TRANSCRIPT OF PROCEEDINGS

Ref. C12YP527

IN THE COUNTY COURT AT BIRMINGHAM

Priory Court
Birmingham

Before MR RECORDER KHANGURE QC

IN THE MATTER OF

KELLY CHILTON
Claimant

-v-

MICHAEL PAYNE
Defendant

GURION TAUSSIG appeared on behalf of the Claimant
NADIA WHITTAKER appeared on behalf of the Defendant

JUDGMENT
18th NOVEMBER 2021
(AS APPROVED)

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RECORDER KHANGURE:

1. In this case Ms Kelly Chilton brings a claim against Mr Michael Payne for negligence and breach of duty arising out of two procedures that she underwent regarding cosmetic surgery. The surgery took place at The Hospital Group, which is a company that provides plastic surgery to clients. In this particular case the nature of the surgery was abdominoplasty surgery (the details of which I will go through in due course).

2. The unusual nature of this claim is that although two procedures were carried out by Mr Payne (the consultant plastic surgeon) there is no allegation of negligence made by Ms Chilton in relation to the actual surgery that took place. The breach of duty that is alleged against Mr Payne arises out of what the claimant says was his duty to provide adequate post-operative aftercare (again I shall go into some detail in respect of this issue in due course).

3. On 1 December 2015, a letter of claim was sent by solicitors acting for Ms Chilton (the claimant) and that was responded to by a letter dated 13 December 2016. Both of those documents can be found in Part A of the trial bundle. Subsequently, the claim was issued, and I have before me an amended particulars of claim dated 28 January 2020, which is responded to by an amended defence which is to be found at page 31 of the bundle.

4. I am going to summarise the amended particulars of claim because a large portion of that document is agreed factual background.

5. It is said that the defendant is a self-employed surgeon. That is admitted by the defendants. It is said that an agreement was entered into on 18 May 2013 and the original abdominoplasty was carried out on 28 May 2013, although I think that the statement refers to 29 May 2013 in the amended particulars of claim. The amended particulars of claim then refers to a consultation that took place with the defendant on 11 April 2015 - with which the defendant agrees - and those attending that consultation were the defendant, the claimant and the claimant's mother, Mrs Davis.

6. On 19 June 2014 a further procedure took place which is referred to as either a "revision" or a "re-do" in the documents before me. Again, this is agreed. On 20 June 2014 the claimant was discharged home.

7. On 28 June 2014, the first follow-up appointment was made whereby the claimant was seen by the nurse employed by the company (whom I shall refer to hereinafter as "The Hospital Group" although at various stages of the trial it has been referred to as "The Harley Medical Group" also). On 10 July, there was a second follow-up appointment at which again the claimant was seen by a nurse employed by The Hospital Group.

8. At the first appointment it is common ground that a document was produced by the nurse during the course of the examination on 28 June. The nurse has recorded that the wound was healing well. In the second appointment, on 10 July 2014, the nurse has recorded that: "There was delayed healing." I shall go back to these documents later in greater detail during the course of my judgment.

9. On 16 July 2014 it is said that the claimant's mother (Mrs Davis) sought an appointment, which would have been the third appointment for the claimant after the second surgery. She sought the appointment by telephone and she was given (it is the claimant's case) a date of 7 August, which she complained about and she then persuaded the hospital to give her a follow-up appointment on 31 July 2014.

10. It is the defendant's case that he was not aware of these discussions either on 16 August or on 31 July. However, on 18 July 2014 the claimant attended the walk-in centre which was local to her at Walsall and complained that she was suffering some pain and possible infection in respect of the wound caused by the second surgery. She was prescribed some antibiotics.

11. It is not mentioned in the amended defence, but we do know that on 31 July 2014 the evidence is that Mrs Davis and the claimant rang The Hospital Group to see if the 4 o'clock appointment on that day could be brought forward, and they were told that there was no appointment that had been recorded on their system. There is an issue between the parties as to what they were told on that day, and again I shall come back to that in due course when I give my judgment on the factual issues in the case.

12. But, in any event, on 6 August 2014, the claimant attended Manor Road Hospital, following further abdominal pains and some collection of fluid around her stomach, which seemed to suggest that there was some serious infection there.

13. On 8 August, Manor Road Hospital (a National Health Service Trust hospital) carried out a surgical debridement and two litres of seroma was drained from her in infected area. By Christmas 2014 the wound had healed satisfactorily, although not to the liking of the claimant, and therefore, by reason of those facts, the claimant alleged that it was incumbent upon Mr Payne, as the surgeon, to arrange a suitable follow-up appointment at which he would be present. There is an issue between the parties and an issue between the two experts as to how long after the first appointment such a follow-up was to have occurred.

14. At paragraph 13 of the amended particulars of claim the claimant further says that the 28 June 2014 and 10 July 2014 appointments should have been conducted by the defendant, but during the course of the trial it seems to me that that allegation has not been pursued.

15. What has been pursued instead is the assertion that within 30 days of the second procedure the defendant (as the operating surgeon) ought to have personally examined the claimant. It is also said (at paragraph 14 of the amended particulars of claim) that the nursing staff ought to have been aware of the delay in healing and contacted the defendant. As I have already said, the defendant says he should have been contacted. So the claimant says, in the circumstances, the defendant (as the surgeon involved) was negligent, the particulars of which are set out in paragraph 16 of the particulars of claim, which I summarise–

1. Inadequate follow-up on the part of the defendant;
2. The defendant should have followed up sooner;
3. Failed to inform the nursing staff that if the wound was not healing properly he ought to be informed;
4. Failed to contact the defendant after the claimant's mother had called; and
5. Failed to make himself available.

16. It is pleaded in the alternative that if the court finds it acceptable for the nurses to conduct the follow-up appointments, then when they were told about the healing delay they should have arranged a review by 17 July 2014, and the importance of that date is stressed - and it is supported by the witness evidence and also the claimant's expert and, to some extent, agreed by the defendant's expert - that if a consultation had taken place on 17 July 2014, conducted by the defendant, he would have seen that there was the start of an infection and that infection would have been treated by way of aspiration and probably, I would

assume, antibiotics and the wound would have healed satisfactorily within two to three weeks. Therefore, the claimant says because she was not seen on or about 17 or 18 July 2014, the subsequent surgery which was carried out at Manor Road Hospital in Walsall under the NHS would have been avoided and the consequences of the increased infection also would have been avoided, such as skin necrosis.

17. So, the claimant says that she has unduly suffered pain, she says that she has a distorted abdomen and unsightly scarring and, in addition to which, she says that she has suffered psychological problems (which are dealt with by the two psychiatrists whose reports I have before me in the trial bundle).

18. In their amended defence the defendant says that he was not privy to the contract that the claimant may have entered into with The Hospital Group.

19. Now I will pause there because we know that The Hospital Group has since gone into administration. During course of trial there was a little bit of confusion as to when The Hospital Group went into administration, but I think it is likely, from what I heard on instructions from counsel, that it was probably 2016 or 2017.

20. It is pleaded because the claimant's mother (Mrs Davis) made a call on 16 July (if she made a call on 16 July) it was to the receptionist at the hospital and that the defendant was not told of that call. It is also said - and I will come back to this also - that emergency numbers had been given to the claimant at the outset and if there was any issue whatsoever, then she could call one of those numbers and be seen as a matter of urgency.

21. At paragraph 10 the defendant pleads that: "The hospital nurses managed the booking system and it was normal for nurses to oversee the post-operative wound care," it appears to me that it is accepted by all parties that the two appointments - i.e. seven days after the second operation and 14 days after the second operation - could be carried out by the nurses, as opposed to the defendant, despite what is said in the amended particulars of claim. In any event, at paragraph 11 of the amended defence the defendant denies that he was required to be in attendance on those two days. I agree with his evidence on this point.

22. At paragraph 12 the defendant says, and again I summarise the document as it is a lengthy document, that: "The delayed wound healing is a common occurrence after surgery such as this and it is common practice for nurses to deal with it." Secondly: "If the nurses had any concern, they would contact the defendant, or any other surgeon who was available, and that was the regular practice of the company would be employed the nurses."

23. However, the defendants also says that he was available on or about 16, 17 and 18 July, and I have seen documents within the trial bundle which show that he was actually at Dolan Park Hospital - which is run by The Hospital Group - on those days. They say, fourthly: "The defendant was not informed of any problems or issues either before the 16th or after." Therefore, the breach of duty is denied and it is accepted now, it would appear to me, on the part of claimant that the nurses were not the defendant's employees and no responsibility for their actions lie at the door of the defendant.

24. There is reference to The Hospital Group's literature, including its guidelines et cetera (at paragraph 14) and, at paragraph 16 the defendant denies that his negligence caused any pain or suffering to the claimant and he repeats that it was not his duty to see her on 28 June or 10 July 2014 and there was no evidence that, even if he had been told after those

appointments of any abdominal infection, any different treatment would have been given to the claimant. There is a reference on the attendance sheet on 10 July 2014 of some iodine being prescribed to prevent any infection occurring. So, liability is the issue before me, as is quantum.

25. Before the trial started the claimant's submission was that there are two fundamental allegations of negligence against the defendant, which is set out by Mr Taussig (counsel for the claimant), at paragraph 10 of his skeleton argument. He says, by reference to paragraph 15 of the amended particulars of claim, that: "The two remaining issues or allegations of negligence are– (a) the failure to arrange any adequate follow-up of the claimant and (b) a failure to ensure that the claimant was followed up with an examination by the defendant adequately or at all."

26. It seems to me that the way that the claimant's case was put during the course of the trial is that those are the only two courses of action or breaches of duty that the claimant relies upon in order to establish liability on the part of the defendant.

27. Now it is important to note at this stage that the claimant's skeleton argument also referred me to the relevant law and guidance and in particular at paragraph 9 onwards it is said: "There are issues here of non-delegable duty on the part of the defendant" and reference was made to the decision of the Supreme Court in *Woodland v Swimming Teachers Association* [2013] UKSC 66 and in particular paragraph 23 of the judgment of Lord Sumption. It is not necessary for me to read that out for the purposes of this judgment.

28. The claimant also relied upon *Hughes v Rattan* [2021] EWHC 2032 (QB), which I was informed by Ms Whittaker is pending either a hearing or a permission appeal hearing before the Court of Appeal. On the eve of trial, it was said, for the first time that I can see, that the duty that was owed by the defendant to the claimant was a non-delegable duty and it was going to be argued that the authorities that I have referred to were in some way in support of that proposition.

29. However, at the start of the trial Ms Whittaker took the point that this was something that surprised her because it had not been pleaded previously, she had not had sufficient time to prepare and, in any event, the claimant would need permission of the court to plead such an allegation. She submitted that the parties would need time to address the issue properly before the trial could commence. I made a ruling on this issue, that it seemed to me that the fairest outcome was that if the claimant wanted to assert that any duty that the defendant had was a non-delegable duty, then she would need to amend the particulars of claim and that time would need to be given to the defendants (a) to respond to that assertion and (b) for the parties to consider their true legal positions by reference to the authorities. After taking instructions, Mr Taussig informed me that he would proceed without relying upon any assertion that the duty imposed upon Mr Payne was a non-delegable duty.

30. It is accepted in the defence and set out positively in the amended particulars of claim that the defendant was a self-employed independent contractor whose services were paid for by The Hospital Group and that he is not responsible for any failings of the nursing staff at The Hospital Group. The nurses that were given the task of the post-operative care, as I have described already, were employed by The Hospital Group. The claimant's contract was with The Hospital Group.

31. We have the quotation (which is in bundle 2, at page 499) dated 18 May 2013 and we have various other documents, such as the patient care booklet, the website, the body surgery patient information booklet and post-operation patient information booklet, which are all provided by The Hospital Group. It seems to clear to me that the claimant was aware from the outset, having plead the same, that the defendant was an independent contractor, and that her contract was with The Hospital Group.

32. As far as legal principles are concerned, in relation to breach of duty both parties have referred me to two authorities, and one authority in particular that they say is the relevant test for a breach of duty in a clinical context, which is set out by McNair J in *Bolam v Fiern Hospital Management Committee* (1957) 1 WLR 582 at [387]:

> "… he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... Putting it another are way round, a man is in the negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view."

33. The *Bolam* test was also applied by Lord Browne-Wilkinson in *Bolitho (Appellant) v Hackney Health Authority (Respondents)* [2015] UKSC 11 at [241-242]:

> "The use of these adjectives - responsible, reasonable and respectable - all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter."

34. In Ms Whittaker's skeleton argument at paragraph 4 she also refers to Lord Browne-Wilkinson quoting the approval of Lord Scarman in *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634, at [639] who held:

> "... I have to say that a judge's 'preference' for one body of distinguished professional opinion to another is also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judge's finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment, negligence is not established by preferring one *respectable* body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if he be a specialist) is necessary."

35. In the same case, after quoting Lord Scarman, Lord Browne-Wilkinson said at page 243:

> "I emphasise that in my view it will be very seldom be right for a judge to reach the conclusion that views genuinely held by a

> competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence. As the quotation from Lord Scarman makes clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported." And my emphasis here– "It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the benchmark by reference to which the defendant's conduct fails to be assessed."

36. Now it is with those passages in mind that I will come to consider the evidence of Mr Stone (the consultant plastic surgeon that was called on behalf of claimant) and the evidence of Mr Fitzgerald (also a consultant plastic surgeon who was called on behalf of the defendant).

37. As far as the other witnesses are concerned, in particular the factual witnesses, I heard from Ms Chilton herself (the claimant), her mother (Mrs Davis) and her father (Mr Davis) and also from Mr Payne.

38. Mr Payne is also a consultant plastic surgeon, but I heard him on the issues of fact, as well as his opinion on the way that he conducted, and felt that was it was right to conduct, surgery, and in particular post-operative care within The Hospital Group or any other organisation such as a private hospital that provides such services.

39. However, I have been reminded, and I also bear in mind as far as the law is concerned, that when it comes to the assessment of witnesses, I was referred to the case of *Ollosson v Lee* [2019] EWHC 784 (QB) where Stewart J provided a summary by reference to earlier case law. At paragraph 87 he says:

> "... honesty does not necessarily equate to reliability, especially when people are trying to recall facts through the prism of later events. I remind myself of the authorities relating to evaluation of oral evidence, in particular *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm). I summarised the principles at [96] in the *Kimathi* case, adding [97] which also relevant to the present case as follows:
>
> "96 ….
>
> i) We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely on it is to be accurate.
> ii) Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of 'flash bulb' memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.
> iii) Events can come to be recalled as memories which did not happen at all or which happened to somebody else.

> iv) The process of civil litigation itself subjects the memories of witnesses of powerful biases.
> v) Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues use in the case of what the witness does or does not say.
> vi) The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. 'This does not mean that oral testimony serves no useful purpose ... But its value lies largely ... in the opportunity for which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guidance to the truth.'"

40. Luckily in this case, although it is not a heavily documented commercial case, there are a sufficient documents to test the accuracy of the various witnesses in their recollections, and that is what I shall do when I come to my conclusion about their evidence.

41. The first witness that came before me was the claimant herself. Now, before I go through her evidence I want to make a few general comments about Ms Chilton. I found Ms Chilton genuinely believed and did go through a difficult period during the course of the aftermath of the second surgery. I found her to be a truthful witness who was attempting to assist the court as best she could. But I also found that her recollection was clouded by her prevailing feeling that she regretted having had any type of procedure at all even though it is common ground between the experts that the first procedure was carried out perfectly properly by Mr Payne and there is no suggestion of any negligence on his part. It is also agreed between the experts that the second procedure was carried out perfectly properly by Mr Payne, with no suggestion of any allegations of negligence on his part.

42. The only part of the case where it is said that there was a breach of duty on the part of Mr Payne is in respect of the post-operative care. But it still remained the fact - and it came out quite clearly when a blunt question was put to her by Ms Whittaker - that she felt that the first operation had not been done properly, when that was not her pleaded case and not something that was supported by any of the other evidence. In those circumstances, there are elements of her recollection that I found to be unreliable.

43. The first part of her evidence was that Ms Whittaker took her through some important documents. The first document is at page 499 of the bundle and is termed as a "quotation" but was referred to as "the contract" between The Hospital Group and Ms Chilton. I think what has happened here is, if one looks at the document itself, it is headed: "Your personal quotation. Customer retains a copy" and then at the bottom: "Once the customer has decided to accept the quotation ..." (i.e. which contains details of the type of surgery that is to be carried out and also the account details) there is a part at the bottom which says: "Patient acceptance of quotation" and it reads: "I confirm I have received the patient information booklet and understand that I need to read through each section. I confirm I have read the

terms and conditions on the reverse of this sheet." It is signed by Ms Chilton and dated 18 May 2013. Also at the bottom, just above "Patient acceptance of quotation" there are the words: "Post-op ... consultation 7 seven and 14 days, nurse/surgeon three months."

44. Now, as far as the terms and conditions are concerned, Ms Whittaker took Ms Chilton through those and she confirmed that she had read the terms and conditions and the patient care booklet when she got home, and those are quite important because she was taken through these terms and conditions in some detail.

45. With definitions such as The Hospital Group as "The Company," it then says at 2.2 for example: "Surgeons, doctors and anaesthetists, as self-employed contractors, are themselves responsible for maintaining their registration with the General Medical Council and maintaining full private practice medical indemnity insurance. The patient warrants no cause of action will accrue against either The Hospital Group (the sister company) for any surgical aspect of the procedure carried out by the surgeon, doctor and/or anaesthetists."

46. At 5.2: "Aftercare: the initial aftercare period will include standard post-surgical review appointments within the term specified on your personal quotation. Please see our website for full details of your aftercare policy. You may wish to download this information for your records. We do reserve the right to change our aftercare policy ..." et cetera "... and your aftercare policy starts on the date of your procedure. Outside aftercare packages and appointments in any subsequent investigations and/or treatment will be quoted and charged separately."

47. As I have said, Ms Chilton accepted that she had received and read this document later. Having read it, she did say at the outset: "I didn't understand that the post-operative care was to be provided by The Hospital Group." She said: "I thought Mr Payne (the defendant) was employed by The Hospital Group." But when it was pointed out to her that she had expressly pleaded at paragraph 1A of the particulars of claim that the defendant was self-employed, she said that she knew this when she signed the particulars of claim.

48. At page 223 of the bundle is a reference to the Hospital Group website which is referred to in the terms and conditions, and again Ms Chilton said that she remembered this. She remembered it in particular because there was reference to "free aftercare for life" and, if one turns to page 223, it is set out there that: "Any revision surgery is free of costs also."

49. There is reference in this document to access to the emergency telephone support. She said that she did not think that she read that but it is quite clearly there on the page.

50. At page 111 Ms Chilton was taken to a document headed "Body surgery patient information booklet" and she accepted that she had received this booklet and she said she was sure that she had read it.

51. She was referred in particular to page 118, which is the section at the top of the page headed "Abdominoplasty aftercare" and in particular she was taken to, and she agreed she had read: "Post-operative follow-up is of paramount importance. Each patient undergoing abdominoplasty surgery will be given post-operative appointments for wound management and suture removal. Post-operative instructions are vital and we consider it very important that you adhere to them. Failure to follow these guidelines and attending your appointments can adversely affect the outcome of surgery and put your safety at risk. Following the abdominoplasty, the patient is asked to return on specified appointments approximately at

seven, 15, 30 and 90 days, or as required. Occasionally it may be necessary to return more regularly than those stated. Transport is not provided by the clinic for post-operative appointments." It is clear that the post-operative follow-up was to be provided by The Hospital Group.

52. At page 102 of the bundle is another document that was provided to the claimant which is headed "Cosmetic surgery post-operative patient information booklet." Again Ms Chilton, quite frankly, said that she was sure that she had received it. Page 103 is important and she said that she would have read this. The reason that it is important is that it states expressly: "If post-operatively you have any concern or doubts or queries about any aspect of your treatment, you should telephone the hospital as follows." A hospital ward number is given and then a telephone number and, underneath that, an emergency nurse number. Further down it says: "However, if you feel that you are developing a more serious problem, do not hesitate to contact the appropriate emergency authority, e.g. local A & E department or GP." It gave the claimant the option of dialling an emergency number to get in touch with The Hospital Group if there were any complications or concerns that she had or, alternatively, quite properly, she was reminded that the NHS provides emergency services also.

53. At page 105 of the same pamphlet, under the heading "Post-operative review/suture removal" the second paragraph: "If you are unable to attend your post-operative review, please contact the outpatients department ..." and it gives another number "... to request an alternative time and date." Next paragraph: "When you attend the clinic for your post-operative review, the type of procedure that you will have had will determine who you will see and what intervals after surgery. You will be given specific instructions for the removal of sutures (stitches) but these will be reviewed at your first follow-up appointment. Your dressing, plaster or suture removal, you will normally see one of our specialist clinic nurses. You should expect to see your surgeon between one to three months after surgery to assess the outcome of surgery. You may, of course, request to see your surgeon post-operatively at any convenient time if you wish to discuss anything about your treatment."

54. All of those documents are quite clear and it has been confirmed to me by the claimant that she had received them.

55. As to the "protocol" (as it has been called from time to time in this trial) or "procedure" (that is adopted by The Hospital Group) for post-operative care, it seems to me that in the circumstances that such protocol or procedure was quite thorough. It brought to the attention of the patient and it gave the patient clear guidelines information as to what to do if the patient thought that there was a concern post-operatively about the procedure that had been carried out or that she was in some difficulty.

56. Now, the first procedure took place on 28 May 2013 and within a week the claimant was seen by the nurses as her first post-operative appointment on 7 June 2013. Seven days later she was seen again by the nurses and the record of her visit is to be found at page 505 of the bundle. She then attended again on 12 July 2013 (44 days after the procedure) and again was seen by nurses. Two and a half to three months later after the procedure she was seen by Mr Payne and the indication that she was seen about two and a half months later is because we have some photographs at page 145 which have a date on them which were taken by Mr Payne (the defendant) which are dated 13 August 2013. So the pattern for the post-operative care after the first surgery was as described by the different types of literature that The Hospital Group provided to the client/patient and it would appear that there is no suggestion

on the part of the claimant that there was anything wrong with that. Ms Chilton confirmed, that after the first surgery she knew what the timetable was, namely as set out above.

57. The claimant says in her witness statement that she returned to see Mr Payne in February 2014. That appears to be an error because the appointment with Mr Payne, where further surgery was considered actually took place on 11 April 2014.

58. But there is a curious factor in this, in that page 108 of the bundle is an attendance sheet for an appointment which is dated 17 February 2014 against which it is recorded "DNA" (indicating that the patient did not attend). Ms Chilton did not know why that was there and she certainly cannot recall missing an appointment.

59. When she was seen on 11 April 2014, Ms Chilton and Mrs Davis say that they said to Mr Payne that: "'You didn't do the first surgery properly' and he said he would do it again free of charge." I do not accept as a matter of fact that any such allegation was made against Mr Payne because, firstly, the documents that I have referred to already provide for any subsequent surgery, or revision, or redo would be provided free of charge and it was Mr Payne's position that he was prepared to do that in any event, so no fees were due or charged for any subsequent procedure.

60. Mr Payne said that he explained all the risks and Ms Chilton did accept that the risks were explained to her again but she said: "Not in as much detail as the first time," but again I am not sure anything turns on that because, although there was the suggestion in the initial instructions to Mr Stone (the claimant's expert) that one of the causes of action may be that Mr Payne failed to explain properly (or at all) the risks involved with either the original surgery or any subsequent surgery, that is not an allegation that has been maintained, and in fact at page 218 there is the letter to Ms Chilton's general practitioner dated 13 May 2014 which sets out the type of explanation and risks that were explained to Ms Chilton on that date in any event.

61. On 19 June 2014 Ms Chilton came back to The Hospital Group for the second procedure. At page 154 is a consent form, which again seems to indicate that the risks were explained to her but, to be fair to Ms Chilton, she said that she cannot remember.

62. Now, at that point of her evidence Ms Whittaker asked Ms Chilton quite bluntly: "What exactly are your criticisms of what happened?" and straightaway she said to me in her evidence: "The first surgery was not done properly." Now, that is not a fair allegation because she does not make a claim against Mr Payne suggesting that the first surgery was not done properly and the expert that she instructed, including the defendant's expert, both agree that there was anything wrong with the first surgery.

63. This type of surgery cannot guarantee results. There may be a picture painted in a patient's mind as to what she would like her body to look like after the surgery has been carried out, but it does not necessarily follow that after such surgery has been carried out that is what the final picture will look like. That was one of the risks that was explained to Ms Chilton. However, as I have said earlier in this judgment , she still bears a grudge, or a disappointment that what she expected after the first and second surgery was not what she eventually got and the evidence from the consultant psychiatrists also refer to the fact that one of her anxieties, or her causes for any condition that she suffers from now is the regret of having sought surgery at all.

64. Ms Chilton then says that her second compliant is that she did not get any appointments when she needed them or appointments that were good for her. Now, it was not clear what she meant, however after considering all of the evidence, "good for her" suggested to me that there was an element on the part of Ms Chilton and her family that the appointments that were to be provided or to be attended at were to be at her convenience and her family's convenience.

65. Ms Chilton also said the aftercare after the first surgery was great but the second time she was not looked after properly. She said: "I regret getting surgery at all. Didn't get what I wanted," which goes back to the point I made about her complaint about the first surgery not being done properly.

66. At paragraph 53 of her witness statement, at page 184 in the bundle, she says: "Not only did he not carry out the first procedure properly; I do not feel that seeing me some three months after surgery is reasonable." Now, again it seems to me to be a complaint which has not been pursued in relation to the first surgery but it is still causing her some regret and anxiety. hat was her whole frame of mind whilst she was giving evidence to me and that is why I came to the conclusion that, without documents which support some of what Ms Chilton says, I cannot be satisfied that I can rely upon her evidence in its entirety.

67. At page 389 of the bundle are the operation notes dated 19 June 2014. This document gathers some significance now although it was not really at the forefront of the claimant's mind when the claim against the defendant was first considered. We can see that from the synopsis of the claim that is contained in both the reports of Mr Stone (the claimant's expert plastic surgeon).

68. Ms Chilton accepted that she was given the contact numbers mentioned above, and she also accepts that the first follow-up appointment was on 28 June 2014. It is recorded that her "wound was healing well," and I did not get impression that she disagreed with what the nurse had written on that document.

69. On 10 July 2014 the second appointment took place and the document as to the wound assessment is also found on page 517. There are two columns there: one is in relation to the appointment of 28 June and the second is in respect of the 10 July appointment. The notes that the nurse has made is as follows, and I will try and decipher this handwriting as best I can: "Removal of dressing. Delayed healing." Then there is reference to "Cleaning" and "iodine" and some "dressing given 1/52" which means, I think, a week's dressing.

70. Ms Chilton said to me in cross-examination: "I do not criticise the nurse on 28 June 2014. I was told to come back the next week." She said that she booked the next appointment for 10 July 2014 - which was a Thursday - because her father could only drive her on Thursdays to Sunday because of work commitments at other times of the week.

71. As to what happened on 10 July 2014 she said: "I got there but they said there was no appointment booked. They told me they would fit us in. They saw me and listened to the concerns. I was told: 'If it gets any worse, then come back in a week's time.'" She said that two weeks supply of dressing was given to her even though the documents records "1/52" (inferring that it was only one week's dressing), but nothing turns on that.

72. She said: "Because my next appointment was in two weeks' time, I said I would come back in one week if not better. I asked for an appointment in two weeks while I was there but

the systems were down. I was not asked to make an appointment. I thought a month after surgery was two weeks." It was pointed out to her: "But a month after surgery would have been seven days after that appointment?" i.e. 17 July, or thereabouts, when she could have made an appointment. Because the systems were down she said that she was told to call in a few days. Then she said: "I did call between 10 and 16 June a number of times - at least three, maybe four - from work. I was given dates that were two weeks away."

73. Now, that is in contrast to the evidence that Mrs Davis gave, which is that she said that her daughter was attempting to make appointments between 10 and 16 June but was not getting through.

74. It was pointed out to her that whilst giving evidence before me was the first time that she had said that she had rang the hospital three times prior. It was not stated in the pre-action letter, where she says that she herself (the claimant) called the hospital on 16 July 2014 to "re-book."

75. She referred to her mother and father going to The Open (Golf Championship) on 16 July for a few days and at page 198 she was taken to her father's witness statement, at paragraph 7, where he said: "As I take Kelly to her appointments, there was no way we would have arranged an appointment for this day." "This day" is a reference to 17 July. Ms Chilton then went on to describe that on 16 July her mother was making a call on her behalf and was given an appointment on 7 August. She said it was too long to wait so they changed it to 31 July 2014 (i.e. 15 days later) and it was put to her that, therefore, if that was accepted as an appointment, she cannot have been in too much pain.

76. It was also put to her that her mother is a healthcare worker and if she had real concerns about the pain that she was suffering or an infection, she would not have agreed to wait 15 days. There was no real response to that, but she did deny that they called to cancel the appointment. It was also put to her that if an appointment had been booked for 17 July she would have had difficulty getting there and she said that she had other members of the family that she could turn to and, alternatively, she could get a taxi.

77. I heard - and it seems to be common ground - that the time it takes to drive to the hospital is anywhere between 45 minutes and 75 minutes, depending on traffic, but that answer seems to me to be difficult to accept that she would have made alternative arrangements because her mother and father were quite clear that they always took her and, as I have already referred to, Mr Davis - who I found to be an honest witness - said that there is no way he would have accepted any appointment around the 17th because they were away at The British Open Golf Championship.

78. Other documents were put to her which do not support her evidence and she could not explain to me why that was the case.

79. On 18 July we know that she went to the walk-in centre. Now, the curious thing about that is that it has been put quite forcefully to Mr Payne and to his expert (Mr Fitzgerald) that a possible infection could have been present on 10 July, although no criticism is made that the nurses examined Ms Chilton on that day, however, at page 629 we have the urgent care centre (or walk-in centre as it is called) notes as to what they recorded on the day that Ms Chilton went to see them and under the heading "History" it says this: "Underwent abdominoplasty and muscleplasty last year for excess skin after losing weight. Had revision surgery one month ago." And then (I emphasise): "Last two/three days noticed pain in scar

and in a couple of places associated with some yellow crust. Feels well in self. On fluoxetine." Then over the page: "No medical illness. On examination, it is well (inaudible) and well-hydrated. Abdomen soft, non-tender." Then there is reference to the linear scar and two spots of the redness and some yellow discharge from her. She was treated with what appears to be some form of antibiotic and review with GP for swabs if it did not get better.

80. Now, that is not consistent with Ms Chilton's case, which is that she was suffering and Mr Payne ought to have been alerted on or around 10 July. It would appear to me - and I accept that the recorded evidence suggests that - shortly before she attended the walk in centre (maybe two days, maybe three days) there started to develop some form of pain but even then when the doctor saw her he does not seem to be unduly concerned.

81. She was also taken back to what happened on 31 July and I can go through this fairly quickly. She says that an appointment was booked at The Hospital Group for 4 pm but her mother called earlier on in the day to see if they could bring it forward and was told that there was no appointment booked that day. And then on 6 August 2014 she went to the Accident & Emergency Centre in Walsall, who in turn called The Hospital Group and said she needed to see a consultant and she was offered an appointment the same day.

82. The second witness that I heard from was Mrs Davis (the claimant's mother). I came to the conclusion after watching her give her evidence that she is quite a strong character. Although she does have some problems with her memory, which she was quite open about in that she did not consider herself to be a reliable witness as to what happened on what date and what was said et cetera, but she likes to confirm things by reference to her diary.

83. I have before me excerpts from her diary. Now, the curious factor about the diary is that the original version of the diaries that were disclosed by the claimant to the defendant were very heavily redacted, but it was clear when - I do not know how this came about and there has been no explanation for it - I made some enquiries as to why if Mrs Davis refers a few times to her diary entries in her witness statement that such diary entries were not in the trial bundle. They were subsequently produced again by the claimant but the copies that were produced this time around were not as heavily redacted and it was clear to me that certain entries which were heavily redacted in the first form of those diaries and were disclosed should not have been redacted at all because they made reference to conversations that took place on the relevant dates by Mrs Davis to The Hospital Group and also her own thoughts on what was going on.

84. I am afraid to say that I found Mrs Davis' evidence to be unreliable in material aspects of the case. She confirmed that she went to see Mr Payne on 11 April 2014 (after the first surgery) with her daughter, not February as she had indicated in her witness statement, and that was a correction that she made, but nothing turns on that.

85. In cross-examination she confirmed that the claimant and her husband cannot drive and the claimant's father takes her to the appointments. She also said that the claimant's father took her to all of the appointments. At page 193 it was put to her: "There is no way that they would have arranged an appointment for 17 July because they would have been away?" But she said in her evidence: "If it was on that day (i.e. an appointment on that day) we would have arranged for someone to take her or by taxi." But it appeared to me that on no occasion prior that had anyone else taken the claimant to an appointment either by way of some relative or friend driving or her or by taxi, and so I do not accept that evidence. She said that she looked at her diary to make sure that the dates were correct, but it was then put

to her: “Well, that’s curious, because if that is correct, then why did you get the February 2014 date wrong?” She could not explain. She said: “My diary is reliable but I am not.”

86. It was also put to her that there are other references to meetings, that for example at paragraph 8 of her witness statement there were no dates given and she could not explain where she got those from. I do not think that we had the diary entries for those particular dates either. She said that she did not go to the appointment on 10 July 2014 and so anything that she put in her witness statement was from what she had been told by her daughter. She said: “Kelly told me that she was told to call back in a few days. I put this in my diary.”

87. She said: “On 16 July 2014 I called the hospital for her. Between 10-16 July, Kelly told me she had phoned several times. She was at work when she called but she could not get through.” he did not put that in her witness statement. She said: “On the 16th she asked me to make a call. Nobody was there to answer the phone at Dolan Park.”

88. She confirmed that they went to The Open Championship on Thursday, I believe, 16 July and they were away for five nights and came back on the Sunday or Monday. She said that she spoke to the receptionist on 16 July: “I asked for an appointment, because Kelly was in pain, and they offered 7 August. I said ‘No’ so they offered 31 July 2014.” She said: “Kelly said it’s OK to have an appointment on 31 July 2014” and she was asked: “Why it is that, if Ms Chilton was in so much pain, why Mrs Davis would have agreed to wait two weeks for that appointment?”

89. She was taken to the use of the word “rebook” that had been used in the letter before action and in the witness statements, but she said that no appointment had been booked for the 17th previously. She was booking a separate appointment or a new appointment is the gist of her evidence. She did, however, accept at one stage that she would not have accepted the 31 July appointment if she thought the wound was infected. This is after we went through a curious stage of her evidence where she told me that Kelly would not allow anybody to see her stomach or where the surgery had taken place, to which she was asked: “Well, how do you know she was suffering from an infection, then?” to which she said that: “She almost blink of an eye, or that quickly, pulled up her top and put it down again.” I fail to see how anybody in that sort of short space of time could have noticed any infection (if indeed that did occur) and so I found that her evidence on that point was unreliable also.

90. She then gave us the details of the walk-in centre and the events thereafter on 6 August where Mr Shabana was in Manor Hospital with somebody that she knew because she was a healthcare worker and worked in a hospital and she also told me that on 6 August, when they went in the hospital they called Dolan Park and they said to bring her down immediately. When the diaries were considered in detail (that had just been disclosed) she agreed that she had made no reference to speaking to Dolan Park on 16 April.

91. This is quite important, in that if one considers the detail of the diary entries elsewhere, it surprises me that she did not record the telephone call to Dolan Park on 16 April. That is her evidence.

92. Mr Davis gave evidence next. His role was effectively to transport his daughter to the hospital and back again. I found him to be attempting to assist the court as best he could when he did not have any first-hand knowledge of any of the relevant issues or details. But he was there on 10 July when Ms Chilton tried to book an appointment but the systems were

down. The rest of his evidence was in relation to what he had been told by others and he does not really assist me one way or the other.

93. Mr Payne was the next witness. I found Mr Payne to be an honest and reliable witness and I found him to be trying to assist the court as best he could and I found that as an experienced qualified plastic surgeon he had reasonable and honestly held beliefs.

94. He has been a plastic surgeon since 2003. He has worked for The Hospital Group first of all for a period of between 2004-2008 and, secondly, between 2010 and then until about 2016. He was the head of the department in Germany and he referred to the different types of cosmetic surgery that he carries out.

95. He explained to me what fleur-de-lis abdominoplasty surgery was - it is, effectively, an incision that takes place vertically near the top of the chest, down towards the bottom and across the midriff - and he carried out abdominoplasty surgery approximately once a week but not necessarily the fleur-de-lis. He said that it is a large cosmetic procedure and it would incur a large incision because of the vast amount of weight that the patient has normally lost.

96. He said, however, although he did a fleur-de-lis surgery in 2013, as far as the revision surgery in June 2013 was concerned he only did a vertical incision. It was less intense than the first surgery, although he accepted that it would incur similar risks. He did accept also that the claimant had extensive scars from the first surgery and when one is undergoing a second surgical procedure on or near the scars of the first surgery then there is an element of increased risk of an infection.

97. He explained to me that the nurses conduct the first appointment within seven days post-operation because they can change the dressing and deal with the wound and a seven-day appointment is too soon for any significant signs of infection or non-wound healing to appear. When he was cross-examined he accepted that where a patient is overweight the risk of a wound not healing increases. He also accepted, quite frankly, that the defendant could possibly argue that there are at least as much (if not more) risks after the second surgery than the first surgery.

98. He was taken to the documents and he maintained that he did discuss the risks that were involved with the patient and, as I have said, I accept his evidence in that respect and also by reference to the letters that were sent to the GP. He also confirmed that one month post-surgery is his preference to see the patient because he could still change something. He said: "I like to see a patient. It is my own preference, but not a rule." He said that seroma can appear quickly after surgery or weeks later and signs do not appear within four weeks.

99. We also had some evidence as to whether - and I thought he was speculating a little bit - he could calculate by reason of the amount of fluid that was present later and count back to what would have been the position on either 10 or 17 July. He referred to the pamphlets, saying that four weeks is about the right date to see the patient again and he referred to the fact that the literature says 7, 15, 30 and 90 days. There was also - I have not mentioned it yet - a flow diagram (or an algorithm as people have mentioned in the course of this trial) at page 150 of the trial bundle which says quite expressly: "Day 30: Review with surgeon and see photos from nurse."

100. He said: “I agree we should have a follow-up after two weeks, but not necessarily by me. I like to see the patient in 30 days because if there is an infection, we can do something about it. But she can be seen by the nurses or, if necessary, the nurses call me.”

101. So the impression I formed from that evidence was that there was a protocol (or a procedure) in place for the surgeon to see the patient after 30 days after this type of surgery. It is not an absolute rule, but, if there are any clinical concerns, then the nurses would inform him. He went on to describe the type of nurses, what they are instructed and what he informs them later on in his evidence.

102. Now, there is some confusion on the part of the defendants as to whether or not an actual appointment had been booked on 17 July 2014 and I think it comes from this fact. It was explained to me by Mr Payne that there was an electronic booking system (called the CIM system) that The Hospital Group used whereby every call and every appointment would be logged on that system. He told me that - I am assuming sometime after the letter of complaint was made or the pre-action protocol letter - there was some discussion, from his memory, with the hospital management regarding the electronic evidence as to what happened, when, and that there was an appointment that had been booked for 17 July. The problem is that, because The Hospital Group went into administration, it would appear that there is no available record of that system (the CIM system) and it also appeared to me - because I asked the question - that neither side really made too much effort to see if the administrators could provide that system to confirm one way or the other whether the 17 July appointment had been booked. So I am left with no evidence (other than what I have been told verbally by Mr Payne) one way or the other as to whether or not an appointment had been booked on that day.

103. On the evidence before me it would appear that no booking had been made, and that is the only conclusion I can come to. But Mr Payne did point out - and I accept his evidence here - he said that his personal schedules, which he does have, for those particular days (i.e. 16, 17, 18 July 2014), do have room and could have been altered so as to allow Ms Chilton to be seen on any of those days if she had called the hospital and if the hospital had been told of any real problems that she was suffering and it also shows that he was at Dolan Park on those particular days. He did that by showing to me that appointments were actually booked on the day or the day before and inserted into his schedule and certainly in the few days following 16-17 July he would have been to see Ms Chilton if it had been stressed by whoever was calling on her behalf that she was in severe pain or suffering from any real symptoms of an infection. I accept that evidence.

104. He was then asked about his duty as a surgeon and it was put to him that it was his duty to follow up after a patient had received surgery and he said: “No. There are protocols in place” (the protocols I have already referred to).

105. He was then referred to the general surgeons’ guidance at page 238 and it might be important that I read that out in full at this stage of the judgment. The Royal College of Surgeons’ guidance document reads as follows: “Good surgical practice: you should take full responsibility for patient management, leading the surgical team to provide best care. Responsibility should encompass pre-operative optimisation and post-operative recovery.” The guidance further states: “You should ensure that patients receive satisfactory post-operative care and that relevant information is promptly recorded and shared with the relevant teams and patient and their supporters.” It was put to him and he said: “The ‘relevant information’ includes the documents that I have referred to as the policy guidance

documents, protocols et cetera, telling the nursing staff when you would wish to see the patient." I am going to come back to the issues that were put to him that the nurses should communicate any concerns to him in due course.

106. One of the criticisms made against Mr Payne is that he did not note on the operation note (at page 389) of when he personally wanted to see the patient next. He said that he did not think that he had to write down that he needed to see the patient after four weeks. He said that there is no need to write it on an operation note. He said: "The procedure (or the protocol) that we have is that we see the patient after four weeks. Every nurse knows we want to see the patient after four weeks and it is also on the consent form."

107. In my judgment that is absolutely correct. I fail to see why it was necessary for a surgeon to write on a particular document (namely the operation note) when he wants to see the patient next when it is common practice within that organisation for the surgeon to see the patient in four weeks. The nurses would know. All the literature sets out when he wants to see the patient, and, as I have said, I will come back to the type of training and the nurses' obligation to inform people of any credible concerns in a moment. I do not accept Mr Stone's evidence in that regard.

108. I can see that it might be the opinion of certain surgeons that you would write something down on the operation note, but do I not see it as critical if there are other documents or ways that it becomes clear to the patient and the staff who are booking the appointments as to when the surgeon is going to see her or him. In fact he said: "Had I documented or not, the nurse knew that I prefer to see the patient after four weeks."

109. He also made a very important point, which is that even if he had seen Ms Chilton on 7-14 July 2014 he said the outcome would have been the same because what is written on the nurse's notes, and if that is an accurate recording - which I accept it is because it is a contemporaneous note - then he would not have done anything different to what the nurses did because at that time on the first occasion the wound was healing well, on the second occasion some preventative steps were taken (by way of iodine) to prevent any infection and the non-healing was not unusual for this type of surgery.

110. He was then asked certain questions about the nurses' duty to communicate any concerns. He said: "It's my practice to ask the nurses to inform me if there are any problems," which I accept is a reasonable stance to take on the part of any surgeon. He said: "If there was an infection, they would tell me. In any event, I have to write the prescription. I told them, if there was a problem, I'd want to see them." He also described to me how close the nurses' room was to where he was working at the hospital and he would regularly pop in to make sure everything was OK with the nurses and ask them if there were any issues or any problems that he needed to sort out or needed to see. So I accept that evidence and I accept the accuracy of it.

111. He said that it was normal to have some pain by about 10 July 2014 after this sort of surgery. He also prayed in aid the fact of what was written by the nurses and also what had been written by the medical practitioner at the walk-in centre (which I have already referred to in some detail). So those are the relevant parts of the evidence of Mr Payne that I need to set out in this judgment.

112. I then heard from Christopher Stone, who is a consultant plastic surgeon. He had prepared a report dated 23 June 2016 and a second report dated 13 May 2019 and a joint

statement with Mr Fitzpatrick (the consultant plastic surgeon called on behalf of the defendants) dated 21 November 2019.

113. He was cross-examined by Ms Whittaker. He told us that he has engaged in private practice since 2001. He said that he could see that the method of working at a private hospital was different and the protocols were different to, say for example, the NHS.

114. There is a curious fact in his report, in that he made no analysis of the key documents that I have referred to, which are the protocol documents (or the procedural documents or the pamphlets) and he could not really give any explanation as to why that was.

115. One document that he did consider (and was very much reliant upon) was the flowchart/algorithm, which is at page 150. He considered this document as being a rigid timetable, with no flexibility at all or, if there was, minimal flexibility and his evidence was that nurses following this process (or protocol) document were so restricted in that it was not a document that should be relied upon. A lot of his evidence stemmed from the fact that, by reference to this document, he thought that it was likely for mistakes to occur.

116. As I have already pointed out, by reference to the guidelines/pamphlets/protocols in a lot of those documents it says that: "These are the dates which we would wish to see. However, if necessary, we will see you on other dates as well." What I read from that was that the ideal is that you have an appointment post-operative for 7, 14, 30 and 90 days but if there are any clinical concerns, then you would have other appointments sooner than that. I do not read this protocol/algorithm as setting down a guideline that cannot be changed at all or not followed.

117. He said that his analysis was based on Mr Payne's medical records only, so it seemed to me that there was a real shortcoming on the part of Mr Stone in his evidence as to why he had not looked at the whole picture before coming to the conclusions that he did.

118. He was also taken to page 248, which is in his first report and the heading 'Synopsis of the Claim.' Now, the curious factor of that synopsis is this. What he says there under the heading, as I have said, of Synopsis of the Claim–
"3.1 Mrs Chilton underwent a fleur-de-lis abdominoplasty procedure under the care of Mr Payne on 28 May 2013 and a revisional abdominoplasty operation on 19 June 2014.

3.2 Ms Chilton asserts that Mr Payne owed her a duty of care that, in undertaking operation in the manner that he did and in failing to adequately warn of risks, he was in breach of that duty.

3.3 As a result of those alleged breaches, she has been left with a result that she considers suboptimal, for which she now pursues a claim in negligence." So it is clear me that his instructions from Ms Chilton were that Mr Payne failed in his duty of care to either carry out the operation properly or warn her of the risks.

119. During the course of the last five days these were not allegations of negligence pursued by Ms Chilton. He was cross-examined on this as to why it was set out in that way and he said that was his interpretation of his instructions, so I assume from that those were the allegations that will be made by the claimant in at that time. He accepted that she had not complained in any way about the aftercare (which is the core of her complaint now). He said

that there was no mention of aftercare in his first report and his views on aftercare based upon his own review of the medical records.

120. As I have said, that review came without reference to what I consider to be key documents which were provided (and acknowledged to be provided) to the claimant at the relevant times.

121. His second report, in 2019, effectively repeats under the heading 'Synopsis of Claim' the same points. I put that down to perhaps his mistake in not changing what the synopsis of the claim was because he does refer to the post-operative care later in the report.

122. He was also cross-examined about the fact that he put down a chronology in both reports which he says was taken from the medical records but the curious factor about that chronology was that the call that Mrs Davis made on 16 July 2014 would not be in the medical records (and was not in the medical records) yet it is recorded as such by Mr Stone and, therefore, he must have got that from the witness statements. He said that he agreed that if Mrs Davis did not mention the infection or she did not call on 16 July and we are left with the nursing observations on 10 July, then there would not be any negligence on the part of Mr Payne or the nursing staff.

123. He was asked questions about the period of time within which a surgeon should review and see the patient and he referred to "two or three weeks." He was then taken to - and I will deal with this very quickly - that when in August 2014 Ms Chilton had surgery in the NHS and Mr Church was her consultant surgeon then there is no record of her being seen after that surgery within two three weeks. Mr Stone tried to explain that by saying that the standard that is applicable in the NHS is different to that in private practice because in the National Health Service you work as a team, where a consultant would have a registrar below him or her and therefore as long as a member of the medical team saw the patient, then that would be sufficient. But he had to accept that there is not even any evidence in the records that any member of the medical team saw Ms Chilton before she received a letter stating that he would see her in October that year.

124. I think I asked him a question as to why he said that two to three weeks is the appropriate time and, to be fair to him, he said that was his preference and his experience but that there is not any literature or guidelines which would say that. He also accepted that the follow-up duty can be different for different patients and it all depends upon the type of surgery and the type of risk involved, so it seems to me to be a fluid rule in that, for obvious reasons and it makes common sense, that the time after the operation at which the patient is seen by a consultant will depend upon a number of factors.

125. He also agreed - and this is quite important - that if Mr Payne had told the nurses that he should be notified about any concerns then he would have discharged such a duty, in that he would have acted reasonably, and I have come to the conclusion, as I have said already, that Mr Payne did so instruct the nurses and did so train the nurses as he described to us. He repeated that by saying that if Mr Payne possibly cultured positive feedback, then he has satisfied his duty.

126. Mr Stone said that he makes no criticism of the nurses and he was taken to page 166, which is a document setting out the type of training the nurses would have. In this context it is important to note - which struck a chord with me - what Mr Fitzgerald said. He said that in the National Health Service the nurses are not accustomed to dealing with one type of

surgery all the time, whereas in the private sector with a company such as this providing plastic surgery services, those nurses would be dealing with plastic surgery aftercare all of the time. It is likely they would be better trained, better accustomed to know what symptoms to look out for and how to react if they are concerned with anything, which again is in accord with what Mr Payne told me.

127. The final witness that I saw was Mr Fitzgerald. Now, something unusual happened here. Mr Fitzgerald's evidence I found to be not as useful or informative as perhaps Mr Stone's for a number of reasons. I got the impression that he would readily accept propositions that were put to him and then he would think about it and then come back again. For example, it was put to him that the patient ought to have been seen by Mr Payne within three to four weeks after the operation. He first of all said that up to three months is sufficient; then he came back to three to four weeks and agreed with Mr Taussig in cross-examination. But at the same time, to be fair to Mr Fitzgerald, it was put to him in cross-examination that the second surgery was again a fleur-de-lis abdominoplasty redo and therefore would have a vertical and horizontal incision, it would be dangerous at the T-junction and also it would be dangerous in respect of going over previous scarring, in that it would be more prone to risk of infection and not healing properly. On that basis he agreed that the patient ought to have been seen within three to four weeks post-operation.

128. In re-examination it was put to him, quite properly, that in fact the second (revision) surgery - as I have already explained - was simply a vertical incision and not a horizontal one, which would appear to be correct from the medical records and the evidence of Mr Payne - and I accept that - that he said: "Well, in those circumstances, the risks are not as great and therefore, as long as the surgeon saw the patient within three months, that would be good practice."

129. Overnight I think that Mr Fitzgerald was a little bit concerned about the way that he had given his evidence and he felt it necessary to write to me to confirm exactly what he said in his re-examination, which was that if the second procedure was not as extensive as the first, then the risks associated with it would be less also. Now, he had already told me that in re-examination. The problem I had was that he had said something different in cross-examination, but that, as I say, is explained by the way that it was put to him, which I think it was put to him that Mr Payne accepted that the second procedure included both the vertical and horizontal incisions when that was an error. It was an accidental error that was not done deliberately but it was an error in any event upon which he came to the conclusion that three to four weeks post-operation would be the right time for the surgeon to see the patient. And as I say, the letter says that if that is not correct, then it goes back to up to three months as being the right time that a patient would be seen by the consultant surgeon (save that if there are any clinical concerns prior to that), then it is the duty of the nurses to tell the surgeon and an earlier appointment would be made.

130. As I have said, I have come to the conclusion that that was the process and procedure that was adopted by The Hospital Group as invoked by Mr Payne in any event, so one can see from there that there is a difference of opinion between the experts as to what the appropriate time for examination of the patient after the operation ought to be and I have come to the conclusion that there is no hard and fast rule on this. It would depend on the circumstances, the nature of the surgery, the physicality of the patient and other factors, as opposed to a rule which says that you have to see the patient within a certain time.

131. As both experts said, sometimes there is surgery which does not require any aftercare on the part of the surgeon - albeit it would be minor surgery - whereas there will be other times when you have minor surgery which attracts a complication which, although the surgeon would normally see the patient, it is necessary for him to see the patient and then, as long as the system and procedures are put in place that he is alerted to the same and those are reasonable and it is reasonable for the surgeon to rely on their systems, then I cannot see how there can be any negligence on the part of the surgeon in those circumstances.

132. Now just to go over some of my conclusions on the issues.

133. As I have said already, my first conclusion is that Dr Payne is not responsible for the actions and/or failures of the nursing staff in respect of any administrative tasks. Even though The Hospital Group went into administration, it is still possible to sue the company in administration (with leave of the court) and it is also possible to bring a claim in a case such as this under the Third Parties (Rights against Insurers) Act. The claimant has chosen not to do that, but I do not criticise her for that - there may be 101 reasons why that was not done but I will not dwell on that.

134. There is a duty upon Mr Payne to ensure that the nurses are competent in their medical roles and that they will ensure that he is informed if there are any clinical complications. I am satisfied that Mr Payne is not in breach of that duty because I accept his evidence as to the training of the nursing staff, what he has told them and how he has trained them in the past. I prefer the evidence of Mr Payne on the whole, as I have already set out by going through this evidence.

135. I am satisfied that the literature - and I use that as a collective term (all the pamphlets, booklets, guidance et cetera) that was provided by The Hospital Group to Ms Chilton sets out clearly when she would be seen, who she would be seen by and giving her the option to call the emergency number if there were any concerns. I am also satisfied that if such concerns had been relayed to The Hospital Group they would have ensured that she saw a surgeon or Mr Payne whenever that call was made. I am satisfied that it is perfectly reasonable for the 7, 14, 30 and 90 days in the programme to be brought forward and I am satisfied that it is not necessary for it to be Mr Payne to have seen the patient after 30 days (although it was his preference) and that if she had come back on 17, or around then, because he was in the hospital, it is likely that he would have seen her.

136. But there is another factor in the case that I need to address, which is the difference between the parties as to what happened after the second appointment on 10 July.

137. In her final submissions, Ms Whittaker asked me to make a finding of fact in relation to the appointment (or not) of 17 July 2014. She said that on the evidence before the court it is more likely than not that an appointment had been arranged for 17 July but had been tentatively made to rebook it for another date and she referred to various documents such as, for example, the particulars of claim was amended to include Mrs Davis' call to The Hospital Group on 16 July.

138. There is no reference in the expert Mr Stone's original report to any such call. Mr Stone records it as an important event in the chronology. Mr Stone, she said, had built his case around this call. She said that Mr Stone does not criticise the lack of any date on the operation note. She said that he was a critical part of the claimant's case because it was referred to (that is the call on the 16th) in all of the witness statements. She said that it makes

no sense for Mrs Davis to have accepted 31 July as an appointment if her daughter was in real pain or was suffering from an infection – Mrs Davis, after all, works in the medical field at Manor Road Hospital. She said that the key element was missing in her diary entries and if one compares the entry on 6 August 2014 in her diary with what she has written on 16 July 2014 it bears no comparison because there is nothing at all really about the call to the hospital yet in her oral evidence she was quite graphic about what happened on 16 July. So Ms Whittaker asks me to find as a matter of fact that the call did not take place on 16 July.

139. If it did, the account of the pain and infection was not conveyed by Mrs Davis on 16 July 2013 to the staff at the hospital and 16, 17, 18 July did not fit in with the holiday schedule of Mrs Davis and her husband, but I would refer to the reference in Mr Davis' witness statement where he says that there is no way they would have booked an appointment for 17 April.

140. She also repeats what I have already gone through, which is that when she walked into the walk-in centre there is no note of her serious condition (that is on page 629-630) and by working back on the discharge letter (at page 641) she says that the pain really started on 16, 17 and 18 of July (if at all).

141. There were a number of other points, which I need not to go into.

142. I have come to this conclusion on the facts. No attempt was made by Ms Chilton to contact The Hospital Group to make an appointment between 10-16 July. If I am wrong about that and she did make an attempt to call the hospital, she did not get through to anybody.

143. Secondly, I conclude that Mrs Davis did make the call on 16 July. It was the day that she and her husband were leaving to go the British Open Golf Championship. I am sure that there will have been lot of other things that were on her mind that day but, as a health worker, if she seriously thought that her daughter needed to see somebody urgently because of the pain that she was suffering as is described in the witness statement of the claimant, I do not believe - and bearing in mind the character of Mrs Davis - for one moment that she would have accepted an appointment for 31 July and I do not believe that she would have gone on holiday without taking her daughter to see somebody on that date. In my judgment, although an appointment was required, Mrs Davis was not overly concerned about the condition of her daughter, and that could only come from what her daughter (the claimant) had told her.

144. I am also satisfied that Mrs Davis would have been very insistent with the hospital that they must see her daughter immediately (within the next day or so) if Ms Chilton's condition was as bad as she makes out.

145. I am also satisfied, from looking at the schedules of Mr Payne, that he was present at The Hospital Group on those days, and he would have squeezed Ms Chilton in and he would have seen her and I accept his evidence on that point.

146. So, what is the consequence of my findings of fact?

147. I put to it Mr Taussig during the submissions that, if as a matter of fact, the reason why an appointment was not taken until about 31 July was as a result of the claimant or her agent's (namely her mother's) actions and the claimant's case is that if the defendant had seen her on 17 or 18 July, the infection would have not have got to the stage that it did and

would have been treated much earlier. There is no evidence before me as to whether by 30 July it was too late to treat the infection and so I cannot make a ruling on that.

148. I asked: "Is it still the claimant's position that the defendant was liable in that he did not personally ensure that she came in and saw him by 17 or 18 July?" I think, to be fair to Mr Taussig, he did try and argue that the defendant would still be liable. That was, quite properly in my view, then conceded by him that it was hard to see how the defendant was either in breach of duty or caused any loss. Therefore, it seems to me that the claim must fail not only on my findings of fact but causation also.

149. I want to say a few words about two other matters.

150. Firstly, the scope of duty. Now, as I understood the claimant's case, it was put quite forcefully to me that the duty is on the surgeon to act in a way that is compliant with a reasonable body of surgeons - which I accept - and that would be that he will see the patient within 30 days of surgery and one of the ways that he would do that is to write down that he wanted to see the patient within 30 days on the operation note. Now, it seems to me on the facts of this case that there is little more that Mr Payne could have done, and to use the word that is used in Mr Stone's expert report "to ensure that he sees the patient" I think is going too far.

151. I agree with Ms Whittaker. This is not a case of strict liability and there are - as I have already pointed out - no strict rules as to when a surgeon should see a patient and, therefore, it is difficult for me to accede to or accept the submission that if the patient was not seen within 30 days, or a month, or four weeks after the operation then it automatically follows that the surgeon is in breach of his duty. I am supported in this conclusion by what Mr Fitzgerald said and also by the hospital literature. It was expected by Mr Payne that he would see Ms Chilton within 30 days but that is not a hard and fast rule and there was nothing to alert him prior to after the first and second appointments.

152. We then come to one other factor, which is that the claimant says that the failure to record on an operation note, or any of the other three documents that Mr Fitzgerald referred to in his evidence, is negligent on the part of Mr Payne because it would have been more likely than not that he would have seen the patient within the timescale as set out.

153. Again, I do not accept that, because you cannot look at that allegation in isolation and exclude all of the circumstances or the context of the case, especially where there is an abundance of literature that I have referred to which sets out, and it was made clear, and the nurses understood, as to when the surgeon wanted to see the patient. Because the whole purpose of adding that note to the operation note is to make sure the nurses knew when Mr Payne wanted to see the patient, if, as I have found, they already knew that because of the procedure and protocols that were in play, then it seems to me neither here nor there that he failed to write that down and it does not seem to me to be critical in any way.

154. For all those reasons that I have given - I apologise for the length of the judgment - I find that the claim against Mr Payne on the grounds of negligence is not made out and is, therefore, dismissed.

This transcript has been approved by the Judge