Case No: 02/TLQ/1742

Neutral Citation No: [2003] EWHC 2160 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London,WC2A 2LL

Date: 19 September 2003

Before:

THE HONOURABLE MR JUSTICE TUGENDHAT

Between:

(1) WILLIAM CASSIE POWELL
(2) ANITA DIANE POWELL

Claimants

- and -

(1) PAUL BOLADZ
(2) KEITH HUGHES
(3) ELWYN HUGHES
(4) MIKE WILLIAMS
(5) ALLAN REES
(6) NICOLA WHITE
(7) HERMINA GRAY

Defendants

The Claimant in person
Mark Warby QC and Jacob Dean (instructed by Ryan Solicitors) for the Fourth Defendant

Hearing dates: 28 and 29 July 2003

Judgment

Mr Justice Tugendhat:

1. The Claimants in this libel action are the parents of Robert Powell. He was born on 29 December 1979 and died on 17 April 1990, at Morriston Hospital, Swansea, within hours of being admitted. He died of Addison's Disease, a hormonal deficiency problem, which is treatable if diagnosed in time. The First to Seventh Defendants are General Practitioners practising near the Powell's home in the Swansea area. Robert was a patient of the practice.

2. In December 1989 the Third Defendant had referred Robert to the Morriston Hospital. He was discharged after four days. He was seen for review by Dr Forbes at the Morriston Hospital in January. Robert was seen again by five of the Defendants between 2nd and 17th April 1990.

3. From very shortly after their son's death the Claimants complained about the treatment that their son had received from the hospital and from the Defendants. They have persisted in these complaints against the Defendants to this day.

4. This libel action is brought in respect of a notice put up by the Defendants on 6th November 1992 in their surgery reception area in the following terms:

> 'Following the HTV programme of 5th November, 1992 the Practice wishes to inform its patients that allegations of conspiracy, missing letters etc. are lies and complete distortion of the actual facts - some of the allegations belong in the realms of fantasy. Ystradgynlais Group Practice'.

5. When the Statement of Claim was served, over three years later, on 22nd March 1996 it was settled by counsel, but the Claimants were acting in person. It included the following:

> '7(3) The [HTV] Programme concerned a number of issues relating to the death of Robert Powell, and in particular it described the Plaintiffs' quest to ascertain events both leading up to and subsequent to his death, their complaint to the local Family Health Services Authority (FHSA) regarding the treatment he had received from the doctors at the Ystradgynlais Group Practice, the hearing of their appeal to the Welsh Office against the finding of the FHSA inquiry, and the Plaintiffs' call for the Director of Public Prosecutions to conduct an investigation into the circumstances of Robert's case and in particular in to the possible falsification and/or suppression of parts of his General Practitioner medical records...
>
> 8. In their natural and ordinary meaning the said words meant and were understood to mean that in a programme broadcast on HTV the Plaintiffs deliberately told lies and completely distorted the true facts about the Ystradgynlais Group Practice, and had included allegations about the Practice that they knew belonged to the realms of fantasy'.

6. This is the hearing of an application to strike out that libel action. The application is made by Dr Williams, the only remaining Defendant. To understand the libel action and the application it is necessary to refer to some of the events subsequent to Robert's death. These are as follows.

7. On 30th April 1990 the Claimants made a complaint to the Medical Services Committee ('MSC') of the Family Health Service Authority, which was heard on 13th December 1990.

8. On 9th January 1991 the MSC Report included a warning to Dr Flower, the member of the GPs' practice who saw Robert on 17th April 1990, but did not uphold the Claimants' complaints against the Defendants.

9. On 14th March 1991 and 5th November 1992 HTV broadcast 'Wales this Week' in which the Claimants expressed their complaints against the Defendants and the hospital. These complaints included serious allegations of deficiencies in the medical records shown to Mr Powell by the Second Defendant after Robert's death.

10. In March 1992 an appeal to the Welsh Office was adjourned and resumed in September 1992. The Claimants' counsel then asked for a stay pending a report to the Director of Public Prosecutions for the investigation of criminal charges against the Defendants. When that application was refused the Claimants withdrew their appeal.

11. In the period late September to 5th November 1992 there were a number of media publications which gave publicity to the Claimants' allegations that the Defendants had been involved in a cover up of negligence on their own part. It is the publication of these allegations against the Defendants to which the words complained of were a response. The libel action was not, however, commenced at that time.

12. In 1993 the Claimants commenced, in their own right, and for Robert's estate, a claim in negligence against the First to Fourth Defendants, Dr Flower and The West Glamorgan Health Authority (which had responsibility for the Morriston Hospital).

13. In 1994 an investigation into the Claimants' allegations was begun by Dyfed-Powys police, following an approach by the Claimants' counsel to the DPP.

14. On 20th December 1994 the Claimants sent a letter before action in respect of the notice put up in the surgery on 6th November 1992.

15. In June 1995 Elizabeth Elias QC held an enquiry set up by the Welsh Office into the Claimants' allegations that documents went missing during their appeal to the Welsh Office.

16. On 3rd November 1995 the Claimants issued the writ in this libel action. On 14th February 1996 the writ was served (after amendments immaterial to this application). The Statement of Claim was served on 22 March 1996, as noted above.

17. On 18th April 1996 a Defence was served. The main issues raised in that Defence were that the words complained did not refer to the Claimants, and defences of fair comment, and qualified privilege. There was a plea of justification, but it was defective in that there were no particulars of the facts and matters relied on. And while the meaning alleged by the Claimants was denied, the Defence did not state what meaning was alleged to be true.

18. On 29th April 1996 a general extension of time for service of a Reply was granted at the Claimants' request. The Claimants had complained of the deficiencies in the Defence.

19. On 5th May 1996 the investigation by the Dyfed-Powys Police ended. On 13th May 1996 the Defendants were informed that the Crown Prosecution Service had advised that no prosecution should be brought against any defendant in respect of any of the allegations.

20. In a letter dated 15th May 1996, Morgnnwg Health, the successor to the West Glamorgan Health Authority, made admissions of liability in respect of certain of the allegations in the negligence action. In particular they accepted that 'had Robert received optimum level of care in December 1989/January 1990, which regrettably he did not, it is likely that a diagnosis of Addison's Disease would have been made. The Health Authority is therefore admitting liability for the failure to diagnose Addison's Disease at that time'. The Authority expressed its apologies. No admission of responsibility or blame was made in relation to any individual. The letter concluded:

> '... there is no foundation or substance whatsoever for the allegations that there was a deliberate attempt to interfere with the case records or obstruct a proper hearing of the case'.

21. On 24th June 1996 Butterfield J gave judgment on an application by the five members of the Practice who were parties to that action, supported by the Health Authority. The application was to strike out those parts of the Statement of Claim concerning events following Robert's death. These claims included one for damages, suffered by Mr and Mrs Powell personally, in respect of the allegedly deliberate falsification of the medical records and the consequential dishonest accounts given by the doctors both to the MSC and the appeal to the Welsh Office. Butterfield J held that the allegations, if made out, would probably amount to the criminal offences of forgery and attempting to pervert the course of justice, but did not give rise to a civil claim for damages at the suit of Mr and Mrs Powell. Accordingly he struck out those parts of the claim.

22. In the first six months of 1997 the Claimants took further steps in the libel action. They threatened to apply to strike out the Defence, and then issued a summons to do so, which was adjourned on 12th June 1997.

23. On 16th June 1997 the Court of Appeal heard the Claimants' appeal from the judgment of Butterfield J. There was some publicity given in the press to the Claimants' allegations. On 1st July 1997 the Court of Appeal dismissed the appeal. The judgment recorded that, immediately following the strike out, the Health Authority agreed to pay Mrs Powell £80,000 together with £20,000 costs, and that upon payment the action of both Claimants was dismissed against it. It was clear, according to the judgment of the Court of Appeal, that the settlement sum must have included a substantial figure in respect of the psychiatric injury sustained by Mrs Powell. The action against the doctors in respect of these claims was also discontinued. The judgment also recited the medical evidence showing that Mr Powell had developed Post Traumatic Stress Disorder and that Mrs Powell had developed Panic Disorder according to DSM-111-R (Diagnostic and Statistical Manual of Mental Disorders 3rd ed Revised, 1987). Finally, having repeated Butterfield J's view that the matters alleged (if proved) would probably amount to the criminal offence of forgery and possibly attempting to pervert the course of justice, the Court of Appeal pointed out that the allegations were denied. The Court of Appeal also noted some reasons to doubt the Claimants' prospects of establishing the allegations.

24. Between September 1997 and July 1998 there were exchanges and meetings between the parties to the libel action with a view to settling the dispute.

25. On 2nd October 1998, the House of Lords having refused leave to appeal from the judgment of the Court of Appeal, the Claimants submitted an application to the European Commission of Human Rights Application No 45305/99.

26. In January to March 1999 the Claimants served notice of intention to proceed with the libel action and the Claimants gave notice of their proposal for the re-listing of the adjourned summons.

27. Between June 1999 and September 2000 attempts to resolve the dispute by mediation were made and failed.

28. On 4th May 2000 the application to the European Commission of Human Rights was held to be inadmissible. A detailed account of the allegations made by the Claimants, and of their claims for damages arising out of the alleged falsification of documents, is to be found in the Admissibility Decision. That makes it unnecessary for me to recite these matters in further detail in this judgment. But the report also includes the following: 'Since Robert's death, over seven years ago, [Mr Powell] has not been able to return to work. For years after the death, [he] read through the medical records and wrote letters every day. He was unable to concentrate on anything except the case'. No evidence to this effect has been placed before me, and Mr Warby QC

did not refer to this. But Mr Powell did tell me that he is living on state invalidity benefits, and having heard Mr Powell present his case, I think it likely that he has concentrated on little other than the pursuit of his complaints, by whatever avenue, since Robert's death.

29. On 22nd June 2000 Master Leslie made an order that the Civil Procedure Rules apply to this action, and that it be stayed to allow for mediation, with directions as to what was to happen in the event that mediation failed.

30. Late in 2000 a new police investigation was commenced by the West Midlands Police. The defects in the earlier investigation by the Dyfed-Powys Police are summarised in the ECHR Admissibility Decision.

31. On 10th November 2000 the Defendants served a summons to strike out the claim, alternatively to amend the Defence and Counterclaim. Master Leslie made an order for exchange of evidence for the hearing of that summons.

32. On 21st December 2000 an inquest into the death of Robert was opened and adjourned. On the same day Master Turner ordered that the proceedings be stayed until 15th June 2001. In a short judgment he noted that the action was stale, and pleadings not yet closed. He said: 'However, the introduction of a very senior Police Officer from another Force must be a very unusual step as must be the renewed Coroner's Inquest ... If the Police investigation clears the Defendants' names, it will be powerful evidence in support of their Defence. If successful prosecutions are secured it will be equally powerful evidence in support of the Claimants, especially as the Police do have greater powers to investigate some of the features of this case such as the missing or allegedly forged documents. This is a very late development in a very stale case, yet the Police investigation could unravel many of the strands of this complex thread of issues and assertions. There is a real danger that if a step were taken either to strike out this action or proceed to trial prematurely in advance of the conclusion of the Police investigations, there could be a serious miscarriage of justice'.

33. On 18th March 2003 Avon & Somerset Police held a meeting with Mr Powell to inform him of the result of their enquiry into the handling by the Dyfed-Powys Police of the events surrounding the death of Robert. The first finding was: 'Dyfed-Powys Police has been institutionally incompetent in respect of the police investigations… [they] failed to investigate professionally, efficiently, and effectively the circumstances surrounding and subsequent to the death of Robert. ...'

34. In early 2003 the West Midlands Police completed their investigation. It did not have the result that Master Turner had envisaged. On 17th April 2003 the CPS wrote to the Claimants to explain their decision not to prosecute any of the doctors. They concluded that there was insufficient evidence to prosecute for manslaughter. They found that there was some evidence that the GPs' medical notes had been altered, sufficient to prosecute certain individuals for offences of forgery and perverting the

course of justice. However, they concluded that it was no longer in the public interest to prosecute those offences because of the passage of time and earlier CPS decisions not to prosecute. They said that there was medical evidence to suggest negligence in the treatment given by Dr Williams on 11th April 1990, but not sufficient evidence that that was a substantial cause of Robert's death. They found an evidential basis for prosecuting for offences of forgery and perverting the course of justice relating to two sets of documents. Those documents were a referral letter from Dr Williams dated l2th April 1990 and medical notes prepared by Dr Flower. They did not find sufficient evidence to support a prosecution for conspiracy to pervert the course of justice. As to the reasons for the delay, the CPS concluded that 'the falsification of notes did not delay the investigation into the notes themselves… it is no longer justifiable to resurrect these offences now and any case brought against the doctors for forgery and perverting the course of justice would inevitably be stopped as an abuse of process'. I interpose at once to say that Dr Williams and Dr Flower do not admit these findings as to the evidence against them, and, for my part, I have not seen the evidence available to the CPS upon which their conclusion was reached. I simply recite it as the conclusion of the CPS, as communicated to the Claimants.

35. On 30th April 2003, after further extensions of the stay, Master Leslie made the following order: '2. the Defendants do serve proposed Amended Defence by 4pm on 20th June 2003; 3. The Claimants to notify the Defendants whether they consent to such amendment by the 27th June 2003. If not consented to, permission to restore. 4. If consented to, the Claimants to serve Reply to each Amended Defence by 4pm on July 2003. 5. If so advised the Defendants to issue and serve application notices seeking orders to strike out the claim with evidence in support by 4pm on the 6th June 2003. Such application to be heard by the Judge...'

36. On 6th June 2003 Andrew Lindsay, a solicitor practising under the name 'Andrews a specialist law firm' (the specialism is in medical negligence and personal injury law) wrote a letter to the Coroner. It sets out the representations that it was proposed to make about the Inquest at a hearing which was to take place the day after the oral hearing of this Application. The letter refers to a conference with Leading Counsel. It appears that the Claimants are hoping that the Inquest will cover the mattes which were investigated by the West Midlands Police and which were referred to in the letter from the Crown Prosecution Service of 17th April 2003. It appears that the Claimants' request for a Public Inquiry made to the First Minister of the Welsh Assembly on 28th May 2003 was still under consideration at that point.

37. On 11th June 2003 Dr Williams issued an Application Notice for an order dismissing this action because there has been a failure to prosecute this action and the action is an abuse of the process of the court. Similar applications were issued by the other defendants.

38. In his witness statement in support, Michael Ryan, solicitor for Dr Williams makes clear that one ground is not relied on in the application before me (although mentioned previously). Dr Williams is not submitting to me that the claim has no

realistic prospect of success on the basis that the publication was protected by qualified privilege and there is no realistic case in malice. In other words, as Mr Warby QC put it, it is accepted that there is a triable issue on malice, albeit that, in the present state of the pleading, what that issue might be is not set out with precision. I take it to be essentially what is said in the letter from the CPS, namely that there was some evidence that Dr Williams' medical notes and/or his referral letter dated 12th April 1990 had been altered (such that there was an evidential basis for prosecuting for offences of forgery and perverting the course of justice), and that there was medical evidence to suggest negligence in the treatment given by Dr Williams on April 1990.

39. In his witness statement dated 5th June 2003 Dr Williams states: 'I have always maintained the same position throughout the case. My referral letter in respect of Robbie Powell was genuine and I have never attempted to misrepresent the position or deceive anyone'. As to the effect of the proceedings he states: 'I regard the claim as a challenge to my professional integrity. As a result of that, it undermines my confidence and makes me wary of decision making. The case is constantly at the back of my mind. It continues to cause me sleepless nights. As is known, I suffered severe anxiety depression about ten years ago I believe as a result of the original allegations. I required nine months off work and it took me some considerable time to recover from the many effects of the depression and I remain worried about the possibility of a relapse. My family life has certainly suffered as a result of the continuation of the claim. My marital life has suffered and my wife and I are somewhat distant from each other. My concern about the outcome of the claim has left me withdrawn and I am not at all keen to go out and to socialise with friends and family. All in all, the claim continues to have a large detrimental affect on my professional and personal life'.

40. There are also witness statements from the other Defendants to which Mr Warby QC referred me, but which it is not necessary to recite.

41. On 26th June 2003 an Amended Defence was served on behalf of the 1st and 4th Defendants. As Mr Warby QC pointed out at the hearing, no formal consent has been given by the Claimants, but no objection has been raised. I take it that consent has now been given. There is now a fully particularised defence of justification (para 8, covering some 12 pages). The meaning which it is sought to justify is not the one pleaded by the Claimants. It is that Mr Powell 'made and/or was responsible for the making on the Programme of allegations of conspiracy, missing letters and other allegations of wrongdoing against the doctors which were false and a complete distortion of the actual facts, some of the allegations belonging in the realms of fantasy. For the avoidance of doubt these Defendants do not contend that Mr Powell made such allegations knowing them to be false, distorted or fantastic. It is however these Defendants' case that the allegations were made with reckless disregard for the truth'.

42. It is necessary to set out the particulars for two reasons. First, it shows the scope of the matters which Mr Warby QC submits will be covered by the trial, if it proceeds. Secondly, given the mention in this judgment of the adverse findings of the CPS, and the detailed recital of the Claimants allegations in each of the two judgments in the negligence action, and in the Admissibility Decision of the Commission, it is only fair to Dr Williams to set out his case as well. The Particulars read:

> "8.1 Mr and Mrs Powell and their late son Robert were residents of Ystradgynlais who were patients of the Health Centre. Robert was born on 29 September 1979 and died at Morriston Hospital, Swansea on 17 April 1990.
>
> **Events before Robert's death (1) Symptoms, referral and treatment**
>
> 8.2 In December 1989 Robert Powell experienced symptoms of persistent vomiting and abdominal pain, and on the evening of 5 December he was referred by Dr Elwyn Hughes to the Paediatric Department of the Morriston Hospital, Swansea where he was admitted under the care of Dr Forbes, Consultant Paediatrician. On 9 December 1989 he was discharged home.
>
> 8.3 A discharge notification form ("DN") was created by the hospital. This was an A5 sized document completed in manuscript recording Robert's symptom of "persistent vomiting" but no diagnosis, and stating that treatment while in hospital was intravenous fluids followed by Dioralyte. It also stated that Robert needed "ACTH stimulation test" and that a follow-up appointment had been made for January 1990. This indicated an intention on the hospital's part to examine and test the possibility that Robert was suffering from adrenal insufficiency. An ACTH test can only be carried out in hospital.
>
> 8.4 The original DN was sent by the hospital to the Health Centre, addressed to Dr Boladz. It was received on 15 December 1989.
>
> 8.5 The hospital also created a Clinical Summary Sheet ("CSS") relating to Robert's admission. This was originally created in manuscript ("CSS(1)") after which a typed up version of this document was created ("CSS(2)"). These were A4 size documents. Whilst not identical, both recorded the hospital's diagnosis of Robert's condition as gastroenteritis and referred to the need for an ACTH stimulation test.
>
> 8.6 The original of CSS(2) was sent by the hospital to the Health Centre where it was received on 22 January 1990.
>
> 8.7 In the meantime on 18 January 1990 Robert Powell saw Dr Forbes at Morriston Hospital as an outpatient for review. Following this Dr Forbes

wrote and sent a letter of that date to Dr Boladz ("the Forbes letter"). In this letter Dr Forbes referred to the earlier query of adrenal insufficiency but indicated that on review this had been discounted, stating, "I feel he may simply have had a severe gastritis and vomiting". Dr Forbes stated he had discharged Robert from the clinic but would be pleased to see Robert again if there were any recurrent episodes. Dr Forbes did not tell the Powells of any concerns he had about adrenal insufficiency.

8.8 The original of the Forbes letter was received at the Health Centre on or about 30 January 1990. It was the only letter sent by Dr Forbes to the doctors in relation to Robert Powell prior to Robert's death.

8.9 Between 2 and 17 April 1990 Robert experienced symptoms of sore throat and pain in the jaw and later, vomiting, and was seen separately by each of Drs Elwyn Hughes, Williams, Keith Hughes, Boladz and Nicola Flower. Dr Williams saw Robert on 11 April when he decided to refer him back to hospital for further assessment, and on 12 April he dictated to tape a letter for that purpose ("the referral letter").

8.10 On 17 April Robert collapsed at home, and that afternoon Dr Flower referred him to the hospital, where he died late that night. The cause of death was Addison's disease, (adrenal insufficiency) extremely rare in children and virtually unheard of in children under 10 years old.

Events before Robert's death (2): Stamping and copying of the DN, CSS and Forbes letter

8.11 As stated above, the DN sent to the health Centre was the original manuscript document. Upon its receipt at the health Centre on 15 December 1989 the DN was date stamped on its face and a Health Centre block stamp placed on it for completion by the GP before filing in the GP notes. The block stamp was placed on the reverse of the DN to avoid obscuring clinical information on the face.

8.12 The CSS was copied and dealt with as follows:

(1) CSS(l) was retained by the hospital. A copy of CSS(2) ("CSS(3)") was made and stamped "17 Jan 1990" and initialled by Dr Forbes. This too was retained by the hospital.

(2) A further copy of CSS(2) ("CSS(4)") was sent by the hospital to the Community Child Health Administration Office ("CCHA") for West Glamorgan which received and date stamped it on 17 January 1990 and then forwarded it to

(3) Powys Health Authority headquarters, where it was received and date stamped on 19 January 1990.

(4) the Powys CCHA Section received and date stamped a copy of CCS(4) on 22 January 1990, forwarding it to

(5) the Senior Clinical Medical Officer ("SCMO") for South Powys, Dr Alun Rees, who received and stamped it on 23 January 1990.

(6) When CSS(2) was received at the health Centre it was date stamped on its face and a Health Centre block stamp placed on its face. At or after that time Dr Rees of the Health Centre added in manuscript the word "test" after "needs ACTH" to correct a typing omission.

8.13 As stated above, the original of the Forbes letter ("F1") was received at the Health Centre on or about 30 January 1990. On receipt it was date stamped on its face and the Health Centre block stamp placed on its face.

8.14 The hospital retained a copy of the Forbes letter ("F2") but made another copy ("F3") which was, during February 1990, forwarded to and date stamped in similar manner to CSS4 by

(1) the West Glamorgan CCHA

(2) the Powys Health Authority headquarters

(3) the Powys CCHA

(4) Dr Rees, the SCMO.

After Robert's death

8.15 On 20 April 1990 Dr Keith Hughes (with whom Robert had been registered) visited Mr Powell to explain the circumstances surrounding Robert's death, taking with him the Health Centre's file of medical records concerning Robert ("the GP file") which he showed to Mr Powell. The file was in a cardboard folder. Its contents at this time included the DN, CSS(2) and Fand the patient's "Lloyd George" medical notes of A5 size, tucked into a pocket on the inside cover of the folder.

8.16 On the same date the practice secretary, Linda Simms, typed up the referral letter. On the 4th Defendant's request the referral letter was dated 12 April, the day of dictation. The letter was not sent. The original and a file copy were retained for the record. They were not placed at that time in the GP file, which was in the possession of Dr Keith Hughes who was

away from the Health Centre. The referral letter was placed in the file later: see §8.19 below.

8.17 A few days later in April 1990 Dr Keith Hughes visited Mr Powell again at his request, taking the GP file, which was examined by Mr Powell and an acquaintance of his, Rev Gerailt Thomas. The contents of the GP file were unchanged since 20 April.

The MSC complaint

8.18 On 30 April 1990 Mr and Mrs Powell made complaint to the Medical Service Committee ("MSC") of the Family Health Service Authority ("FHSA") about the conduct of Drs Boladz, Keith and Elwyn Hughes, Williams and Dr Nicola Flower.

8.19 For the purposes of the inquiry into that complaint the practice sent the original GP file to the FHSA. This was done on about 25 July 1990. The file contained all the documents mentioned at §8.15 above. In addition, by this time the top copy and the file copy of the referral letter, and the envelope addressed to Morriston Hospital, had been placed in the file and were included in the file as sent for the record. At no time after the original file was sent to the FHSA did it or any of its contents return to the doctors' possession except for the purposes of examination of the DN during the hearings by the MSC and Welsh Office appeal as stated in §8.23(1) and §8.27(1) below.

8.20 Copies of documents in the GP file were made by the FHSA for the purposes of the hearing. On or about 23 November 1990, having received such copy documents in connection with his complaint Mr Powell visited the Health Centre where he saw Dr Keith Hughes and queried the appearance on the file of the referral letter. Dr Hughes confirmed to Mr Powell that the referral letter had not been on the file when shown to Mr Powell which he put in writing to Mr Powell.

8.21 The hearing of the Powells' complaint by the MSC took place on 13 December 1990. During the hearing allegations were made ("the initial allegations") that the documents had been tampered with by the doctors including an allegation by the Rev Gerallt Thomas that when he examined the GP file it had contained two letters from the hospital which were no longer there.

8.22 The initial allegations

(1) were untrue: there never were any other documents as alleged by Mr Powell and Rev Thomas;

(2) were based solely on the uncertain recall of Rev Thomas which (at that time) was lacking in any detail; they were not supported by any independent evidence;

(3) were manifestly implausible because

(a) they involved the suggestion that the doctors were people prepared to engage in a complex attempt at deception by destroying or removing from the file documents adverse to them;

(b) it was an intrinsic element of the allegations that before engaging in such attempted deception the doctors had shown all the genuine documents to Mr Powell (twice) and Rev Thomas (once).

(c) the GP file contained other references to the need for an ACTH stimulation test which a reasonably competent general practitioner would recognise as indicating a possibility of adrenal insufficiency or Addison's disease, so that no plausible motive or purpose could be seen in the alleged forgery and suppression.

8.23 At the MSC hearing the doctors responded to the initial allegations as follows:

(1) Dr Keith Hughes refuted them, confirming that the GP file had been in his possession at all the material times, and had not been tampered with in any way.

(2) After examination of the original documents the respondents explained to the Committee in Mr Powell's presence what appeared as the obvious explanation for Mr Powell's errors, and for the non-appearance of the block stamp on the copy DN in the papers: the "letter" Mr Powell recalled was the DN but in copying it for the hearing this had been blown up to A4 size; and the block stamp which did appear on the reverse of the form had not been copied.

8.24 Further, at the hearing Dr Williams confirmed that the referral letter had been typed after Robert's death, had not been sent, and had been placed on the file for the record.

8.25 The MSC did not uphold Mr Powell's allegations. In its report dated 9 November 1991 the MSC found as facts that

(1) the DN had been received by the practice dated 15.12.89, recommending a hospital based ACTH test

(2) a letter had been received by the practice dated 18.1.90 from Dr Forbes reviewing his original opinion of the necessity of further tests.

The MSC also found as a fact that

(3) the typing of the referral letter had been delayed by the Holiday weekend and following the patient's death was not sent.

The MSC recommended that no further action be taken in the matter of the complaints against Drs Keith and Elwyn Hughes, Boladz and Williams. (Dr Flowers was given a warning about her conduct).

The appeal to the Welsh Office

8.26 Mr and Mrs Powell appealed to the Welsh Office against the decision to take no action and a 3-man tribunal was formed to hear the appeal. At the hearing of that appeal, which took place over 8 days in March and September 1992 further and yet more serious allegations were made by and on behalf of Mr and Mrs Powell that medical records had been dishonestly tampered with by members of the practice. It was alleged that there had been a conspiracy to cover up the facts surrounding Robert's death and

(1) that CSS(2) was a forgery; it was alleged that the original CSS had contained on the reverse typescript including the words "Information, needs ACTH test, parents informed" and a reference to "Addison's disease", that the original had been deliberately removed from the GP file after it was seen by Mr Powell and Rev Thomas, and copies removed from the hospital file with the involvement or connivance of unidentified hospital staff;

(2) that there was no block stamp on the DN, the suggested explanation being that the stamp had been placed on the alleged original missing CSS, which had been sent with the DN or that the original DN which was on A5 sized paper was itself missing from the file;

(3) that there had "possibly" been a "reconstruction" of the Forbes letter, which was said to have been on a short or half size piece of paper when shown to Mr Powell in April, so that F1 was or might be a forgery;

(4) that there had been a deliberate attempt by Dr Williams to mislead Mr and Mrs Powell and the MSC enquiry into thinking that he (Dr Williams) had sent a referral letter to the hospital; and

(5) that the respondents to the appeal, or some of them, had deliberately withheld from the FHSA documents supplied to them by the hospital in advance of the MSC hearing including a hospital nursing cardex relating to Robert's admission on 17 April 1990;

(6) that the Lloyd George notes in the GP file have not been present when Mr Powell saw it in April 1990.

8.27 Each of these serious allegations ("the second set of allegations") was false. Without limiting the generality of those averments, the doctors will refer to the facts set out above, and in particular the details of the creation and dissemination of the CSS and Forbes letter and copies of those documents. Further:

(1) The allegations as to the CSS were also inherently wholly improbable since they presupposed an elaborate conspiracy involving not only the doctors but also hospital staff to suppress information said to have been on the back of the CSS but which was not (to anyone medically qualified) substantially different from that which appeared on the face of CSS(2). In cross-examination during the Welsh Office hearing Mr Powell accepted that the information was very similar. The allegations were refuted by Dr Forbes, called as a witness by the Powells themselves. In fact, nothing was ever typed on the reverse of a CSS.

(2) The block stamp allegation was refuted on examination of the original A5 size DN showing the block stamp on its reverse, whereupon it was falsely alleged on behalf of the Powells that the stamp had been added between March and September 1992. This was untenable given that the original DN had been examined to show the existence of the block stamp during the MSC hearing in December 1990 as stated above (§8.23(1). What is more, it was a practical impossibility since the doctors had not had access to the original DN during that period. Mr Powell had no evidence that they had. Yet further, the original DN bearing the block stamp had been examined by Counsel and the solicitors for the doctors in March 1992 and Counsel told the tribunal this in the presence of Mr Powell. Mr Powell's Counsel accepted that he could not contradict this; yet still the allegation was persisted in.

(3) The supposed reasons for "reconstructing" the Forbes letter were obscure. Even the Powells' own Counsel acknowledged at the

outset that the evidence was weak. The allegations were wholly or mainly dependent on the evidence of Rev Thomas. He gave evidence that he had seen another letter in the file which referred in terms to Addison's disease and "hormone imbalance". The suggestion was that this had been suppressed and replaced by the Forbes letter. This was wholly implausible, not least because by its reference to adrenal insufficiency the Forbes letter as it stood disclosed that Dr Forbes had considered the possibility of Addison's disease. Further, wording such as "hormone imbalance" would not be used by a consultant writing to a GP. The non-existence of any letter of 18 January 1990 from Dr Forbes other than the Forbes letter held by the doctors had already been confirmed by Dr Forbes in a letter of 12 June 1991 and was confirmed by him in his evidence at the Welsh Office hearing.

(4) It was absurd to suppose that Dr Williams had sought to deceive the Powells into thinking the referral letter had been sent when the original top copy had been included in the GP file. The effect of this was to make plain that the letter had never been sent.

(5) There was no basis for accusing the doctors of withholding hospital documents from the FHSA. The doctors had not done any such thing.

(6) The allegations regarding the Lloyd George notes were bizarre since there was nothing in these which was, or which was alleged to be, of any significance.

8.28 On the second day of the resumed hearing in September 1992 and before any evidence had been heard from any of the doctors, the Powells' Counsel sought a stay of the appeal pending a report to the Director of Public Prosecutions for the investigation of criminal charges against the respondents. This application was refused, the Tribunal Chairman confirming the Tribunal's view that the evidence so far did not go within a mile of showing any conspiracy to conceal documents. Counsel thereupon announced the Powells' intention to withdraw the appeal (which was later formally confirmed and approved by the Secretary of State).

The Programme

8.29 Despite the above Mr Powell participated in the making of the Programme and caused or authorised the broadcast on 5 November 1992 as part of the Programme of words to the effect that the doctors had lied about the circumstances of Robert Powell's death and sought to deceive

the Powells and the Welsh Office enquiry and pervert the course of justice by

(1) conspiring with Dr Forbes to remove from their files, after the GP file was seen by Mr Powell and Rev Thomas, a CSS containing on the back a letter from Dr Forbes relating to Robert's admission to hospital in December 1989, which referred to Addison's disease;

(2) adding a bogus block stamp to the DN during the adjournment of the Welsh Office hearing;

(3) pretending that the referral letter had in fact been typed on 12 April, so they could mendaciously claim it had been misplaced up until Robert's death;

and thereby taken part in a wicked cover-up.

8.30 The doctors will refer to the whole of the Programme, and to the transcript. They will particularly rely on the following passages

p1 "MR POWELL: ...to have lied about it ... I've let them down once because I trusted the doctors so I won't let them down again …."

p2 "BRUCE KENNEDY: The hearing at the Welsh Office began in March but was adjourned until September. It was then discovered that vital medical records on Robbie had disappeared for that six months period. With the advice of his barrister, Will Powell withdrew from the hearing.

MR POWELL: He totally agreed with me, he felt it was appalling that these records had gone walkabout for six months and nobody seemed to care where they'd been. And been added to and block-stamped.

…

BRUCE KENNEDY...Tonight we examine startling disclosures about what happened after (Robbie) died ...."

p4 BRUCE KENNEDY: ...On April 20th Dr Keith Hughes saw Will Powell with the boy's medical records. Mr Powell claims they contained a letter from the hospital dealing with Robbie's illness in December 1989. It referred to Addison's disease. He asked Dr Hughes back to his house three days later. He was so concerned at the reference to Addison's disease, he wanted his neighbour, a local clergyman, to witness the records.

REV GERALLT THOMAS: The thing that Mr Powell was most concerned about was this reference to this ACTH test, the adrenaline insufficiency, and this reference to Addison's disease. So, in reading through this, these papers, this was what I looked for, and this was what I noted. Er, that is how I got involved with this.

INTERVIEWER: And you were quite certain that there was the letter or note on the back of the clinical summary sheet which has become so important in this case?

REV THOMAS: Ah yes, I remember that very clearly.

INTERVIEWER: You made a note of that.

REV THOMAS: I made a note of that

p6 BRUCE KENNEDY: ...Will Powell appealed to the Secretary of State at the Welsh Office ... His lawyers focussed on specific areas in the GPs records. One related to Dr Mike Williams. On April 11th he told the Powells he was referring Robbie back to Morriston Hospital. That was six days before the boy died on April 17th Mrs Linda Simms, a secretary at the centre, gave evidence that she typed the referral letter on April 19th. That was two days after he died.

p8 BRUCE KENNEDY: So the letter was typed on April 19th but backdated to April 12th for the record. However, it wasn't in the records when Will Powell and Rev Thomas saw them.

MR POWELL: Why didn't they type it on the 19th but date it the 12th date of dictation and inform everybody of those facts? Then you wouldn't be trying to hide anything would you?

…

p9 MR POWELL: …I believe that what they tried to do was to pretend they were typed on the 12th to mislead the enquiry and say they had been misplaced up until Robert's death.

…

BRUCE KENNEDY: Evidence was also given to the appeal about the letter from the hospital to the GPs which allegedly referred to Addison's disease. The GPs records had been shown to Will Powell three days after his son's death. He says they contained a clinical summary sheet and on the back was the Addison's letter, now missing. Rev Thomas said the same

…

In evidence, it was claimed the alleged missing letter was sent from Morriston Hospital. Robbie had been a patient there in December 1989. ... Dr William Forbes, the Consultant, revealed he'd met the GPs some time after Robbie died but could remember little about it.

p12 BRUCE KENNEDY: The Welsh Office appeal began in March and was adjourned. The medical records were thought to have been lodged in a vault at the Welsh Office. The appeal resumed in September. It was then Will Powell noticed the GPs records were different. There were additional documents. This document [shown] [which] is central to his allegation that the Addison's letter had existed, now carried a Health Centre block stamp on the back. He said that stamp had not been there in March."

The doctors' case as to the Programme

8.31 The doctors' case is that:

(1) the grave allegations of wrongdoing which Mr Powell made or caused to be made against the doctors in the Programme were not only untrue, but represented a grave distortion of the true facts in the respects specified above; the doctors will rely in particular on the account of the true facts at §8.2 to §8.17 above, and on §§8.27(1) to (4) above.

(2) the allegations of tampering with the CSS and the DN were so far removed from reality, so lacking in plausibility or cogent evidential support and so at odds with other credible evidence of which he knew that they are rightly to be described as being in the realms of fantasy;

(3) when he made or caused those allegations to be made on the Programme Mr Powell's state of mind was such that he had allowed a determination to establish wrongdoing by the doctors to overwhelm any objective assessment of the evidence and acted with heedless disregard for the truth.

43. The Amended Defence now includes a counterclaim for libel, based on the publicity referred to in summary above. The counterclaim is for an injunction only. There is no counterclaim for damages. The meaning complained of is that set out in para 8.29 of the Particulars of Justification. Dr Williams alleges in para 12 that, unless an injunction is granted, the Claimants will further publish words conveying the

allegations made on the HTV Programme in November 1992. The grounds for this allegation are given. I set these out because they also state Dr Williams' case as to the Claimants running a campaign against him.

"13.1 In 1992, after the MSC decision, the Powells caused or authorised the publication of the media reports identified in §9.3(2) to (6) of the Defence.

13.2 In 1992, after the withdrawal of the Welsh Office appeal, the Powells caused or authorised the broadcast of the Programme.

13.3 Between 1993 and 1996 the Powells unsuccessfully sought to pursue other official avenues to ventilate their allegations.

(1) In April 1993 they began legal proceedings against doctors Boladz, Keith Hughes, Elwyn Hughes, Williams and Dr Flower and the Health Authority for damages for negligence. These proceedings came to include claims that the said doctors had caused the Powells emotional damage and financial loss by forgery and falsification of the medical records ('the forgery claims').

(2) In March 1994 the Powells caused Dyfed Powys police to embark on an investigation of the facts surrounding Robert Powell's death including the conduct of the doctors to determine if any criminal offences had been committed, including manslaughter or conspiracy to pervert the course of justice by tampering with documents.

(3) In 1995 Mr Powell caused the Welsh Office to commission an enquiry chaired by Elizabeth Elias QC into the allegations made by him that papers relevant to the appeal had been tampered with by the doctors.

(4) All these avenues came to nothing. The police enquiry led to a decision by the Crown Prosecution Service in May 1996 that a prosecution should not be brought against any party and the police decided to take no further action. The Elias enquiry did not uphold Mr Powell's allegations. The forgery claims were struck out by the Court in the circumstances set out below.

(5) In February 1995 copies of CSS4 and F3 were supplied to Mr Powell by Gwyn Phillips, Chief Executive of the Powys FHSA showing the dissemination of copies of the CSS and Forbes letter within the Health Authority in 1990 as detailed above. As must have been obvious to the Powells these, if authentic, demolished the forgery claims because they showed that copies of the

documents allegedly forged after 23 April 1990 had been circulated in January and February 1990. There was no good reason to doubt the authenticity of the documents. The Powells nonetheless proceeded with the forgery claims.

(6) The forgery claims were struck out as bad in law by Mr Justice Butterfield in June 1996. In August and September 1996 affidavits of Gwyn Phillips, Dr Alun Rees and Ms Andrea Evans were served on the Powells confirming the supply of the copy documents in February 1995, and their authenticity. The Powells nonetheless pursued an appeal against Butterfield J's order.

13.4 Butterfield J's decision was upheld by the Court of Appeal in a judgment of 1 July 1997. To coincide with the Court of Appeal decision and before they knew what it was, the Powells caused the publication of a substantial article on pages 4 and 5 of The Guardian for 1 July 1997 entitled "Unfitting epitaph" containing extensive details of the Powells' allegations against the doctors. This article repeated all or most of the allegations made on the Programme. It was grossly one-sided, unbalanced and unfair, depicting all the Powells' allegations as if they were established fact, the doctors' denials (in so far as they were mentioned) as if they were false and dishonest and portraying each of the four official investigations into those allegations (the MSC Welsh Office appeal, Elias inquiry and police investigations) as flawed by incompetence or bias and in any event a whitewash.

13.5 In his judgment of 1 July 1997 dismissing the Powells' appeal Lord Justice Stuart-Smith observed among other things that it was difficult to see how the alleged differences in the contents of the documents could possibly have assisted the doctors' case before the MSC and that the copy documents shown to the Court appeared to show from the date stamps that CSS(2) and F2 were in existence long before April 1990, or alternatively that the conspiracy was much wider than one (alleged in the proceedings) between five of the doctors and Dr Forbes. Stuart-Smith LJ expressed the hope that the Powells would now take the view that there was little to be gained in seeking to take the matter any further.

13.6 Nevertheless, the Powells caused the publication on 6 July 1997 of a substantial article in The Sunday Telegraph entitled "A doctor's right to lie" in which the doctors were accused of lying to the Powells, removing documents, forging others, and backdating letters.

13.7 On 8 September 1997 the doctors' solicitors sent to Mr Powell a letter enclosing further copies of the affidavits of Dr Rees and Ms Evans, and pointing out that these demonstrated conclusively that the Powells' allegations of conspiracy, forgery and substitution of the Clinical

Summary Sheet and Forbes letter were false. They invited him in the light of these to withdraw his claims, offering in return not to press for any costs or pursue any claim in respect of The Guardian and Sunday Telegraph articles. Mr Powell responded by letter of 15 September 1997 refusing such offer and reasserting the truth of his allegations.

13.8 On 2 April 1998 the House of Lords refused the Powells permission to appeal the Court of Appeal's decision to dismiss the appeal from Butterfield J striking out the forgery claims. As a result the Powells brought an application against the UK in the European Court of Human Rights alleging breaches of articles 2, 6, 7, 10 and 13 of the European Convention of Human Rights. That application was ruled inadmissible by the Court on 4 May 2000.

13.9 From a date around October 2000 to a date unknown, the Powells caused or authorised the publication of an article entitled Robbie's story", made available on or via a website entitled www.patientprotect.org. This further repeated the allegations against the doctors. Since a date unknown a shorter account containing allegations of cover-up and deceit appears on that website under the heading "Personal accounts of abuse in our hospitals ".

13.10 A renewed police investigation into the Powell's allegations concerning the doctors began in late 2000. The investigation concluded in March 2002. In March 2003 the Powells were informed by the Crown Prosecution Service that no charges were to be brought against any of the doctors. This decision was explained in a meeting on 2 April 2003 and a letter dated 17 April 2003. Mr Powell quickly announced that he was considering judicial review proceedings in respect of that decision, causing the publication of an article entitled "Father's decision over boy death" by the BBC on 4 April 2003.

13.11 On 28 April 2003 the Fourth Defendant received a letter from Paddy French, a producer with HTV Wales stating that filming was shortly to start for another television programme on this matter. That letter quoted extensively from the 17 April 2003 letter from the CPS to Mr Powell. It is apparent that Mr Powell has cooperated with HTV Wales by providing the said CPS letter. These Defendants fear that a further programme is soon to be broadcast, with the cooperation or authorisation of the Powells, which will repeat the allegations against the doctors complained of."

44. On 14th July 2003 the Claimants served a Notice of Discontinuance of all claims against all the Defendants other than Dr Williams.

45. On 21st July 2003 Mr Powell made a witness statement in which he says the statement is in defence to the application to strike out the claim being made by Dr Williams, and that it is also to serve as his Reply to Dr Williams' Defence and Counterclaim.

46. Mr Powells' witness statement covers 23 pages. The substance of it is in the sentence: 'Dr Williams knew that the offending notice he was party to was false and untrue (certainly in respect of the referral letter which the police and the CPS believed to be a forgery as stated in [the letter from the CPS dated 17th April 2003]'. Amongst other exhibits is Mr Powell's statement to the police made on 19th April 2001 which covers 137 pages. As appears from the foregoing, the statement is a mixture of allegations of fact, of evidence of himself, and evidence and opinions of third parties. It is plain that it does not conform to Part 53 Practice Direction 2.8 and 2.9, and I shall return to this aspect of the matter later in this judgment.

47. More seriously, (although Mr Warby QC did not develop submissions on this pleading point) there is reason to question whether, if the Claimants were legally represented, at least some of the allegations in his witness statements could appear in a Reply at all, or if they could be pleaded, whether they could be persisted in at a hearing. I return to this point below.

48. On 22nd July 2003 Mr Lindsay made a witness statement in response to the application to strike out. He states that he was the Claimants' solicitor for the purposes of this action until recently when the Claimants filed a Notice of Change of Solicitor, and that he continues to represent the Claimants in relation to various other matters arising out of the death of Robert in April 1990, including the forthcoming inquest. He has arranged an interview with DCI Poole regarding the evidence obtained in the second police enquiry. Amongst other evidence, Mr Lindsay has been told that there is forensic evidence from a document examiner and a DNA scientist concerning Dr Williams' referral letter dated 12th April 1990. The implication seems to be that, if this evidence or information about it is communicated to Mr Lindsay, Mr Lindsay will make it available to the Claimants for use in this action as well as at the inquest. Mr Lindsay attaches a letter from the Coroner dated 21 July 2003 which itself encloses 'a comprehensive list' of witnesses whose statements the Coroner holds, and invites submissions as to the scope of the enquiry. Mr Warby QC tells me that the list includes some 111 different witnesses.

49. The case thus comes before me, thirteen years after the events in question, and eleven years after the words complained of were published, with pleadings which are largely new, so far as Dr Williams is concerned, and not yet formulated so far as the Claimants' Reply is concerned.

50. A further point to be noted about the pleadings is that the reason for Mr Powell's consent to the amendment to the Defence is unclear. A legally represented Claimant might have objected to the introduction of a plea of justification at this very late stage. On the other hand, Mr Powell might take the view that the plea of justification

is little more than the mirror image of his own plea of malice. And so far as the Counterclaim is concerned, since Mr Powell appears to be content with, and perhaps to procure, as much publicity for his complaints as the media will afford him, the fact that it is made so late may be immaterial. That appears to be implicit in the letter about a forthcoming programme from HTV Wales dated 28th April 2003, referred to in para 13.11 of the Counterclaim. On 3rd June 2003 Mr Powell wrote a letter of complaint to the General Medical Council. It may be that a new action on the basis of the Counterclaim could be started at almost any time. The Inquest is due to start in November, and will no doubt attract further publicity.

THE PURPOSE OF THE PROCEEDINGS

51. Mr Warby QC submits that the proceedings are not brought for the purpose of vindicating the Claimants' reputation and are an abuse of process. The following paragraphs set out the case as presented by him.

52. He points out that this action was only begun three years after the publication, when the limitation period was about to expire. The proceedings were not served for another three months, near to the last possible moment. The Particulars of Claim contained no details at all of any specific facts relied on in support of the allegations of injury to reputation or feelings. There still are no such particulars. As the expert Counsel and solicitors retained by the Claimants at the outset must have realised and advised them, the occasion of publication was manifestly one of qualified privilege, and the central issue in any action was always going to be malice; and in practice the issue of malice would turn on whether in and around April 1990 the doctors were indeed guilty of the destruction, forgery, and falsification of which Mr Powell had accused them on the HTV programme.

53. At the time, however, Mr Powell had three other avenues for pursuing those allegations which remained alive: the conspiracy claim, the first police investigation and the Welsh Office inquiry. The inference to be drawn from all of the above is clear: these proceedings were not issued from a genuine desire to vindicate reputation, but in order to keep alive the possibility of using the libel action as an alternative vehicle for the pursuit of Mr Powell's allegations, in case the other avenues then being pursued should fail. In other words, this action is itself a further aspect of Mr Powell's campaign. Master Turner was clearly right when he said in his judgment of 21 December 2000 that the Cs had "...pursued many different avenues in their efforts to obtain redress for the death of their son. This defamation action is but one more stage in that process".

54. It is plain from the circumstances set out above (submits Mr Warby QC) that the Claimants' purpose in bringing this libel action is not to vindicate any possible damage to their reputation but is rather to preserve a potential forum in which to ventilate their complaints against all the original doctor defendants (and the other medical professionals now alleged to be part of the conspiracy) if the other concurrent existing attempts to do so (namely the GMC complaint, the Inquest, and

further complaints to the police) prove fruitless. Contrary to his bare assertion in his witness statement, Mr Powell has repeatedly asserted that he is not concerned about damages but rather with achieving a full inquiry into his son's death. Mr Powell's only answer to these points, Mr Warby QC submits, is simply to assert that his interest in the case is to prove he and his wife are not liars and to seek damages.

55. I asked whether Mr Warby QC wished to cross-examine Mr Powell. He declined to do so, stating that I would have the opportunity to hear Mr Powell make his submissions in person, as I did. In any event, he submitted, the test of intention is an objective one.

56. In answer to my questions, and in the course of his submissions, Mr Powell said substantially what follows. He said his reputation in his community had suffered: 'I am interested in any compensation I am entitled to have, but that is less important than truth about my son's death ... all we ask is the truth. Mr Warby portrays me as vindictive, hounding the doctors for revenge. That is not true. Had the doctors shown remorse, that would have been enough. The doctors have suffered, but it is the result of their own behaviour. The doctors should admit their mistakes and apologise. They have not, but continue to claim Robert received appropriate medical treatment.... The libel action is to recover damages for damage to our reputations'. He said that the compensation paid by the Health Authority had been entirely lost in paying the costs of the unsuccessful claims which were struck out. He said in relation to these proceedings: 'If I lose my house so be it. I want what I am entitled to' [by which he meant relief in the libel action]. He said he wanted the truth about the circumstances of Robert's death, and the medical profession should not be allowed to cover up. He said: 'If I had had the money I would have sued for libel as soon as the notice went up. Peter Carter-Ruck and Partners advised me' (for no charge, as he gave me to understand). 'I have done everything I possibly can to advance the libel action'. He said an application for legal aid for a claim in malicious falsehood had been granted, but no such claim could be brought in the absence of evidence of financial loss. He said his solicitors, by which I understood Mr Lindsay, had been threatened with a wasted costs order, and that he understood the implications of costs orders.

57. Most of Mr Powell's submissions to me were devoted to the events immediately preceding Robert's death, and to what he claimed was the cover up by the doctors thereafter.

58. As to the law, Mr Warby QC submitted as follows. This was a separate ground for striking out or staying an action under the RSC, which does not depend on the need to show prejudice, or that a fair trial is not possible. That remains the case under the CPR: UCB Bank Plc v Halifax (SW) Ltd (CA, unreported 6 December 1999) at [6]-[9]. It has, accordingly, been held that it is an abuse of the process of the court to bring and/or prosecute proceedings not so as to vindicate a right but in a manner designed to cause a defendant problems of expense, harassment, and the like beyond those ordinarily encountered in the course of properly conducted litigation. The Claimants' purpose is to be objectively ascertained, by reference to what a

reasonable person in his situation would have in mind when initiating or pursuing the action. See Wallis v Valentine [2003] EMLR 175, CA, at [31]-[32], applying and explaining Broxton v McLelland [1995] EMLR 485 and Goldsmith v Sperrings Ltd [1977] 1 WLR 478, CA, 499E. In particular, in relation to Broxton, Mr Warby QC relied on abuse by, as he said, the achievement of a collateral purpose beyond the proper scope of the action and the conduct of proceedings not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment, commercial prejudice and the like beyond those ordinarily encountered in the course of properly conducted litigation.

59. The only proper purpose of a libel action is to vindicate reputation. Hence it is the hallmark of a genuine claim for libel that it should be brought and pursued with expedition. And whether it has been so pursued is the touchstone by which to judge whether it is genuinely a claim to vindicate reputation. In Lloyds Bank PLC v Rogers (CA, unreported 20 December 1996). Hobhouse LJ quoted with approval the following from Glidewell LJ's judgment in Grovit v Doctor (CA, unreported, 28 October 1993):

> "The purpose of a libel action is to enable the Plaintiff to clear his name of the libel, to vindicate his character. In an action for defamation in which the Plaintiff wishes to achieve this end, he will wish the action to be heard as soon as possible."

and Simon Brown LJ said (transcript p.16)

> "Mr Eady ... relies heavily upon the powerful dicta of this Court in [Grovit] and [Oyston v Blaker] emphasising the desirability of those who allege they have been defamed seeking the vindication of their reputation as speedily as possible, and pointing to the relative speed or delay of their proceedings as a touchstone by which the genuineness or otherwise of their complaint may be judged.
>
> In 99.9 per cent of libel cases I have no doubt as to the correctness of that approach and, not least, in cases where the issue is whether to strike out the claim for want of prosecution (Grovit) or whether to permit it to be brought out of time under the provision of section 32A of the 1980 Act (Oyston). ..."

60. Having heard Mr Powell, I find myself in a position similar to that in which Simon Brown LJ found himself in Broxton (as described by him at p496). There is not the evidence to justify so harsh a judgment on the Claimants at this stage. Their motive for bringing the libel action is to a large extent to find the truth, if they can, and is not confined to vindication and damages. But, as Simon Brown LJ said (Broxton at p497-8), 'motive and intention as such are irrelevant' and a claimant 'is entitled to seek the defendant's financial ruin if that will be the consequence of properly prosecuting a legitimate claim'. That is not say that the Claimants are seeking Dr Williams' financial ruin, but the same applies to the ruin of his professional

reputation, which would be a consequence of the Claimants' success in the libel action. I do not find that the Claimants are seeking a collateral advantage beyond the proper scope of the action. The Claimants do have a genuine desire to vindicate their reputation.

61. I turn now to the conduct of the proceedings by the Claimants. This raises different considerations. Mr Warby QC criticizes what he says is the Claimants' attempt to keep alive the possibility of using the libel action as an alternative vehicle for the pursuit of Mr Powell's allegations, in case the other avenues then being pursued should fail.

62. Mr Powell defended his conduct of the action by reference to the decision of the Court of Appeal in Khalili v Bennett and others [2000] EMLR 996. In that case the claimant complained of newspaper articles published in January 1995, relating to his alleged involvement in a theft in France. He delayed proceeding with the libel action in England while the proceedings against him France were determined at first instance and on appeal. He resumed pursuit of the libel action after the proceedings in France had been resolved in his favour. Hale LJ said (at para 29) that the real issue in the case was whether or not it was reasonable for the claimant to delay matters until the outcome of the French criminal proceedings was known. She noted that it was clearly not a case where the claimant had no intention of bringing matters to a conclusion. Unlike in the present case, there had not at any time been an order of the court that the libel proceedings be stayed. She concluded (at para 42) that where there were related criminal proceedings and libel proceedings 'there can be no conclusive rule either way' as to which proceedings should be heard first. She also said at para 46: 'But the overriding principle is justice. Furthermore, under rule 1.3 of the Civil Procedure Rules, both parties are required to help the court to further the overriding objective. It may, therefore, no longer always be appropriate for defendants to sit back and wait for the claimant to do nothing when there are several steps that they themselves could have taken to have the matter disposed of earlier'. She concluded that the failure to proceed with the libel action was not an abuse.

63. There is more than one set of proceedings (other than these libel proceedings) to which I must have regard in this case. There is the claim in negligence, and there are other avenues of complaint, referred to above, some of which involved the police and a possibility of criminal proceedings.

64. So far as the negligence proceedings are concerned, if the negligence claim had not been struck out, but had had a reasonable prospect of success, or at least been arguable, then it would have been difficult to argue that the delay in awaiting the outcome of those claims was an abuse of process. The issues sought to be raised in this libel action might have been resolved in the negligence action, and, on that assumption, there might have been no need to pursue the libel action at all.

65. As it is, those claims having been struck out, and all further proceedings on those claims have failed. So the Claimants cannot rely on the negligence proceedings to

excuse the delay in proceeding with the libel action. If those were the only relevant proceedings, then it could have been said that the delay in the libel proceedings while the hopeless claims in the negligence action were being pursued was conduct of the libel proceedings in a manner designed to harass and prejudice the Claimants. In my judgment, it follows from the decision of Butterfield J, as upheld by the Court of Appeal, that the Claimants cannot rely on those hopeless proceedings as a good excuse for the inordinate delay in getting on with the libel action.

66. Mr Warby QC sought to make a similar point in relation to the other proceedings which had led nowhere for the Claimants as he made in relation to the negligence proceedings. He relies on the MSC Complaint, the Welsh Office Appeal, the first police investigation, and the enquiry by Elizabeth Elias QC. None of these, he says, provide a good excuse for the inordinate delay in the libel action.

67. Had those matters fallen for consideration by me before the start of the second police enquiry in late 2000, there would have been force in the submission that the libel proceedings should have been commenced more promptly and that there were no other relevant proceedings excusing the delay, after the notification by the CPS on 13 May 1996 that there would be no prosecution. But a second police enquiry was started late in 2000, and an inquest was opened on 21 December 2000. Given the result of the second police enquiry, as explained in the CPS letter of 17th April 2003, and the still pending inquest, I do not consider that it is now possible for me, at this stage, to categorise the Claimants' persistence in following those avenues as hopeless or abusive, even though it may have appeared so, at least in the period between May 1996 and late 2000. I respectfully agree with the remarks of Master Turner in his judgment cited above, when he said: 'the Police investigation could unravel many of the strands of this complex thread of issues and assertions. There is a real danger that if a step were taken either to strike out this action or proceed to trial prematurely in advance of the conclusion of the Police investigations, there could be a serious miscarriage of justice'. If the view expressed by the CPS in April 2003 is correct, then the earlier proceedings and enquiries should have disclosed the evidence that has now come to light, and there would, at an earlier date, not have been the reasons which now exist for not proceeding with a prosecution (namely delay and assurances that there would be no prosecution).

68. I do not accept the submissions that the purpose of the proceedings and the manner in which they have been delayed is an abuse of process, given the particular circumstances of this case.

DELAY

69. Mr Warby QC submits that the delay should be considered as follows. In addition to the three years' delay in issuing proceedings the Claimants have - on a conservative assessment - been responsible for a further 37 months' unwarranted delay since the action began:

i) 3 months between issue and service of proceedings: November 1995 to February 1996;

ii) 13 months between the Claimants' threat of an application to strike out the Defence and the issue of a summons to do so: 29 April 1996 to 29 May 1997;

iii) 12 months over the period between 12 June 1997 (when the Master adjourned the striking out summons) and 27 January 1999 (when the Claimants served notice of intention to proceed by reissuing the summons). This is a total of 19 months' delay, but Mr Warby QC accepts that 7 months are accounted for by the without prejudice discussions of December 1997 to July 1998.

iv) 9 months from 27 January 1999 to October 1999, during which all that was done by the Claimants was some ineffectual steps to list their striking out summons. In October 1999 mediation was agreed in principle. The process did not conclude until a year later.

70. Mr Warby QC submits that to this must be added the further 28 months' delay, from 21 December 2000 to 30 April 2003, due to the stays sought and obtained by the Claimants on account of the renewed police investigation. The initial stay application was only made after, and (he submits) it seems reasonably clear that it was prompted by, the doctors' issue of an application to strike out for delay (10 November 2000). It was resisted by the doctors, but Master Turner - whilst recognising that this was "a very stale action" - granted it, in order to protect the integrity of the police investigation. That is the basis on which the Claimants had sought the stay. By January 2003 Master Leslie was, as the Claimants' solicitors acknowledged "extremely concerned that the civil proceedings are very old and are drifting". He was right to be concerned. Yet the Claimants pressed for and obtained a further three month stay to await the CPS decision. In view of Master Turner's earlier decision the doctors consented. Master Turner had foreseen that the police investigation might resolve the issues either by clearing the doctors, or by resulting in their prosecution and conviction. But it had neither of these outcomes. It found that any prosecution would be an abuse, due in part to the very delay of which Dr Williams is complaining.

71. The argument on delay as presented in the Skeleton argument is in the alternative:

i) Delay has made a fair trial impossible, and the claim should be struck out on that basis;

ii) Independent of the question of fair trial, Art 6 requires a trial within a reasonable time.

iii) There has recently been a further delay (which is also a breach of the order of Master Leslie of 30th April 2003) in that a Reply has not served by 11th July 2003 (that is a Reply compliant with the rules);

72. So far as the law is concerned, Mr Warby QC relies on the following propositions.

i) Under the CPR the court has ample power to strike out for delay. Rule 3.4(2)(c) gives the court a broad and unqualified discretion to strike out a claim where there has been a failure to comply with a rule, practice direction or court order: Biguzzi v Rank Leisure Plc [1999] 1 WLR 1926, 1933. In addition, as May LJ pointed out in Purdy v Cambran (CA, unreported, 12.12.99) at [45], Rule 3.1(2)(m) gives power to take any step or make any other order for the purpose of furthering the overriding objective, and the inherent jurisdiction is preserved by Rule 3.1(1). Although conduct before the introduction of the CPR is to be assessed by reference to the rules then applicable the decision is made under the CPR regime, and is not fettered by the pre-CPR law; the correct approach is to take account of all relevant circumstances and to make a broad judgment after considering all available possibilities; there are no hard and fast rules: Purdy v Cambran at [47], [48], [51] per May LJ. I would add the following citation from [51]: '...it is necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective'.

ii) Although, as Lord Woolf MR pointed out in Biguzzi, the CPR provides a broader range of possible sanctions than existed under the RSC, the lesser sanctions are for the less serious cases; Biguzzi does not mean that in the more serious cases the courts will be more lenient than before; in such cases striking out remains the appropriate remedy: UCB Bank Plc v Halifax (SW) Ltd (CA, unreported, 6 December 1999) at [17] per Lord Lloyd. If delay has made a fair trial impossible then, it is submitted, the action must be struck out. The reasoning of Simon Brown LJ in Roe v Novak (CA, unreported 27 November 1998) at p11 remains valid: In a case where it is clearly established that the plaintiffs inordinate and inexcusable delay has seriously prejudiced ... the possibility of a fair trial ... justice will generally be better served by striking out … than by allowing the action to proceed to what ex hypothesi is likely to be an unfair trial. For the court to do otherwise would infringe the defendant's right to a fair trial under Article 6(1) of the Convention and thus be inconsistent with s6 of the Human Rights Act 1998.

iii) The Claimants' delay in this case is in clear breach of the rules applicable under the RSC (which applied from the inception of the claim until April 1999): "...if the plaintiff is guilty of inordinate and inexcusable delay before issuing the writ, then it is his duty to proceed with it with expedition after the issue of the writ ... even a short delay after the writ may in many circumstances be regarded as inordinate and inexcusable": Biss v Lambeth Area Health

Authority [1978] 1 WLR 382, 390 per Lord Denning MR. In that case 9 months' delay was held inordinate and inexcusable in the light of delay in starting the case.

iv) Article 6(1) requires not only a fair trial but also a trial within a reasonable time. These are independent requirements, and it is no answer to a complaint of breach of one of them that the other was not broken: Porter v Magill [2002] 2 AC 357, [108]; Dyer v Watson [2002] 1 WLR 1448, PC, [73]. In determining what is a reasonable time for this purpose the court must consider the complexity of the case, the conduct of the parties and of the relevant authorities; and where proceedings have an impact on a defendant's professional reputation and ability to practise his profession special diligence is called for: Davies v United Kingdom [2002] 35 EHRR 29 at [26]. The ECHR has also held that in a libel case expeditious proceedings are necessary, and protracted uncertainty unacceptable: Alithia Publishing Company v Cyprus Application 53594/99, Judgment of 11 July 2002 at [37], [43]. English law reflects that approach by allotting a uniquely short limitation period to libel actions, and taking that as its guide in assessing what kind of delay is reasonable or acceptable in such actions. As Simon Brown LJ observed in Roe v Novak (CA, unreported 27 November 98)

> "... the very purpose of an action like this is supposed to be the vindication of the plaintiff's character. That plainly is something most appropriately done sooner than later if it is to be done at all. The cause of action pleaded here is malicious falsehood. True, the limitation period for that remained six years when, in 1986, for defamation claims it was reduced to three years. In 1996, however, the limitation period for both was reduced to one year. That to my mind says much about how courts should view long delays in cases of this kind." (New Law Publishing transcript page 13).

v) Although it is not yet authoritatively decided whether a breach of the reasonable time requirement necessarily requires dismissal of an action (Dyer [65]-[68] per Lord Bingham) it is submitted that only this can be the appropriate remedy here, as indeed it was held to be in Dyer itself, in respect of the defendant "K", where the delay in prosecuting sex offences was 3½ years: see ibid [68].

73. So far as concerns the period in when the action was subject to the Rules of the Supreme Court, I find that the period of delay is inordinate, but, for the reason already given in relation to the submission of abuse of process, I find that the delay was excusable. For the same reason, I find that all the delays in the four periods identified by Mr Warby QC are excusable.

74. I turn next to consider whether the delay has made a fair trial impossible. The allegations against Dr Williams are very grave, amounting as they do to allegations of criminal conduct. There is some force in the submission that if the delay is such as to have made the CPS consider that it was one reason why there should be no prosecution at this stage, then that is some indication that neither should there be a libel action. Further, there can be no doubt that the delay will impede any attempt in any future proceedings to get to the truth concerning the Claimants' allegation. One of the Claimants' main witnesses has died.

75. On the other hand, a libel action requires the court to have regard to the claimant's right of access to justice as well as to the defendant's rights. I shall consider this further below.

76. Moreover the consequences of the two types of trial, civil and criminal, are very different. If convicted of the crimes alleged, the legal consequences to Dr Williams would be criminal sanctions, and almost certainly very severe professional sanctions as well. If the allegations are proved to be true in a libel action, then the legal consequence will be an award of damages, and perhaps costs. What the professional consequences would be to Dr Williams of the Claimants succeeding in the libel action (if they were to succeed) would depend on the evidence in the case. So it cannot be said that just because a prosecution cannot now be brought it follows that the libel action cannot now proceed either.

77. The recent introduction of a counterclaim into the pleadings provides an illustration of the position. I say an illustration, because it is Mr Warby QC's case that the proceedings should be struck out. If the claim were struck out, Dr Williams' case is that he would not plan to seek an injunction against Mr Powell because he would not want to take any step which would serve to continue or revive the dispute. However, the counterclaim is not in fact dependent on the claim. As noted above, there may well be further publicity about the events with which this case is concerned (whether or not that publicity is instigated by the Claimants). It appears from para 13.11 of the Counterclaim that there is a present intention to make another broadcast.

78. I ask myself what would happen were Dr Williams to wish to restrain, or seek damages for, a future publication of the allegations of the Claimants, possibly in circumstances where the Claimants were not themselves threatening to repeat them, but where a journalist or publisher was threatening to do it. If Mr Warby QC's submissions are correct, then it ought to follow that no such claim by Dr Williams could proceed because there could not be a fair trial of the action.

79. But in my judgment that would not be right. The fact that a person threatens to publish, or does publish, allegations about events occurring many years previously does not of itself preclude a fair trial. In the l970s it was possible to have a libel trial of allegations against a naval officer on a Russian convoy, and there have been more than one very famous trials concerning the holocaust, one at the suit of Dr Dering, and only recently at the suit of Mr Irving. Criminal proceedings concerning events

occurring a generation or more ago are also not uncommon, particularly in relation to allegations of abuse of children. In order to show that a fair trial is not possible, it is not enough to point to the delay. Each case will depend on its own facts.

80. While, as I have said, the delay will undoubtedly impede the trial of this action, if it is to be tried, on the information before me, it appears that the issues depend mainly on what is, or is not, to be found in the documents. In so far as recollection is important to the case of one side or the other, it is Mr Powell's recollection of the documents that were shown to him and Rev Thomas that is most important. If delay creates unfairness, then so far as recollection of witnesses is concerned, the disadvantage is likely to be felt more heavily by the Claimants than by Dr Williams.

81. I have particularly in mind, also, the impact that these proceedings have had and are having on Dr Williams. I assume his witness statement to be true. But the libel action is not the only matter that has been causing him this distress in the past, nor is it the only matter now. As already noted, there are other proceedings, namely the inquest, and the continuing threat of further publicity. I do not know what course the inquest is to take, because no decision had been reached at the close of submissions in this case. I assume that the inquest will proceed, at least in some form. Striking out the libel action would not bring to an end what Dr Williams is suffering

82. I conclude that a fair trial of the libel action is not precluded by the delay that has occurred.

83. So I turn to the question whether the independent requirement of Art 6, of a trial within a reasonable time, can no longer be met. I particularly bear in mind, as Mr Warby QC submits I should, the complexity of the case, the conduct of the parties and of the relevant authorities (here the police and the other bodies who have been involved in considering the Claimants' complaints), and, since the proceedings have an impact on a defendant's professional reputation and ability to practise his profession, that special diligence is called for. I also bear in mind that if this action is to proceed, then it cannot come to trial for a considerable period, which may be the 18 months to two years estimated by Mr Warby QC.

84. As I noted above, a libel action requires the court to have regard to the claimant's right of access to justice which corresponds to the defendant's (and indeed the claimant's) right to a trial within a reasonable time. On this point, namely where Convention rights of both the parties are in play, I receive limited assistance from the cases cited to me. Porter v Magill, Dyer v Watson and Davies v UK all were (or concerned) not civil litigation between individuals, but proceedings by public authorities against individuals. In a criminal case such as Dyer the corresponding interest of the state is the public interest in convicting the guilty, and in the other cases there are corresponding public interests which the state is pursuing. But none of these public interests is itself an Article 6 right. Alithia v Cyprus did concern a libel action between individuals, but the case in Strasbourg was between the publishers of the newspaper who were defendants in the libel action and the state.

Naturally, the plaintiff in the libel action was not a party. The delay had been due to the lack of time available in the national courts and for reasons independent of the defendant publishers' will. The Strasbourg Court was concerned with whether there was a breach by the state of the defendant publishers' Art 6 rights, and did not have to consider the position of the plaintiff in the national courts.

85. What is 'a reasonable time' is not fixed or ascertainable from the case law. It depends on all the circumstances of the case. I find that a trial of this libel action, assuming it to take place even in one year's time, would not be within a reasonable time. The publication was in November 1992, and the proceedings were commenced in early 1996. The delay until the date of this judgment is nearly eleven years from the publication, and over seven years from the date of commencement of the proceedings. Neither period is reasonable, notwithstanding the complexities.

86. For reasons already given, I have held that long as this period is, it is not the fault of the Claimants. The Claimants' actions are excused by the apparent failure of public authorities to conduct appropriate investigations, the outcome of which it was reasonable for the Claimants to await. It may be for debate whether, arising out of the failures in the investigations, the Claimants and Dr Williams may have a ground for complaint against a public authority under the Convention (the Human Rights Act 1998 was not, of course, in force until October 2000). But the decision in Alithia does not take me very far in deciding what I should do when faced with an issue between the two individual litigants, and not an issue between a litigant and the state, as to what should be done about a delay for which the state is responsible.

87. I have not had any authorities under Art 6 cited to me by Mr Warby QC on the proper approach for the court faced with two litigants, neither of whom is a public authority, and each of whom is seeking to enforce an Article 6 right, the one to access to justice, the other to a trial within a reasonable time. In Khalili para [50] Hale LJ concluded that the arguments under Art 6 did not add anything to the arguments under the Civil Procedure Rules. For the reasons given below, I find that the same applies in the present case.

88. There is some guidance on the approach a court should take where two individuals are each invoking Convention rights. In Re S (Publicity) (2003) [2003] EWCA Civ 963 the Court of Appeal considered the existence and exercise of the jurisdiction of the High Court in cases involving the care and upbringing of children over whose welfare the court is exercising a supervisory role. In that case the issue was: can or should the court restrain the publication of the identity of a defendant and her victim in a murder trial to protect the privacy of her son who is the subject of care proceedings? This was not a case in which the child's welfare was the paramount consideration. The Court of Appeal held that in considering whether or not to make an order such as the order applied for in that case, the court has to carry out the exercise, which was identified at paras [55]-[57] and [65] of the judgment, of identifying the extent to which refusing to grant the relevant terms of the injunction asked for would be a proportionate interference with the private life of the child on

the one hand, and their grant would be a proportionate interference with the rights of the press under Article 10 on the other hand.

89. I also bear in mind that this is a libel action in which the Claimants have been (as they contend) accused of lying, and in which Dr Williams' professional reputation is no less at issue (and is specifically the subject of the counterclaim). The reputations of both parties are in issue. In Prebble v Television New Zealand Limited [1995] 1 AC 321 Lord Browne-Wilkinson said: 'The effect of a stay is to deny justice to the plaintiff by preventing him from establishing his good name in the courts'. That statement puts the access to justice point clearly, notwithstanding that the case was from New Zealand, and not expressed in the language of the ECHR. A court should be very reluctant to cause such an injustice to an individual claimant.

90. Although this case was not cited to me, I also note that in Cumpana and Mazare v Romania Application no 33348/96, judgment of 10 June 2003, the ECHR unanimously held that reputation and honour are equally protected by Articles 8 and 10(2) of the Convention: see para [48] and the Dissenting Opinion, last paragraph. If this is so, then the Claimants are also invoking a Convention right in seeking to vindicate their reputation. Dr Williams is invoking his right to freedom of expression under Art 10 in his Defence, and the same right as the Claimants in his counterclaim. Since, as it seems to me, both parties are already invoking Convention rights under Art 6, the fact that they may also be in a position to invoke Convention rights under Arts 8 and 10 adds little.

91. I must concentrate on the intrinsic justice of a particular case in the light of the overriding objective. It seems to me that, in the context of the argument I am at present considering, the exercise that I must carry out to fulfil this duty is to identify the extent to which refusing to grant the relief asked for by Dr Williams would be a proportionate interference with his Article 6 right to a trial within a reasonable time on the one hand, and the grant of that relief would be a proportionate interference with the rights of the Claimants to access to justice under Article 6 on the other hand. I do not find this exercise easy. Art 6 is not qualified in the manner in which both Art 8 and Art 10 are qualified. On the other hand, there can be, and is here, a tension between the rights under Art 6 of the Claimants and the Defendant. I conclude that granting a stay would be a serious injustice to the Claimants in preventing them from establishing their good name in the courts, while the corresponding injustice to Dr Williams would be less serious, since, as I have found, a fair trial remains possible on the facts of this case. Accordingly I would not grant a stay on the basis of the argument advanced under Art 6 and the requirement of a trial within a reasonable time.

THE OVERRIDING OBJECTIVE AND PROPORTIONALITY

92. In reaching the conclusion that I have on the justice of the case, I have had in mind a number of specific points raised by Mr Warby QC by reference to CPR 1.1. Broadly I summarise them as follows, together with my observations.

93. It is submitted that the cost and the complexity of a libel action would be disproportionate to the prospective benefit, in terms of damages, to the Claimants. That is commonly the case in libel proceedings. The arguments concerning the appropriate financial benefit to a libel claimant have recently been considered in the Privy Council in Gleaner Company Ltd & Anor v. Abrahams (Jamaica) [2003] UKHL 55 (14 July 2003). In many cases the imbalance between the cost of the proceedings and the possible damages leads prospective claimants not to sue. In the present case, Mr Powell appears undeterred by this imbalance. That may well be a reason why, if the case proceeds, the court should exercise case management powers, if and when it comes to ruling upon any new draft of the Reply, or on the conduct of any trial. It is not, in my view, a reason by itself for striking out the claim. Mr Powell's indifference to the consequences in costs may at some point become a reason why the action has to be struck out, (if and when some sanction is shown to be necessary), because it may then appear that none of the other case management powers, considered in Biguzzi as alternatives to a strike out, would be effective in these Claimants' case. That point has not yet been reached in my judgment.

94. Next it is submitted that the inquest and other possible investigations provide a more appropriate forum than a libel trial for the investigation of the Claimants' allegations against Dr Williams. I have already held this to be correct, and hence that there was an excuse for not pressing on with the libel action, while such other proceedings are pending. If and when such other proceedings are determined (and if the libel proceedings have not meanwhile been stayed or struck out for other reasons) then that time will be the appropriate time to decide whether the libel proceedings can properly proceed. The existence of other unresolved proceedings is not of itself a reason for staying or striking out the libel action.

95. Finally it is submitted that an appropriate share of the court's resources has already been taken up by the negligence proceedings and the applications to Butterfield J and the Court of Appeal, and the application to the ECHR. The fact that a claimant has pursued other avenues of redress which were struck out is not a reason why, when he ultimately adopts an appropriate avenue of redress, that too should be struck out.

DELAY AND THE SERVICE OF A REPLY

96. As mentioned above, it is plain that the witness statement that the Claimants propose should stand as the Reply does not conform to Part 53 Practice Direction paras 2.8 and 2.9. These provide:

> '2.8 Where a defendant alleges that the words complained of are true, or are fair comment on a matter of public interest, the claimant must serve a reply specifically admitting or denying the allegation and giving the facts on which he relies.

> 2.9 If the defendant contends that any of the words or matters are fair comment on a matter of public interest, or were published on a privileged occasion, and the claimant intends to allege that the defendant acted with malice, the claimant must serve a reply giving details of the facts or matters relied on.'

97. There is serious reason to question whether, if the Claimants were legally represented, at least some of the allegations in his witness statements could appear in a Reply at all, or if they could be pleaded, whether they could be persisted in at a hearing. The reason for this concern is the well known rule requiring particularity in the pleading of dishonesty, and the related professional duties of lawyers, most recently discussed in Medcalf v Mardell [2003] 1 AC 120, where Lord Bingham of Cornhill said:

> 'The parties to contested actions are often at daggers drawn, and the litigious process serves to exacerbate the hostility between them. Such clients are only too ready to make allegations of the most damaging kind against each other. While counsel should never lend his name to such allegations unless instructed to do so, the receipt of instructions is not of itself enough. Counsel is bound to exercise an objective professional judgment whether it is in all the circumstances proper to lend his name to the allegation. As the rule recognises, counsel could not properly judge it proper to make such an allegation unless he had material before him which he judged to be reasonably credible and which appeared to justify the allegation. At the hearing stage, counsel cannot properly make or persist in an allegation which is unsupported by admissible evidence, since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn. I would however agree with Wilson J that at the preparatory stage the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it. I could not think, for example, that it would be professionally improper for counsel to plead allegations, however serious, based on the documented conclusions of a DTI inspector or a public inquiry, even though counsel had no access to the documents referred to and the findings in question were inadmissible hearsay'.

98. One object of this rule is to protect the right to a fair trial of a defendant against whom such allegations are made. The court must be concerned to uphold the rights to access to justice, and to a fair trial, which claimants invoke, but the court must be no less concerned to uphold the right of defendant to a fair trial. It may not be realistic to expect that a litigant in person will be able to conform to the requirements of pleading a Reply in a case as complicated as this one, and I certainly do not suggest that Mr Powell's attempt at a Reply is a deliberate disregard of the requirements of fairness for Dr Williams. But Dr Williams is entitled to have the case against him

properly pleaded, and limited to what can properly be alleged. That is something to which the court must have regard at an appropriate stage.

99. My concerns as to how the case might proceed (if not stayed or struck out) have been added to by Mr Powell's explanation of his discontinuance of the action against the other defendants. One reason why Dr Williams was left as the only defendant is because he is the only one against whom the CPS has said there is evidence on which a prosecution might be based. But Mr Powell also said that he had not discontinued against the others because he accepted that there was no case in malice against them. He said that he dropped the case against them because of his difficulties, as a litigant in person, of conducting a case against so many different defendants. Mr Warby QC made the point, with some force in my view, that if the other defendants were to be called as witnesses in any future trial, then it could be expected that Mr Powell would seek to cross-examine them on the basis that they too knew that the words complained of were false.

100. So there is also force in Mr Warby QC's submission that there has been further delay since the expiry of the time for service of the Reply, which was set at 11 July 2003 by the order of Master Leslie of 30th April 2003. This delay is not excused (although it may be explained) by the absence of legal representation available to the Claimants.

101. The CPS letter of April 2003 may perhaps provide the basis for a plea of malice. Since this question is not before me at this stage, I reach no decision as to whether the Claimants should have an extension of time for serving a Reply, or, if they should, as to what it can or cannot contain.

102. It does not seem to me that I should contemplate staying or striking out the action on this point. The reason why the proceedings have come before me in the way they have, (with a concession for this purpose that there is a triable issue on malice, while there is no proper pleading of malice) is apparent from the chronological account of the proceedings given above. If no Reply compliant with the CPR is, or can be, served, or if one is served in terms to which Mr Warby QC can object, it remains open to Dr Williams to take the point (if so advised) that he did not take on this application, namely that that the claim has no realistic prospect of success on the basis that the publication was protected by qualified privilege and there is no pleaded, alternatively no realistic, case in malice.

103. There is a further point that I note with concern. Mr Powell addressed me with skill and economy of time. It is clear that he could in principle be a capable litigant in person, aided as he appears to be by persons who are competent to assist him with legal arguments and research. However, the subject matter of the action is Robert's death, and no one conducting litigation about his own child's death could be expected to show the detachment required of an advocate (even when the advocate is a litigant in person). Moreover, questions of medical negligence are highly technical, and commonly require to be investigated by persons with training or experience in

both law and medicine. Mr Powell does not have that training, and, outside the proceedings arising from Robert's death, Mr Powell does not have that experience. I am concerned as to whether it would be fair to Dr Williams to be submitted to cross-examination by Mr Powell about Robert's death, for this reason, and for a further reason. The death of a child patient of Robert's age in such circumstances is not a normal event for a doctor, and discussion of it with the child's parents will normally be conducted, and should normally be conducted, in circumstances very far removed from those prevailing in a court. That the cross examination is being conducted by the parent could be an inhibition on the doctor in his responses. Everyone in this case has expressed their sympathy to Mr Powell for the loss he has suffered, and it is natural that this sympathy should inhibit responses to Mr Powell's points. The purpose of my referring to this point is not to suggest any solution, but to invite the attention of those concerned to the point, so that any possible procedures to address the matter may be considered.

CONCLUSION

104. I refuse the application made on behalf of Dr Williams. I will give the parties the opportunity to address me on what further directions should be given in the action, following consideration of this judgment.