that after 07.38 hours the CTG Trace is completely unreliable, as a diagnostic aid and that the Trace pattern has to be regarded as an artefact and not as showing an improvement in the fetal heart rate. I find on the evidence that at 07.38½ hours, where the comment "Ventouse applied" is written on the Trace, the plaintiff was in a life threatening difficulty. When delivered at 08.03 hours the cord Ph, - arterial 6.96 and venous 6.98, - indicated severe acidosis and imminent death. This was corroborated by the Apgar Score which was initially recorded as "0 at 1 minute" and sometime later was changed to "1 at 1 minute". An Apgar Score of 0 at 1 minute indicates that the plaintiff was initially considered to have been born dead.

136. I find on the evidence of Professor Hill, that fact that the plaintiff suffers from seizures and mental retardation and, the fact that his present brain volume is grossly micro-cephalic atrophied, due to extensive sub-cortical necrosis, indicates that he suffered a prolonged partial hypoxic-ischemic insult to the white matter of the cortex and sub-cortical areas of both hemispheres of his brain. I find that this damage occurred slowly but over a period of time of less than 1 hour prior to 08.03 hours. The plaintiff's brain is so devastated that his head circumference at the time of the hearing of this action was six to seven times below that mean. I find on the evidence that the plaintiff also suffered a brief but very severe near total hypoxic-ischemic insult with caused serious injury to the basal ganglia and the thalami of his brain. During this incident all blood circulation and oxygen delivery to these areas of his brain ceased. I find that the opinion of Professor Hill, whose area of particular skill of necessity involves the special study and understanding of neo-natal brain injuries, considered together with the obstetric evidence, in particular the expert evaluation of the cardiotocograph print-out establishes well beyond a probability, that the damage to the white matter of the plaintiff's brain was not merely secondary to the acute near total hypoxic-ischemic insult, but was caused by a separate prolonged partial hypoxic-ischemic insult to the plaintiff's brain.

137. I find on the perinatal and neonatal evidence that if the plaintiff had been delivered at 07.30 hours there was a much better than even chance that any (if indeed there was any), damage done could still be fully reversed. If he had been delivered between 07.10 hours and 07.20 hours the probability that any damage done (if again there was any), could be reversed would have been very much greater still. I find that from 07.30 hours onwards irreversible brain damage was occurring and increasing in an exponential fashion. Every minute after 07.30 hours resulted in more brain damage occurring. I find on the evidence that at 07.38.5 hours the plaintiff had already suffered irreversible brain injury. However, I accept the opinion of Mr. Clements which corresponds with the opinion of Professor Hill that even if the plaintiff had been delivered at 07.42 hours he would be in a very much better condition than he now is.

138. I find on the evidence that had Dr. Wiza been called by Senior Midwife O'Dwyer at 06.50 hours he would have responded just as quickly then to the notification of a shocking CTG Trace as he did later. On the evidence, at 06.50 hours Dr. Wiza was just resting in his room as he was later at 07.30 hours. I find on the evidence, particularly on Dr. Wiza's own evidence that if he had arrived in Mrs. Fitzpatrick's room at 06.54 hours or 06.55 hours, (I believe one must reasonably allow 2 minutes or so to Senior Midwife O'Dwyer to make the telephone call to Dr. Wiza and explain the reason for it), he would first have examined the cardiotocograph record for the

previous 45 minutes or thereabouts. I find on the evidence that this would have taken him 2 or 3 minutes. Dr. Wiza told the court that later, when he actually arrived in Mrs. Fitzpatrick's room, he had examined the CTG Trace back to 06.47 hours, - back to just before the deep and prolonged deceleration. I find on the expert evidence that this was both necessary and appropriate. I find on the evidence that Dr. Wiza would next have carried out an abdominal examination of Mrs. Fitzpatrick which would have taken 1 or 2 minutes. I find on the evidence that he would then have put on surgical gloves and carried out a vaginal examination which would have taken 2 or 3 minutes.

139. In his evidence, Dr. Wiza insisted, despite the very strongly expressed contrary opinion of Mr. Clements which was put to him, that as Registrar he could not make a clinical decision as to how to proceed on the basis of the vaginal examination of Mrs. Fitzpatrick carried out by Senior Midwife O'Dwyer at 06.30 hours and the resultant Partograph Note on Labour written and signed by her at 06.30 hours. In this respect all the other obstetricians who gave expert evidence during the course of the hearing agreed with Dr. Wiza. I do not accept that Dr. Wiza would have waited to see if the turning of Mrs. Fitzpatrick on to her left side and the reduction in the rate of the Oxytocin infusion from 120mls/ph to 90mls/ph would cause the CTG Trace to return to normal before acting as above. These were merely recognised standard measures employed probably mostly by midwives to endeavour to address a worrying fetal heart rate, but it was clearly his duty as the person with overall responsibility for the safety and well being of the plaintiff and his mother to ascertain the facts for himself and to arrive by the exercise of his own skill applied to these facts at his own clinical judgment as to the probable cause of the CTG Trace pattern and the correct measures to be taken in response to it.

140. I find on the evidence that Senior Midwife O'Dwyer carried out a vaginal examination of Mrs. Fitzpatrick at or about 06.30 hours and found her to be 9cm dilated. Mr. Woolfson and Professor Baker told the court and this opinion was not questioned, that once 9cm dilatation is achieved a procedure such as a vaginal examination will almost invariably cause the cervix to become fully dilated. I find on the evidence on the balance of probabilities that at between 06.59 hours and 07.03 hours Mrs. Fitzpatrick would have become fully dilated had Dr. Wiza carried out a vaginal examination. Senior Midwife O'Dwyer found that Mrs. Fitzpatrick was fully dilated though it will be recalled that an issue arose as to whether this was at 07.00 hours or 07.10 hours or somewhere between. In my judgment this timing lends very major support to the opinion of Mr. Woolfson and Professor Baker.

141. I am satisfied on the evidence that once he had ascertained that Mrs. Fitzpatrick was fully dilated, Dr. Wiza would have proceeded to deliver the plaintiff at once. I find on the evidence that having regard to a very worrying CTG Trace since 06.30 hours and to what was emerging in real time on the CTG Trace from 06.58 hours onwards, it would have been seriously substandard for Dr. Wiza to have adopted any other course. I find that there is nothing whatever in the evidence to suggest that Dr. Wiza would have disregarded the whole previous suspicious history of the CTG Trace with which he had made himself familiar, the particularly worrying more recent development since 06.30 hours, especially the deep and prolonged deceleration patterns at 06.47 hours and 06.50 hours the established, or at least establishing pattern of late decelerations or variable decelerations with a late component and, the fact that Mrs. Fitzpatrick had been 9 hours in labour, and for some wholly unidentified reason decided not to set about delivering the plaintiff immediately.

142. I find on the evidence that Dr. Wiza would have been informed by the midwives of Mrs. Fitzpatrick's birthplan or at least the features of it, relevant to second stage labour. It is clear on his evidence that he was informed by the midwives that Mrs. Fitzpatrick did not want an episiotomy and I am satisfied that he would have inferred from this, even if the midwives did not directly inform him that it was expressed in the birthplan, that she wanted the birth of the plaintiff to be as natural as possible. Further, all the expert witnesses were agreed that the appropriate course to adopt would be to encourage Mrs. Fitzpatrick to give a few pushes to see if the plaintiff would be delivered spontaneously and, if this did not occur, - and it did not in fact occur when tried between 07.15 hours and 07.21 hours, - to proceed without further delay to carry out an assisted vaginal delivery employing either a ventouse or a forceps for that purpose. I find that this is the course which Dr. Wiza would and should have adopted. I find on the evidence and, having regard to the foregoing, that Dr. Wiza, had he been called, as I find he ought to have been called by Senior Midwife O'Dwyer at 06.50 hours, would and should have commenced to deliver the plaintiff by ventouse assisted vaginal delivery at 07.13 hours at the very latest even allowing for three pushes and 4 minutes discussion about the ventouse. I find on the evidence that there was no physical or medical reason why the plaintiff should not have been delivered by 07.25 hours at the very latest so that any damage, (if any), which he might have suffered from 07.10 hours onwards would probably on a much better than even chance have been entirely reversible. Unless some circumstances beyond his control presented Dr. Wiza from delivering the plaintiff, I find that there is a clear causative link between the negligence of Senior Midwife O'Dwyer in not calling Dr. Wiza at 06.50 hours and the injury suffered by the plaintiff.

143. In the altogether unlikely event that a vaginal examination carried out by Dr. Wiza at between 06.57 hours and 07.00 hours would not have resulted in Mrs. Fitzpatrick becoming fully dilated, I am fully satisfied on the expert evidence, and particularly on his own evidence, that Dr. Wiza would have carried out a fetal blood sample to check whether the plaintiff had become or was becoming acidotic. Mr. Clements, Dr. McKenna, Professor Baker and Mr. Woolfson were all agreed that they would have carried out a fetal blood sample repeat test in the period up to 7.10 hours. I find on the expert evidence that the cardiotocograph record is a non specific screening test and if a worrying CTG Trace pattern is presenting, a fetal blood sample should be carried out to ascertain whether in fact the fetus has become or is becoming acidotic. This is the course which Dr. Wiza adopted at 05.10 hours having reviewed a far less worrying CTG Trace. I can find no reason on the evidence why he would adopt a different approach in the circumstances under discussion at between 06.57 hours and 07.00 hours. He also gave evidence that if the CTG Trace showed any abnormality he would do a fetal blood sample. He said that he might do a fetal blood sample two or three times if necessary in the course of labour.

144. There was much debate amongst the expert witnesses as to whether Dr. Wiza should have returned unsummoned to Mrs. Fitzpatrick's room or ought to have been recalled by Senior Midwife O'Dwyer to carry out another fetal blood sample after the elapse of 1 hour from 05.30 hours, the time when the result of the previous fetal blood sample test became available. I find it unnecessary to resolve this problem, because Dr. Wiza further told the court that he would always carry out a fetal blood sample during the course of a labour if it seemed to him to be necessary, for example, if he thought that the Ph was dropping below 7.27. Mr. Woolfson told the Court that in his opinion by 07.00 hours the Ph had fallen below 7.2 having regard to all the signs. Dr. Wiza told the court that if the PH was below 7.25 he would not repeat the foetal blood sample, but would deliver the fetus at once. I am satisfied on the expert evidence that at 06.55 hours Dr. Wiza, on the balance of probabilities would have been concerned having regard to the clinical signs that the Ph had fallen below 7.27 and would have carried out a fetal blood sample. I am quite satisfied therefore that Dr. Wiza would have carried out a fetal blood sample between 06.57 hours and 07.00 hours if Mrs. Fitzpatrick was still not 10cm dilated. All the obstetricians who gave expert evidence were agreed that from the arrival of the doctor to completion of the print out of the result, approximately 10 minutes must be allowed for a fetal blood sample test.

145. In these circumstances I find on the evidence that Dr. Wiza would have remained present in Mrs. Fitzpatrick's room waiting for the result of the fetal blood sample test and would have witnessed the late decelerations and probably also this sudden drastic deterioration in the CTG Trace at 07.10 hours. On the evidence of the obstetricians who gave expert evidence I find that after 07.10 hours it was too late for a fetal blood sample and there was no time to wait and see how the CTG Trace might evolve or whether

turning off the Oxytocin would have an effect. Professor Baker said it would not be logical and Dr. McKenna said it would be "testing this baby to death". I find that having regard to the suspicious history of this labour, to the fact that the decelerations were now clearly established as entirely out of phase with the causal contractions and to what would almost certainly have been a drop in the Ph, it would have been substandard in any Registrar of Dr. Wiza's skill and standing, acting with reasonable care to have left Mrs. Fitzpatrick's room and not to have continued personally to monitor the CTG Trace, the other clinical risk factors and, the progress of cervical dilatation, with a view to delivering the plaintiff as soon as possible.

146. I have no doubt whatever on the evidence that if called at 06.50 hours, Dr. Wiza would have been present in Mrs. Fitzpatrick's room at 07.10 hours, and have by then carried out the three examinations. I find that there is no evidence of any medical or physical reason why the plaintiff would then not have then been delivered by 07.25 hours, at the latest. Having seen and heard Dr. Wiza give evidence and, having carefully considered his evidence to the court, I am fully satisfied that on the 25th and 26th December, 2001 Dr. Wiza adopted a very cautious, conservative and deliberate approach in the practice of his profession, the sort of approach one would expect in a Specialist Registrar on the threshold of his career as a Consultant Obstetrician. It was abundantly plain to me that Dr. Wiza would not have taken any risks at all in the management of this particular labour and would not have adopted any form of wait and see approach or have left the management of the labour in the hands of Staff Midwife Murphy and Senior Midwife O'Dwyer had he been called, (or even informed) as he ought to have been called at 06.50 hours.

147. I have held, that but for the fact that Dr. Wiza was not called at 06.50 hours or even at 07.12 hours by Senior Midwife O'Dwyer, on the evidence there was no medical or physical reason why the plaintiff should not have been delivered at or before 07.30 hours. I find on the evidence of all the experts that if Dr. Wiza was called at 06.50 hours or even at 07.12 hours and was not obstructed by the plaintiff's parents then not to have delivered the plaintiff uninjured by 07.30 hours at the very latest was unacceptable, substandard and negligent. I have held that Dr. Wiza was called at 07.30 hours or very shortly thereafter and arrived in Mrs. Fitzpatrick's room at 07.32 hours or 07.33 hours. However, it is common case that the plaintiff was not delivered until 08.03 hours. It is the defendant's case that this delay in delivering the plaintiff, was due to the fact that Mrs. Fitzpatrick needed to be persuaded to permit a ventouse assisted vaginal delivery, that this took 6 to 8 minutes, that she then refused to grant permission for an episiotomy when one became necessary and, when the ventouse was unable to overcome the resistance offered by the perineum she refused to allow a forceps assisted delivery. The defendant submits that these same difficulties would have arisen whether Dr. Wiza had been called at 06.50 hours or at 07.12 hours, so that the plaintiff could still not have been delivered before 07.30 hours.

148. I have already found that there was no 6 to 8 minute delay as alleged in persuading Mrs. Fitzpatrick to permit a ventouse assisted vaginal delivery. Mrs. Fitzpatrick told the court that she would have consented to an episiotomy and to a forceps assisted vaginal delivery, or to any other procedure had she been told that there was something wrong with the plaintiff. Mr. Fitzpatrick told the court that he would have done everything in his power to persuade his wife to consent, had he been aware that there was something wrong with the plaintiff. Both the Fitzpatricks told the court that Dr. Wiza did not speak to either of them before the plaintiff was delivered at 08.03 hours. Both recalled that just before the plaintiff was delivered Senior Midwife O'Dwyer had said that the plaintiff was tired and that was the only reference made by Staff Midwife Murphy, Senior Midwife O'Dwyer or the doctor, they said they did not know his name then, - to the plaintiff's condition. The recollections of Staff Midwife Murphy, Senior Midwife O'Dwyer and Dr. Wiza in this regard are quite different to those of Mrs. and Mr. Fitzpatrick.

149. I find on the evidence that Mrs. and Mr. Fitzpatrick are mistaken in their recollection that Dr. Wiza did not speak to them or to either of them from the moment he arrived in Mrs. Fitzpatrick's room until after the plaintiff had been delivered. Dr. Wiza gave evidence which was not disputed or questioned that when using the ventouse, the obstetrician must pull and the mother must push at exactly the same time and in synchronisation with the contractions. He told the court that only he could tell Mrs. Fitzpatrick exactly when to push so as to synchronise her pushing with his pulling and with the contraction. I find that no other person could do this satisfactorily other than through a system of most elaborate and carefully prearranged signals between that person and the obstetrician. There was no evidence of a need for any such arrangement in the instant case and, it is altogether improbable that a Senior Midwife and a Specialist Registrar in Obstetrics would indulge unnecessarily in such an elaborate mime particularly against the background of a terminal CTG Trace and the life or death imperative to deliver the plaintiff immediately.

150. Staff Midwife Murphy, Senior Midwife O'Dwyer and Dr. Wiza all agreed that it was most important that Mrs. Fitzpatrick should remain as calm and co-operative as her circumstances would permit. The expert witnesses did not dissent from this opinion. In my judgment, nothing would be more calculated to cause serious agitation in a woman at Mrs. Fitpatrick's stage of labour than an obstetrician carrying out invasive procedures for almost thirty minutes without addressing a single word to her.

151. If I were to accept the recollection of Mrs. & Mr. Fitzpatrick I would of necessity have to conclude that Dr. Wiza's Operative Vaginal Delivery Report written at 08.30 hours on the 26th December, 2001 was a deliberate fabrication and a conscious and intentional fraudulent misrepresentation of events insofar as it states:-

> "Ventouse assisted delivery… procedure explained to patient, need for episiotomy explained to the patient… effort of convince patient failed."

152. I would be obliged to reach a similar conclusion regarding Senior Midwife O'Dwyer's stated retrospective Partograph Note Labour made at 08.45 hours on the 26th December, 2001, insofar as it states:-

> "Need for episiotomy explained to Michelle – same refused… Need for forceps delivery explained to Michelle and partner by Dr. Wiza same refused…."

153. Having observed Dr. Wiza giving evidence, while there were occasions when I considered his evidence to be somewhat exaggerated and over dramatic, I can find nothing in his background, training or personality which would suggest that as a matter of probability he said nothing at all to Mrs. or to Mr. Fitzpatrick throughout the entire second stage of labour, until after the plaintiff was born, not even in relation to the episiotomy and the forceps issue and not even so much as a greeting upon entering her room. That he would then conspire with Senior Midwife O'Dwyer that they would both present a wholly different picture of what had occurred in the Operative Vaginal Delivery Report prepared by him and in the retrospective Partograph Note Labour written by her, carefully ensuring that their notes generally corresponded.

154. I find, on the balance of probabilities that the recollection of Senior Midwife O'Dwyer is correct and that when Dr. Wiza came into Mrs. Fitzpatrick's room he briefly greeted Mr. and Mrs. Fitzpatrick with some polite phrase like, "Hello again". Mr. Fitzpatrick told the court that the Doctor seemed to him to be methodical, deliberate and even gentle in carrying out the fetal blood sample test. Having observed Dr. Wiza giving evidence I came to the same conclusion: that he was methodical, deliberate, careful and not in any way arrogant, opinionated, distant or discourteous. I find on the evidence that he had been asked by Senior Midwife O'Dwyer to come immediately to Room 5, (and not her office as he recalled), because the CTG Trace was shocking with bad decelerations. Despite the

existence of a serious crisis involving the plaintiff which this message almost certainly suggested to him, I find it improbable that Dr. Wiza, an experienced Specialist Registrar, would have become so overwhelmed by the seriousness of the problem as to overlook the ordinary courtesies on entering a room, and his expressed concern that Mrs. Fitzpatrick should remain calm.

155. I find that Senior Midwife O'Dwyer is correct in her recollection that Dr. Wiza having examined the CTG Trace, made an abdominal examination and carried out a vaginal examination, and informed Mrs. and Mr. Fitzpatrick that he needed to do a ventouse Assisted Delivery. I noted that Dr. Wiza seemed very conscious of what he perceived to be the overriding necessity of obtaining informed patient consent to any form of invasive medical procedure. That is what he did at 05.10 hours when he considered that a fetal blood sample was necessary. This also explains the note, "procedure explained to patient" in his Operative Vaginal Delivery Report written at 08.30 hours on 26th December, 2001. I find on the evidence that Dr. Wiza would never carry out a ventouse assisted vaginal delivery or an episiotomy or a forceps assisted delivery without first obtaining the consent of the patient and would not delegate the task of obtaining that consent to anyone else. For these reasons and, because I accept the evidence of Dr. Wiza that he had to synchronise Mrs. Fitzpatrick's act of pushing with his traction and with the contractions by telling her when to push, I am satisfied that Mrs. Fitzpatrick is incorrect in her recollection that Dr. Wiza did not discuss the ventouse with her and that she only realised that a ventouse was being employed when Mr. Fitzpatrick told her that he could see the plaintiff's head but was unable to tell her the colour of his hair because of the ventouse cup on his head.

156. On the evidence I do not accept that Dr. Wiza, when informing Mrs. and Mr. Fitzpatrick that he needed to do a ventouse assisted vaginal delivery added that the baby was tired and needed to be delivered. Staff Midwife Murphy considered that he had said this, "or words to that effect", while Senior Midwife O'Dwyer recalled that he said that the baby needed to be delivered though she could not recall the exact words. It was Dr. Wiza's own recollection that he told Mrs. and Mr. Fitzpatrick that the baby was not getting enough oxygen and needed to be delivered at once. Significantly there is nothing in the Partograph Notes on labour or in Dr. Wiza's Operative Vaginal Delivery Report to corroborate these recollections, all of which were firmly denied by Mrs. and Mr. Fitzpatrick.

157. I find on the expert evidence that from 07.20 hours onwards the CTG Trace clearly indicated that the plaintiff was getting no oxygen. In such circumstances for Dr. Wiza to have said that the plaintiff was tired or even very tired would have been a deliberate untruth and a gross deception of the Fitzpatricks, and on the expert evidence would have been seriously substandard in an obstetrician of his training and skill acting with reasonable care. While I have no doubt that Dr. Wiza correctly read the cardiograph record as indicating that the plaintiff was anoxic, I find on the balance of probabilities that he did not say this to Mrs. and Mr. Fitzpatrick, that he did not say that he needed to do a ventouse assisted vaginal delivery because the plaintiff was not getting enough oxygen and needed to be delivered at once. Had he said that, I have no doubt but that Mrs. and Mr. Fitzpatrick and also Staff Midwife Murphy and Senior Midwife O'Dwyer would never have forgotten it, and the whole subsequent tragic sequence of events on the balance of probabilities would never have occurred.

158. I find on the balance of probabilities that Dr. Wiza is correct in his recollection that he had told Mrs. and Mr. Fitzpatrick that he needed to do a ventouse assisted delivery. She had asked if it was not possible to deliver the plaintiff naturally and, that he had replied that it was but they did not have time to wait. I find on the balance of probabilities and for the above stated reasons, that Dr. Wiza did not add the words, "because the baby's heart rate if very low and it is not getting enough oxygen". Dr. Wiza told the court that Mrs. Fitzpatrick had then agreed to the use of the ventouse. I find on the evidence including the expert evidence of Mr. Clements that the entire business of informing Mrs. and Mr. Fitzpatrick of the need to carry out a ventouse assisted vaginal delivery and obtaining Mrs. Fitpatrick's consent to that procedure probably took 2 or 3 minutes at the most and, in all likelihood took place while Dr. Wiza was concluding the vaginal examination.

159. There was no real controversy as to what then occurred. Dr. Wiza removed the fetal scalp electrode, applied the silastic cup of the ventouse and checked that it was properly in place on the plaintiff's head. Senior Midwife O'Dwyer set the ventouse machine in operation and a vacuum was built up which sucked the plaintiff's head firmly into the cup. Dr. Wiza then told Mrs. Fitzpatrick when to push and synchronised her pushing with his traction and with the uterine contractions. After two contractions the plaintiff's head descended well, to near crowning on Mrs. Fitzpatrick's perineum but the ventouse cup was unable to distend the perineum sufficiently to permit the plaintiff to be delivered and the cup came off the plaintiff's head. I find on the expert evidence that this resistance is a very common and frequent occurrence in primigravids because the perineum had not been previously stretched and the ventouse machine has a particularly sensitive disengagement mechanism to prevent injury to the fetal skull. Dr. Wiza's Operative Vaginal Delivery Report of 08.30 hours of 26th December, 2001 corroborates this sequence of events as recalled by Mr. Fitzpatrick, Staff Midwife Murphy, Senior Midwife O'Dwyer and Dr. Wiza himself.

160. Mr. Fitzpatrick and Senior Midwife O'Dwyer both gave evidence that they saw Dr. Wiza reach for a package on the instrument trolley, open the package and take out an episiotomy scissors. Mr. Fitzpatrick told the court that he assumed the Doctor was going to carry out an episiotomy and he had said "No". He said that the Doctor appeared to be going to carry on with the procedure regardless but Senior Midwife O'Dwyer had said "No" in a raised voice and then he stopped. Dr. Wiza and Staff Midwife Murphy told the court that Dr. Wiza had explained to Mrs. Fitzpatrick that she needed an episiotomy but that she and Mr. Fitzpatrick would not agree. This recollection is supported by Dr. Wiza's Operative Vaginal Delivery Report of 08.30 hours, which records "need for episiotomy explained to patient but declined".

161. Mrs. and Mr. Fitzpatrick and Senior Midwife O'Dwyer all recalled that Senior Midwife O'Dwyer told Mrs. Fitzpatrick that she needed an episiotomy and asked her why she would not permit it pointing out that otherwise she would tear. All three recalled that Mrs. Fitzpatrick had replied that she did not mind if she tore. Mrs. Fitzpatrick recalled that she had added that she believed that a natural tear would heal easier than a surgical cut. Given her circumstances at this time I consider it most unlikely that Mrs. Fitzpatrick would have volunteered this explanation for refusing and she was confusing this occasion with discussions which had taken place at Medical Midwife Manager Fannigan's Ante Natal classes. It was Mr. Fitzpatrick's evidence that after Mrs. Fitzpatrick stated that she did not mind if she tore that Senior Midwife O'Dwyer had shrugged her shoulders and returned to the bottom of the bed.

162. Senior Midwife O'Dwyer gave evidence that after Mrs. Fitzpatrick had said that she did not mind if she tore she said to Mrs. Fitzpatrick that they were not doing an episiotomy to avoid her tearing but because the baby was very tired and needed to be delivered. She said that Mrs. Fitzpatrick answered "No". She said that she then told Mrs. Fitzpatrick that if she would not consent to an episiotomy they could not be responsible for the consequences for her or her baby. She said that Mrs. Fitzpatrick still said "No". Staff Midwife Murphy told the court that she recalled Senior Midwife O'Dwyer saying to Mrs. Fitzpatrick that she could not be responsible for the consequences if she continued to refuse "or words to that effect". In cross examination Dr. Wiza told the court that at this time and again later when a forceps assisted vaginal delivery became an issue, Senior Midwife O'Dwyer had said to Mrs. Fitzpatrick that if she did not allow them to do this she (Mrs. Fitzpatrick) was the one who was going to be responsible for it. Both Mrs. and Mr. Fitzpatrick very firmly, and in the case of Mrs. Fitzpatrick with apparent shock and very considerable outrage and disbelief, denied that Senior Midwife O'Dwyer had said these things to her. Mrs. and Mr. Fitzpatrick gave evidence that no one, not Staff Midwife Murphy, Senior Midwife O'Dwyer or the Doctor had at anytime during the labour said that there was something wrong

with the plaintiff, or that he was getting sick and needed to be delivered, or that he needed to be delivered quickly for his own safety, or that he was distressed, or that he needed to be delivered quickly because he was not getting enough oxygen.

163. Mrs. Fitzpatrick recalled that Senior Midwife O'Dwyer had said to her that the plaintiff was very tired but that this was just before he was delivered. She thought that this was because the labour had gone on for so long (nine hours and fifty seven minutes). Both Mrs. and Mr. Fitzpatrick told the court that there was no air of urgency whatsoever in the room. Staff Midwife Murphy and Senior Midwife O'Dwyer accepted that this was so and I am satisfied on the expert evidence that this was entirely proper. Mrs. Fitzpatrick gave evidence that the first time she felt that there might be something wrong with the plaintiff was after he was born and she noticed that he was not crying and that his arms seemed to be hanging down loosely by his sides. Mr. Fitzpatrick told the court that he told Mrs. Fitzpatrick after the birth that it was a little boy and that he was fine but that this was only to reassure her. He said that he noticed the plaintiff was not clearing his lungs and he saw about ten people at the door of the room so he knew something was terribly wrong with the plaintiff.

164. Mrs. and Mr. Fitzpatrick gave evidence that they did not know that the oxytocin had been turned off and that no one had discussed the CTG Trace with them. Mr. Fitzpatrick said that he saw the Doctor looking at the Trace and then speaking to the midwives about it but he had said nothing at all to them. In cross examination Mrs. Fitzpatrick told the court that if anyone had said that there was something wrong with the plaintiff she would have agreed to anything immediately. Mr. Fitzpatrick said in evidence that if he had been told that an episiotomy was necessary because the plaintiff needed oxygen he would have told Mrs. Fitzpatrick, and he had no doubt whatsoever that she would have immediately permitted it. Mr. Clements told the Court that in all his years of practice since 1963 he had never known a mother not to fully co-operate if told that her baby was short of oxygen and needed to be delivered at once. No one sought to qualify or to contradict this evidence from Mr. Clements.

165. I find on the evidence that Senior Midwife O'Dwyer wrote the following Note on Labour in the Partograph:-

> "Retrospective note written at 08.45 hours (26.12) At 07.50 hours.
>
> Need for episiotomy explained to Michelle – same refused.
>
> Ventouse cup came off – need for forceps delivery explained to Michelle and Partner by Dr. Wiza same refused spontaneous delivery of Male infant at 08.03… etc."

166. Senior Midwife O'Dwyer told the court that this Note on Labour meant that all these things had occurred prior to 07.50 hours as she had looked at the clock. I find myself quite unable to accept this evidence with regard to the timing of these recorded events.

167. I find on the evidence that the first attempt to deliver the plaintiff by ventouse assisted vaginal delivery starting at 07.39 hours must have taken about 6 minutes and it is possible that it took longer than this. Dr. McKenna and Mr. Clements considered that it would be reasonable to allow 10 minutes for a ventouse assisted delivery while Professor Turner and Mr. Woolfson considered 8 minutes to be sufficient, particularly in the dire emergency of the situation. The CTG machine print-out irrefutably fixes 07.38.5 hours as the moment when the fetal scalp electrode was removed and before which the silastic cup could not have been emplaced. I accept the evidence of Mr. Clements that the cup was almost certainly applied at 07.39 hours. The expert evidence established that the contractions were coming every two or three minutes and though Mr. Clements and Dr. McKenna considered that it would have taken longer I find that for Dr. Wiza to have checked the secure placement of the silastic cup and for the vacuum to be built up would have taken not more than two minutes using a modern machine.

168. When one looks at this retrospective Note on Labour written by Senior Midwife O'Dwyer the preposition "at" is very consciously and very deliberately placed and having regard to its position could not possibly be considered to be mere surplusage. In their common and ordinary usage the words employed must mean and could only mean that the events described occurred exactly at and after 07.50 hours up to 08.03 hours. There is nothing whatever to indicate that the words used should be given any special extended, restricted or technical meaning. It is worthy of note that Professor Baker and Professor Turner, both distinguished academics who gave evidence in the case for the defendant, interpreted this Note on Labour as meaning that the events described occurred between 07.50 hours and 08.03 hours. Indeed, Professor Baker was critical of the practice of making retrospective notes of this type and of making comments on the cardiotocograph print-out, particularly retrospective comments.

169. A Memorandum by Dr. Declan Keane, then Master of the National Maternity Hospital, dated 21st January, 2002 was proved in evidence by him. It states, *inter alia* the following:-

> *"Re: Meeting with Michelle Gilroy and Paul Fitzpatrick*
>
> *… Wednesday 16th January, 2002 at 10.30a.m. …*
>
> *In Attendance: Paul Fitzpatrick, Michelle Gilroy, Dr. Anne Twomey, Sr. Geraldine Duffy, Sr. Clare O'Dwyer and Dr. Declan Keane*
>
> The above meeting was arranged at the request of Michelle Gilroy and her partner Paul Fitzpatrick….
>
> This couple were extremely difficult to deal with in labour and there is copious documentation in the notes of the patient's continuing refusal to accept various forms of treatment including fetal blood sampling, oxytocin administration, forceps application and an episiotomy. In the end this delay in applying a forceps and performing an episiotomy *may* have had significant deleterious effects on the baby and *may be partly* responsible for its severe condition. (the emphasis is mine)
>
> … … …
>
> In addition the couple stressed at the meeting that if the labour ward staff on the night had pointed out the severity of the baby's condition they would have agreed to the various forms of treatment that they refused on the night. This was rejected by the Sister, who had explained to them quite clearly that she had said this to them on the night as indeed had Dr. Wiza, the Registrar who performed their delivery.
>
> … … …".

170. Dr. Keane accepted that the statement that Mrs. and Mr. Fitzpatrick were extremely difficult to deal with in labour was a record of what was said to him by Senior Midwife O'Dwyer. He accepted that Mrs. and Mr. Fitzpatrick had not refused a fetal blood sample and had not refused oxytocin administration. I have heretofore found on the evidence that there was nothing whatever untoward in their taking time to discuss these recommended procedures before agreeing to them, and they did not delay unduly in reaching their decision to permit the fetal blood sample and in agreeing to the administration of oxytocin.

171. I find on the evidence that Senior Midwife O'Dwyer did not, nor did Dr. Wiza, nor indeed did Staff Midwife Murphy (though on the evidence it was hardly her place to do so given the presence of the others) explain the severity of the plaintiff's condition to either Mrs. Fitzpatrick or Mr. Fitzpatrick at any time prior to the birth of the plaintiff. I cannot imagine how it could be legitimately stated that this couple were extremely difficult to deal with in labour. I have already found that they were encouraged to and did formulate a birthplan which was given to and discussed with Staff Midwife Murphy on Mrs. Fitzpatrick's admission to the labour ward, who then brought Senior Midwife O'Dwyer into the discussion. All of the matters of concern to them, other than the fetal blood sample, - and I am satisfied on the evidence that this was not discussed by Medical Midwife Manager Fanagan at the ante-natal classes, - and their preferences in respect of these matters were clearly signalled in this birthplan. On the evidence there is no doubt but that these were the very choices to which they thereafter sought to adhere and in respect of which they were later accused of being extremely difficult to deal with. I reject entirely the idea that they should be considered to have been difficult and at fault because they did not instantly abandon what they had indicated in the birthplan merely because the obstetrician indicated that he needed to do an episiotomy, and later, that he needed to carry out a forceps assisted delivery.

172. I find that the evidence clearly establishes that Mrs. and Mr. Fitzpatrick could be persuaded to and did in fact agree to change their minds, for example in relation to the administration of oxytocin and, could be convinced to permit a procedure once satisfied that it was necessary and would not hurt the plaintiff, for example the attachment of the fetal scalp electrode and the carrying out of the fetal blood sample. All the expert witnesses accepted that their behaviour as regards these matters was both natural and reasonable. Though the very second item on the front of the birthplan stated, "I would like to have a natural birth", I have found that Mrs. Fitzpatrick readily abandoned that position once Dr. Wiza and Senior Midwife O'Dwyer had told her that she needed to have an assisted vaginal delivery.

173. If I were to accept the evidence of Staff Midwife Murphy, Senior Midwife O'Dwyer and Dr. Wiza with regard to what they claim was said by Senior Midwife O'Dwyer and Dr. Wiza to the Fitzpatricks in relation to the need for an episiotomy, I would have to accept that Mrs. Fitzpatrick without feeling or scruple put her own perceived ease of healing before the life of her baby. No other possible construction could be placed on a statement by an obstetrician that the baby was not getting enough oxygen and its heart rate was very low and on statement by a Senior Midwife that unless she agreed to an episiotomy the midwives and obstetrician could not be responsible for the consequences for her and her baby. There was no evidence that Mrs. Fitzpatrick was so tired and so distressed by her long labour or in such pain that she was unable to comprehend what was allegedly said to her. In any event Mr. Fitzpatrick was present at all times.

174. I am satisfied that it is a universally acknowledged and established fact that save in the case of certain very infrequent and very tragic circumstances, expectant mothers are extremely solicitous for the well being of their unborn children. This is a matter of which I take judicial notice. There was no evidence of any such tragic circumstance in this case. I find on the evidence that Mrs. and Mr. Fitzpatrick had throughout the labour demonstrated this natural concern for the safety and well being of the plaintiff. They were very concerned he the might suffer pain or discomfort during the attachment of the fetal scalp electrode and during the taking of the fetal blood sample. In my judgment it is wholly inconsistent with this proven level of anxious care for the plaintiff that particularly Mrs. Fitzpatrick would consciously disregard an alleged warning that the plaintiff was not getting enough oxygen and needed to be delivered at once, merely because she had been told by another woman that a natural tear would heal more quickly than a surgical cut.

175. If Dr. Wiza had said what he claims to have said then I do not understand how he could have reasonably considered, given the entirely unnatural reaction of the Fitzpatricks, that the message that the plaintiff was in a life or death situation had got across to Mrs. and Mr. Fitzpatrick. I find on the expert evidence, particularly on the very strong evidence of Mr. Clements, Dr. McKenna and Mr. Woolfson, that there was a very heavy onus on Dr. Wiza to ensure that the Fitzpatricks were informed in as plain and as blunt terms as the situation demanded that the plaintiff was in extreme danger and that an episiotomy had to be performed at once if he was to be saved. Dr. McKenna gave evidence that the Fitzpatricks should have been told that it was a life or death situation for the plaintiff. Professor Baker said that a succinct explanation was necessary. Mr. Woolfson told the Court that it would be substandard not to have given appropriately worded advice as without it the Fitzpatricks could not have made an appropriate decision in relation to the episiotomy and the forceps. Mr. Woolfson agreed with Dr. McKenna and told the Court that Dr. Wiza should have been as blunt as was necessary with the parents. He should have said something like – we appreciate that you do not want on episiotomy but we cannot wait until you tear, because that could take another 30 minutes. If Mrs. and Mr. Fitzpatrick still refused, Dr. Wiza should have spelled it out plainly for them that the baby would suffer severe brain damage if she did not agree. If she still would not agree, he was of the same opinion as Dr. McKenna and Mr. Clements that Dr. Wiza, to save the plaintiff, should have done the episiotomy and apologised and explained later.

176. I find that there is a lack of consistency between the recollections of Staff Midwife Murphy, Senior Midwife O'Dwyer and Dr. Wiza as to what is alleged to have been said to the Fitzpatricks at this crucial time. The extremely laconic entries in the retrospective Partograph Note on Labour written by Senior Midwife O'Dwyer at 08.45 hours and in the Operative Vaginal Delivery Report written by Dr. Wiza at 08.30 hours, that the need for an episiotomy was explained to Mrs. Fitzpatrick but was refused do not identify the basis for that need, the nature of the explanations offered or the reasons given for the refusal. These were notes written after the plaintiff was delivered and when the extreme seriousness of the situation was known, and at a time when at least Senior Midwife O'Dwyer considered the Fitzpatricks to be extremely difficult people to deal with.

177. Three weeks after the birth of the plaintiff at the meeting in the hospital arranged at their request, Mrs. and Mr. Fitzpatrick in the presence of Senior Midwife O'Dwyer, (Staff Midwife Murphy and Dr. Wiza were not requested by their employer to attend this meeting and on the evidence there is very considerable doubt as to whether they were even aware that such a meeting was taking place), stressed that if the labour ward staff on the night had pointed out the severity of the plaintiff's condition they would have agreed to the episiotomy, and if necessary to the forceps assisted delivery. On the evidence if the episiotomy had been carried out there would have been no necessity for a forceps assisted delivery.

178. Though not mentioned in Dr. Keane's Memorandum I am satisfied on the evidence that Mrs. Fitzpatrick complained at the meeting on the 16th January, 2002 that no one had told her that the plaintiff was in distress or that anything was wrong with him. I accept the evidence of Mrs. Fitzpatrick because it accords with Senior Midwife O'Dwyer's own evidence that at the meeting on the 16th January, 2002 she said that she had told Mrs. Fitzpatrick that the plaintiff was very tired and needed to be delivered urgently. I accept the evidence of Mrs. Fitzpatrick that she had responded that Senior Midwife O'Dwyer had mentioned that the plaintiff was

tired only and that was just before he was delivered and that she had never said that he was in any distress. I accept the evidence of Mrs. Fitzpatrick that Dr. Keane had replied that words such as "distress" were not used in the National Maternity Hospital to women in labour and that she had responded that perhaps they should.

179. Senior Midwife O'Dwyer told the court that on that occasion they were anxious not to panic Mrs. Fitzpatrick. However, Mr. Clements, Dr. McKenna and Mr. Woolfson while accepting that this was generally a laudable object considered that in the circumstances prevailing at the time when the issue of the need for an episiotomy arose it should have been made unmistakably clear to Mrs. and Mr. Fitzpatrick by whatever plain blunt language was necessary, that the plaintiff was in serious difficulties and needed to be delivered at once and an episiotomy was necessary for that purpose.

180. I find on the evidence that Mrs. Fitzpatrick and also Mr. Fitzpatrick genuinely believed that the only matter at issue was that Mrs. Fitzpatrick would tear unless she agreed to an episiotomy. I find on the evidence that had Mrs. Fitzpatrick been aware that the plaintiff was in any distress she would have immediately consented to the episiotomy. I find on the evidence that Dr. Wiza and Senior Midwife O'Dwyer did not inform Mrs. and Mr. Fitzpatrick that the plaintiff was in distress and that his life was in danger, (which was the true position from 07.30 hours onwards), unless an episiotomy was performed at once, and the plaintiff was delivered immediately. I find on the evidence that nothing was said by Dr. Wiza or by Senior Midwife O'Dwyer that ought reasonably to have suggested to Mrs. or Mr. Fitzpatrick that some very serious problem had arisen in the labour and that they should immediately co-operate fully and unquestioningly with Dr. Wiza's requests and instructions. I find that this failure on the part of Dr. Wiza and Senior Midwife O'Dwyer was substandard and negligent and that but for this negligence Mrs. Fitzpatrick would have immediately consented to the episiotomy and, if necessary, to forceps assisted vaginal delivery. I am satisfied that it would be expecting far too much of a Registrar, even of a Specialist Registrar on the point of becoming a Consultant Obstetrician to have gone ahead and carried out an episiotomy despite the refusal of consent. This of course is entirely without prejudice to my finding that Mrs. Fitzpatrick would have given her consent had she been informed that the plaintiff was in any distress.

181. The Operative Vaginal Delivery Report completed by Dr. Wiza at 08.30 hours on the 26th December, 2001 referring to the refusal to permit an episiotomy states "effort to convince patient failed". Significantly the nature of the alleged effort is not even briefly described. I find that it would have been just as easy and just as economical with space to record something like, - patient told fetus lacking oxygen but still refused episiotomy. This after all is what Dr. Wiza now recalls that he said to Mrs. Fitzpatrick. The same is true of Senior Midwife O'Dwyer's retrospective Partograph Note on Labour made by her at 08.45 hours. If I accepted, which I do not, that Dr. Wiza when explaining that he needed to do a ventouse assisted delivery had said to Mrs. Fitzpatrick that the plaintiff's heart rate was very low, and that he was not getting enough oxygen and she then permitted him to proceed, it is very difficult to imagine how she could possibly have forgotten this less than twelve minutes later, and that Mr. Fitzpatrick who was by her side, had forgotten it also. I find on the evidence that Dr. Kennedy, the Paediatrician, arrived in Mrs. Fitzpatrick's room shortly after Dr. Wiza and remained present somewhere in the room or at the door of the room until the plaintiff was born and was immediately delivered into her care. In my judgment I am entitled to take into account and give weight to the fact that she was not called to give evidence.

182. Dr. Wiza gave evidence that he re-applied the ventouse silastic cup to the plaintiff's head and tried to deliver the plaintiff again, but the perineum would still not stretch sufficiently and the cup came off. He told the court that he again re-applied the cup, and again the cup came off. This evidence is supported by the recollection of Staff Midwife Murphy and Senior Midwife O'Dwyer, and is also in accord with Senior Midwife O'Dwyer's retrospective Partograph Note on Labour and Dr. Wiza's own Operative Vaginal Delivery Report. It was also the recollection of Mr. Fitzpatrick. What occurred then was a matter of further deep disagreement between the parties.

183. Dr. Wiza told the court that he now felt desperate. He said that he stood up and said to Mrs. Fitzpatrick that the matter was serious and he would have to use forceps to deliver the baby. To say that the matter was "serious" and Mrs. and Mr. Fitzpatrick deny that it was said, was a travesty of the true situation at this time. He told the Court that Mrs. Fitzpatrick had shouted at him and he repeated and emphasised the phrase, "she shouted, she actually shouted at me, no you will not, don't you touch me". He said that he was extremely shocked as he was only trying to help. He then stood back as there was nothing more he could do. In the light of the expert evidence I am quite unable to accept the validity of this statement. He said that Senior Midwife O'Dwyer was begging Mrs. Fitzpatrick to let him use the forceps but she continued to refuse. He said that Senior Midwife O'Dwyer then encouraged Mrs. Fitzpatrick to push and after four or five contractions the baby was delivered naturally.

184. Senior Midwife O'Dwyer told the court that she had anticipated a forceps delivery when the ventouse cup kept coming off and she had asked Staff Midwife Murphy to open the pack. At that point Dr. Wiza had said to Mrs. Fitzpatrick that he needed to do a forceps delivery. Senior Midwife O'Dwyer recalled that Mrs. and Mr. Fitzpatrick replied in unison, "No you won't". She then said to Mrs. Fitzpatrick that they were not doing this unnecessarily, that the baby was very tired. They both said "No". She then said that there was nothing better they could do that the baby was very very tired and needed to be delivered, but they both still answered "No". Dr. Wiza she said just stood there, he could do no more. Senior Midwife O'Dwyer told the court that she then got Mrs. Fitzpatrick to push and the plaintiff was delivered after three or four pushes. In giving this evidence Senior Midwife O'Dwyer became extremely upset and sobbed, "this baby was asking for help and we were not allowed to give it". Justice requires that I also record that Mrs. Fitzpatrick, Mr. Fitzpatrick and Clinical Midwifery Manager Keenan all became very distressed in giving evidence. Their distress, which I am satisfied was totally genuine is very understandable. Such suffering must stand as an indictment of this ghastly process for resolving these tragic cases even where, as in the instant case, the matter is handled as sensitively as possible by counsel on all sides.

185. Staff Midwife Murphy recalled that Dr. Wiza indicated, though she did not recall his exact words, that he needed to do a forceps delivery. Senior Midwife O'Dwyer had asked her to get the forceps which was in a package on the instrument trolley on her left hand side. When Mrs. and Mr. Fitzpatrick saw the forceps they both said "No, No". Mr. Fitzpatrick looked at the CTG machine and said to Mrs. Fitzpatrick that the baby's heart rate was fine. Senior Midwife O'Dwyer then got Mrs. Fitzpatrick to push a few times and the baby was delivered normally. Mrs. Fitzpatrick accepted that Senior Midwife O'Dwyer had said to her that the plaintiff was very tired, but insisted that this was just before he was delivered. She thought that Senior Midwife O'Dwyer was referring to the fact that the labour had gone on for so long, (nine hours and fifty seven minutes). In cross examination Mrs. Fitzpatrick told the court that Dr. Wiza had not said anything to her about a forceps. She denied that she and Mr. Fitzpatrick had shouted, "No you won't". It was put to her, though significantly no witness for the defence subsequently gave that evidence, that when Dr. Wiza had told her that he would have to use a forceps, she had refused and had tried to close her legs. She denied that Mr. Fitzpatrick had said anything to her about the plaintiff's heart rate being fine.

186. Mr. Fitzpatrick told the court that he saw the Doctor opening a package and taking out a forceps. He was certain that it was the Doctor who opened the package not one of the Midwifes. He said that about one minute after this the plaintiff was born. The Doctor had said nothing at all to him or to Mrs. Fitzpatrick and he denied that he and Mrs. Fitzpatrick had said "No, No" or "No you

won't". He denied that Senior Midwife O'Dwyer had said that they had to use the forceps and that they were not doing it unnecessarily. He said that he had not looked at the CTG machine, and said to Mrs. Fitzpatrick that the plaintiff's heart rate was fine. Senior Midwife O'Dwyer's retrospective Partograph Note on Labour and Dr. Wiza's Operative Vaginal Delivery Report were put to him and he said that they contained things that simply had not happened on the occasion.

187. I find on the evidence, on the balance of probabilities that Dr. Wiza did say to Mrs. and Mr. Fitzpatrick that he needed to use a forceps. I am satisfied on the expert evidence that this was the only option open to him which would overcome the resistance of the perineum without recourse to an episiotomy. I am totally convinced having seen and heard Dr. Wiza giving evidence that he would not attempt to carry out any such procedure without first obtaining Mrs. Fitzpatrick's permission. Senior Midwife O'Dwyer recalled that she had anticipated this situation and had asked Staff Midwife Murphy to get the forceps. Mr. Fitzpatrick recalled that he saw Dr. Wiza opening the package containing the forceps. I have already found that Mrs. and Mr. Fitzpatrick were incorrect in their recollection that Dr. Wiza did not speak to them at all until after the plaintiff had been delivered. I find that the recollection of Dr. Wiza, supported by the recollections of Senior Midwife O'Dwyer and Staff Midwife Murphy, is correct in this instance save that I find that he did not say that the matter was serious. If he had said that the matter was serious I am satisfied that Senior Midwife O'Dwyer and Staff Midwife Murphy would have recalled the fact and, it is altogether unlikely that Senior Midwife O'Dwyer would have detracted from this by saying that the plaintiff was very tired. I find that the retrospective Partograph Note on Labour made by Senior Midwife O'Dwyer at 08.45 hours is correct in recording that the need for a forceps delivery was explained to Mrs. and Mr. Fitzpatrick by Dr. Wiza.

188. This retrospective Partograph Note on Labour continues, "Same refused", while the 08.30 hours Operative Vaginal Delivery Report made by Dr. Wiza records, "Patient refused forceps application to deliver baby". I am satisfied on the evidence, on the balance of probabilities that Mrs. Fitzpatrick did say "No" and that Mr. Fitzpatrick probably repeated it for emphasis. Senior Midwife O'Dwyer told the court that she then said that they were not doing it unnecessarily: the baby was very tired and needed to be delivered. Both Mrs. and Mr. Fitzpatrick denied that Senior Midwife O'Dwyer had said, that they were not doing it unnecessarily. However, Mrs. Fitzpatrick did recall that Senior Midwife O'Dwyer had said that the baby was very tired. She said that she assumed that this was referring to the fact that the labour had gone on for so long and she did not know that there was anything wrong with the plaintiff.

189. I do not accept that Mrs. Fitzpatrick had shouted at Dr. Wiza, "No you will not, don't you touch me". As I have already stated it was put to Mrs. Fitzpatrick that she had also attempted to close her legs. This is alleged to have occurred after she had been told by Mr. Fitzpatrick that he could see the plaintiff's head. In my judgment this is totally improbable, but it must have been related to counsel as something which had occurred on that occasion. According to Senior Midwife O'Dwyer, Mrs. and Mr. Fitzpatrick "replied in unison, No you won't". It is significant that none of this most quite extraordinary behaviour is recorded anywhere in Senior Midwife O'Dwyer's retrospective Partograph Note on Labour, or in Dr. Wiza's own Operative Vaginal Delivery Report, even though Dr. Wiza and Senior Midwife O'Dwyer gave evidence that they were both terribly shocked, on that occasion. Dr. Wiza said that Senior Midwife O'Dwyer was begging Mrs. Fitzpatrick to permit him to use the forceps and she would not. On the evidence, I find that both Dr. Wiza and Senior Midwife O'Dwyer were fully aware that there was an emergency involving the plaintiff since at least 07.13 hours. If Dr. Keane's Memorandum of 21st January, 2002 is correct, at least Senior Midwife O'Dwyer had come to the belief that the Fitzpatricks were "extremely difficult to deal with" and, yet none of this alleged, absolutely shocking behaviour on the part of the Fitzpatricks appears either in Senior Midwife O'Dwyer's retrospective Notes on Labour or in Dr. Wiza's Operative Vaginal Delivery Report. When asked why this was so, Dr. Wiza said that he did not record it because he did not wish to appear judgemental. I find this explanation utterly implausible. How could recording something like, patient shouted "No you won't, don't you touch me" be judgmental: it is simply a statement of fact, and an important statement to be recorded in these circumstances. I find that all of this is exaggeration due to afterthought: that the recollection of Staff Midwife Murphy is correct, and that Mrs. and Mr. Fitzpatrick had simply said "No" when Dr. Wiza said that he needed to carry out a forceps assisted delivery. This recollection accords both with Senior Midwife O'Dwyer's retrospective Note on Labour and Dr. Wiza's Operative Vaginal Delivery Report.

190. Both Mrs. and Mr. Fitzpatrick gave evidence that there was never any hint of panic in Mrs. Fitzpatrick's room at any time. Staff Midwife Murphy and Senior Midwife O'Dwyer both agreed with this. In my judgment the events described by Dr. Wiza and by Senior Midwife O'Dwyer, if not amounting to panic, were certainly something approaching very near to pandemonium. The Paediatrician, Dr. Kennedy was summoned by Senior Midwife O'Dwyer at the same time as she called Dr. Wiza, and on the evidence arrived at Mrs. Fitzpatrick's room shortly after Dr. Wiza and remained thereafter in the room, or at the door of the room until the plaintiff was born so that it is altogether unlikely that she would not have witnessed such extraordinary events. In my judgment I am entitled to have regard to this and to the fact that she was not called in evidence in reaching a conclusion as to whether these alleged events occurred or not. Dr. Wiza said that Senior Midwife O'Dwyer was begging Mrs. Fitzpatrick to permit him to use the forceps. It is interesting to recall that Senior Midwife O'Dwyer in giving evidence regarding the episiotomy issue employed the same phrase that Dr. Wiza was begging Mrs. Fitzpatrick to permit him to carry out the episiotomy. If this had occurred on either of these occasions it is impossible to reconcile with the established fact that Mrs. Fitzpatrick was very concerned that the fetal scalp electrode and the fetal blood sample might hurt the plaintiff unless one accepts her evidence and that of Mr. Fitzpatrick that they did not know, and were not told, that there was something wrong with the plaintiff.

191. Dr. Wiza told the court that at the time he was urging Mrs. Fitzpatrick to permit a ventouse assisted vaginal delivery, Mr. Fitzpatrick had looked at the CTG monitor and said that the plaintiff's heart rate was fine, and that he (Dr. Wiza) had responded that it was not fine. Staff Midwife Murphy however, told the court that this had occurred when Dr. Wiza said that he needed to do a forceps assisted delivery. The recollections of Dr. Wiza, Senior Midwife O'Dwyer and Staff Midwife Murphy are rather vague, and often contradictory with regard to events which they each assert were quiet extraordinary and the like of which they had never before experienced. Further, if one accepts that at 07.50 hours the need for an episiotomy was explained to Mrs. Fitzpatrick, and if one also accepts the expert evidence that the contractions were occurring on average every two or three minutes, and that to fix the ventouse cup in place, check its positioning and build up the vacuum force in the machine would require approximately two minutes, there is simply not enough time for the number of pushes said by Dr. Wiza and Senior Midwife O'Dwyer to have been given by Mrs. Fitzpatrick after she had declined to permit the use of the forceps and Senior Midwife O'Dwyer had apparently taken over the delivery of the plaintiff from Dr. Wiza. I find on the evidence on the balance of probabilities that Mrs. and Mr. Fitzpatrick are correct, that the plaintiff was delivered very shortly after Senior Midwife O'Dwyer had said to Mrs. Fitzpatrick that he was very tired, and very shortly after the time Mr. Fitzpatrick saw Dr. Wiza taking the forceps out of its packaging.

192. I find on the evidence that Senior Midwife O'Dwyer was negligent and in breach of duty in not calling Dr. Wiza at 06.50 hours and in not turning off the Oxytocin and, without prejudice to this finding, was further guilty of negligence and breach of duty in failing to call Dr. Wiza at between 07.10 hours and 07.12 hours. By reason of this negligence and breach of duty on her part I find that the plaintiff was deprived of the opportunity to being delivered without irreversible brain injury and injury to his liver, kidneys and blood forming system. But for this negligence and breach of duty on the part of Senior Midwife O'Dwyer I find that Dr. Wiza would and, acting with reasonable care in the proper discharge of his duties as Special Registrar in Obstetrics, should have delivered the plaintiff at or before 07.30 hours thereby ensuring that the plaintiff would have been born uninjured or that any, (if any), injuries sustained by

the plaintiff from 07.10 hours onwards to 07.30 hours would, stand a much better than even chance of being entirely reversible. I find on the evidence, with particular reference to the clear and resolute evidence of Professor Baker in this regard, that it was substandard on the part of Senior Midwife O'Dwyer not to have called Dr. Wiza until 07.30 hours or shortly thereafter. Because of this negligence and breach of duty on her part, the plaintiff was deprived of all opportunity to being delivered without irreversible brain damages and other injuries. I find on the evidence that the delay on the part of Dr. Wiza in not delivering the plaintiff, between 07.33 hours and 07.48 hours and not in fact delivering the plaintiff until 08.03 hours was in the circumstances of the dire emergency then prevailing seriously substandard. This negligence and breach of duty on the part of Dr. Wiza materially contributed to the amount of irreversible brain damage and other injuries suffered by the plaintiff between 07.30 hours and 08.03 hours. All of the obstetricians who gave expert evidence were agreed on this unless, the delay was excusable by reason of the alleged delay on the part of Mrs. Fitzpatrick in permitting the use of the ventouse and her alleged total refusal to permit an episiotomy or a forceps assisted vaginal delivery.

193. I find on the evidence that there was no material or untoward delay on the part of the Mrs. Fitzpatrick in permitting the use of the ventouse. I find on the evidence that the refusal of the episiotomy and of the forceps assisted delivery would not have occurred but for the failure of Dr. Wiza and of Senior Midwife O'Dwyer to inform Mrs. and Mr. Fitzpatrick in plain and unequivocal terms that the plaintiff was in distress and unless delivered immediately would die or suffer serious injury to his brain. I find on the expert evidence that it was negligent and seriously substandard on their part not to have so informed Mrs. and Mr. Fitzpatrick. I find on the evidence that but for this negligence and breach of duty Mrs. Fitzpatrick would have immediately consented to these procedures or to any other necessary medical procedures at whatever time she might have been asked. I find on the evidence the plaintiff suffered increasing irreversible hypoxic-ischemic injury to his brain and other injuries during the period from 07.30 hours to 08.03 hours and that this delay contributed materially to his present state of cerebral dysfunction.