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The 1COR Quarterly Medical Law Review

Updates and analysis of the latest legal developments

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Editorial Team

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Welcome to the second issue of the Quarterly Medical Law Review, brought to you by barristers at 1 Crown Office Row. In our second issue of QMLR:

Rajkiran Barhey explains the Supreme Court's decision in *Poole Borough Council v GN and another* [2019] UKSC 25 concerning liability of public authorities.

Jeremy Hyam QC explains and analyses the new discount rate of -0.25% and considers the prospects of dual rates. In later pages he explains the Court of Appeal's decision in *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220 concerning ATE premiums and also covers *Beard v General Osteopathic Council* [2019] EWHC 1561 (Admin) on procedural irregularity in disciplinary proceedings.

Dominic Ruck Keene analyses a wealth of recent authorities from the past year on the scope of the duty of care.

Matthew Flinn covers another (see Issue 1) interesting new judgment on bespoke life expectancy evidence. He also looks at the recent decision of *R (Maguire) v HM Senior Coroner for Blackpool and Fylde* [2019] EWHC 1232 (Admin) concerning Article 2 and medical inquests and the decision in *R (on the application of BPAS) v Secretary of State for Health and Social Care* [2019] EWHC 1397 (Admin) on the interpretation of the Abortion Act 1967.

Suzanne Lambert provides a comprehensive review of the regimes relating to fundamental dishonesty in litigation, including CPR Rule 44.16(1) and s.57 of the Criminal Justice and Courts Act 2015.

Shaheen Rahman QC looks at the recent Court of Appeal decision in *B v Local Authority* [2019] EWCA Civ 913 on capacity in relation to decisions regarding residence, care, contact, social media and sexual relations.

Finally, see our In Brief section. Previous newsletters can be found on our website here. If you would like to provide any feedback or further comment, do not hesitate to contact the editorial team at medlaw@1cor.com.

THE SUPREME COURT RULES ON LIABILITY OF PUBLIC AUTHORITIES

Rajkiran Barhey

Poole Borough Council v GN (through his litigation friend 'The Official Solicitor') and another [2019] UKSC 25

In this judgment, handed down by Lord Reed in June 2019, the Supreme Court found that Poole Borough Council did not owe a duty of care to two children, CN and GN, who it had failed to re-house, although they were suffering severe abuse from their neighbours. Despite the loss for the individual Claimants, the court opened the door to claims against local authorities.

Factual background

The Claimants, referred to as 'Colin' and 'Graham', aged 9 and 7 respectively, had been housed by the Council on an estate in Poole with their mother, known as 'Amy' in May 2006. Colin had severe disabilities.

The neighbouring family were known by the Council to have persistently engaged in anti-social behaviour. Soon after their arrival, this family began a campaign of harassment and abuse directed at Amy and her children. Amy repeatedly reported their behaviour and asked for help from the Council, but the measures taken did not stop the abuse. The Home Office even commissioned an independent report which criticised the police and the Council's failure to make adequate use of powers available under anti-social behaviour legislation.

In September 2009, Graham expressed suicidal thoughts and ran away from home, aged 10. Eventually, Graham was made subject to a child protection plan. Amy and her family were rehoused in December 2011.

Basis of the claim

Colin and Graham alleged that, as a result of the abuse and harassment from May 2006 to December 2011, they suffered psychological harm. The claim was struck out by Master Eastman in October 2015, who relied on *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 to find that no duty of care arose. The Claimants' appeal was allowed by Slade J who granted permission to serve amended Particulars of Claim.

The Claimants alleged that two broad duties existed:

1. The Council had a duty, at common law, to protect children in its area, and, in particular, children reported to it as being at foreseeable risk of harm. The Council were aware of the foreseeable risk of harm from July 2006 and therefore had a duty to investigate whether the Claimants were at a foreseeable risk of harm and to take reasonable steps to protect them. The Council had accepted responsibility towards the Claimants by purporting to investigate the situation and, in so far as it is shown that the investigation was negligent, the Council were liable for breach of duty.

2. The Council was vicariously liability for the failures by its employees, the social workers, to meet their duty of care. That duty of care included duties to protect the Claimants, monitor them, ascertain if they were at risks from which their mother could not protect them and ultimately remove them from the risk of harm.

The Claimants' case was that the duty of care existed in the common law, but they relied on sections 17 and 47 of the 1989 Children Act as part of the statutory backdrop which gave rise to that common law duty. Those parts of the Act provided for a statutory duty to safeguard the welfare and promote the upbringing of all children in a LA's geographical area.

As to breach of those duties, the Claimants alleged that the Council failed to properly investigate and, had competent investigations and assessments been carried out, the Council would have found that Amy was unable to meet the children's' needs and would have removed them from her care, at least temporarily.

Decision of the Court of Appeal

The Court of Appeal in *CN & Anor v Poole Borough Council* [2017] EWCA Civ 2185 rejected the claim for two main reasons. First, they found that imposing liability in negligence in a difficult and sensitive field, such as social work, could lead to defensive decision making in these areas which would be contrary to public policy. They relied in particular on *X (Minors) v Bedfordshire* and *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

They also relied on the principle that, generally, a party is not liable for the wrongdoing of a third party even where that wrongdoing is foreseeable. The two exceptions, that (1) the Council had brought about the risk of harm or had control over the individuals representing the risk, or (2) that the Council had assumed responsibility towards the Claimants, were not applicable in the present case.

The Court of Appeal also found that the Claimants had misunderstood the statutory basis upon which an order resulting in the removal of the claimants from their mother could have been made.

The Claimants appealed that decision to the Supreme Court.

By the time the case was heard in the Supreme Court, *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 (concerning liability of the police to a bystander injured during the apprehension of a suspect) had been decided.

Decision of the Supreme Court

The Supreme Court unanimously agreed that the claim should be struck out, but for different reasons from the Court of Appeal.

The authorities

After summarising the background of the case at [1] to [24], Lord Reed traced relevant developments in the law of liability of public authorities since 1995 at [25] to [64].

At [28], he set out the core principle that: "*Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm.*" He deliberately framed the distinction as: *"between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions."*

He went on to restate the principle that there may be a duty to protect from harm in some circumstances, e.g. where the public body had created the source of danger or assumed responsibility to protect the Claimant from harm.

He explained that *Anns v Merton London Borough Council* [1978] AC 728 and *Caparo Industries plc v Dickman* [1990] 2 AC 605 had, in trying to clarify the law, been misunderstood. In particular, he described *Caparo* at [30] as '*widely misunderstood as establishing a general tripartite test which amounted to little more than an elaboration of the Anns approach, basing a prima facie duty on the foreseeability of harm and "proximity", and establishing a requirement that the imposition of a duty of care should also be fair, just and reasonable: a requirement that in practice led to evaluations of public policy which the courts were not well equipped to conduct in a convincing fashion."*

He emphasised at [34] that decisions such as *X (Minors) v Bedfordshire* had to be viewed in this context.

At [64] he explained that *Robinson* did not lay down any new principles of law but clarified: (1) that *Caparo* did not lay down a 3-part test to establish whether a duty of care existed. Rather, it recommended an incremental approach to new situations, based on using previous cases as guides, and in which the question of whether a duty of care would be 'fair, just and reasonable' was part of the assessment of whether the incremental step should be taken. However, generally courts should apply established principles of law and not try and assess the requirements of public policy (2) the distinction between harming the claimant and failing to protect the claimant from harm was significant and (3) public authorities are generally subject to the same principles as private bodies, except where legislation requires a departure from those principles.

He ultimately concluded at [65] that: *"It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."*

Assumption of responsibility

Lord Reed went on to discuss the nature of an assumption of responsibility, setting out the origin and development of the concept at [67] to [69].

At [70] to [73] he addressed the Council's argument that a public authority cannot assume responsibility merely by operating a statutory scheme. He rejected this argument, noting at paragraph [73] that: "*There are indeed several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme… The point is also illustrated by the assumption of responsibility arising from the provision of medical or educational services, or the custody of prisoners, under statutory schemes."*

The present case

Lord Reed then went on to find at [74] that *X (Minors) v Bedfordshire* was no longer good law in so far as it ruled out the possibility of a duty of care on the basis of public policy. He found that the question of whether a local authority owes a duty of care towards a child in particular circumstances depends on the general principles clarified in *Robinson.*

The first question, therefore, is whether the case is one in which the defendant has harmed the claimant or whether it is one in which the defendant has failed to confer a benefit, i.e. by protecting him from harm. The present case fell into the latter category.

At [75] he acknowledged that the Court of Appeal had taken a different approach, starting by considering public policy. He effectively disavowed that approach, emphasising that: *"Rather than justifying decisions that public authorities owe no duty of care by relying on public policy, it has been held that even if a duty of care would ordinarily arise on the application of common law principles, it may nevertheless be excluded or restricted by statute where it would be inconsistent with the scheme of the legislation under which the public authority is operating. In that way, the courts can continue to take into account, for example, the difficult choices which may be involved in the exercise of discretionary powers."*

Because the case involved a 'failure to confer a benefit', Lord Reed went on to consider at [76] whether there had been an assumption of responsibility. The Claimants argued that, in purporting to investigate the risk that the neighbours posed and in attempting to monitor the Claimants situation, the Council assumed responsibility for the Claimants' particular difficulties - see [78].

Lord Reed agreed at [79] with the Court of Appeal that the Particulars of Claim did not provide a basis on which an assumption of responsibility might be established. He found at [81] that the Council's investigating and monitoring the Claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely. Furthermore, it could not be said that the family had entrusted their safety to the Council, nor had the Council accepted that responsibility. The Council also had not taken the children into care.

At [84] to [88] the question of whether the Council was vicariously liability for the individual social workers was considered. Lord Reed noted at [86] that the first question was whether the social workers assumed a responsibility towards the Claimants to perform their functions with reasonable care. In finding that there was

no assumption of responsibility he relied at [87] on the argument that, "*there is no suggestion that the social workers provided advice on which the claimants' mother would foreseeably rely.*" Furthermore, he found at [88] that there was no suggestion that the Council had undertaken the performance of some task or the provision of some service with an undertaking (express or implied) that reasonable care will be taken.

Lord Reed finally found, at [90], that to dispel any doubt that the claim ought to be struck out, there were real difficulties in in relation to the breach of duty alleged. He found that the Claimants' case, namely that "*any competent local authority should and would have arranged for [the claimants'] removal from home into at least temporary care"* could not succeed because, to obtain a care order, the Claimants would have to establish that they were suffering significant harm which was attributable to a lack of reasonable parental care. In the present case, the source of the harm was the neighbours, not the parent, and so there were simply no grounds for removing the children from their mother.

Conclusion

Whilst a loss for the Claimants, the decision is likely to be considered a victory for claimants generally as the Court has explicitly overruled *X (Minors) v Bedfordshire* and found that, in some circumstances, local authorities can be liable to children if it fails to protect them from third parties.

The decision re-emphasises the decline of *Caparo* as a 'one size fits all' test which can be simply applied to see if a duty of care exists. Rather, the court has reaffirmed that the incremental approach is correct, and courts should generally avoid wading into complex questions of public policy.

Furthermore, the decision hails the end of the act/omission distinction in favour of the more conceptually sound causing harm/failing to confer a benefit distinction.

Finally, the judgment reiterates the general rule that liability of public authorities will generally be the same as liability of private authorities unless inconsistent with legislation.

Lizanne Gumbel QC, Iain O'Donnell, Duncan Fairgrieve and Jim Duffy acted for the Claimants in this case. Philip Havers QC and Hannah Noyce acted for the 1st intervener, the AIRE Centre, and Martin Downs acted for the 4th intervener, Coram Children's Legal Centre. None of them have been involved in the writing of this article.

THE NEW DISCOUNT RATE & A PROPOSAL FOR DUAL RATES

Jeremy Hyam QC

We couldn't omit from this edition of QMLR the Lord Chancellor's announcement on 15 July 2019 of a revised discount rate of **minus 0.25%** to take effect from 5 August 2019. It will cover all personal injury claims, irrespective of the term of the future loss. As the Lord Chancellor rightly noted in his statement of reasons the legal framework was changed by the Civil Liability Act 2018. This inserted key provisions into the Damages Act 1996 which mandate a number of requirements and assumptions for the Lord Chancellor to take into account when setting the rate. Those provisions at paragraph 4 of Schedule A1 to the Damages Act 1996, require *inter alia*, that the rate should be set at the rate that the Lord Chancellor considers a recipient of relevant damages could reasonably expect to receive if they invested their damages award for the purpose of securing that—

(a) the relevant damages would meet the losses and costs for which they are awarded;

(b) the relevant damages would meet those losses and costs at the time or times when they fall to be met by the relevant damages; and

(c) the relevant damages would be exhausted at the end of the period for which they are awarded.

The Lord Chancellor in his statement of reasons describes these provisions as the codification of the guiding "full compensation" principle for the award of damages, as set out by the House of Lords in *Wells v Wells* [1999] 1 AC 34 per Lord Hope of Craighead:

"*... the object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss.*"

The surprise, at least for some, was that the Lord Chancellor concluded that a negative rate of minus 0.25% was the 'appropriate' rate having regard to the responses to the Government's Call for Evidence, and the Government Actuary's Department ("GAD") advice. Indeed the summary of the responses to the Call for Evidence reports how, in the lead up to the Lord Chancellor's announcement, a positive 0.5% or 1% rate was being adopted in offers to settle by Defendants, which reflected a market view that the negative discount rate at minus 0.75% was too heavily weighted in favour of the Claimant and was likely to result in overcompensation in a significant proportion of cases. To best understand how the Lord Chancellor reached the conclusion he did it is worth recalling what he was required to take into account and what he was required to assume by the Damages Act.

Assumptions and considerations in setting the discount rate

By paragraph 4(1)(a) to (c) Lord Chancellor was required to assume that:

(a) relevant damages are payable in a lump sum (rather than under an order for periodical payments);

(b) that the recipient of the relevant damages is properly advised on the investment of those damages; and

(c) that they invest in a diversified portfolio of investments.;

(d) that the sums are invested using an approach which involves more risk than very low risk, but less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims.

The Lord Chancellor was also required to have regard to:-

(a) the actual returns available to investors;

(b) the actual investments made by investors of relevant damages; and importantly

(c) to make such allowances for taxation, inflation and investment management costs as he thought appropriate.

The advice of the Government Actuarial Department

Perhaps most importantly he was also required to consult with the GAD, who advised that:-

i. for the time being at least there should be a single rate to cover all claimants;

ii. that such rate should be set on the basis of a representative claimant profile where by regular future damages costs are to be met over a 43-year period through the investment of a portfolio of assets constructed according to the mid-range portfolio of those suggested in the responses to the Call for Evidence;

iii. That such portfolio was likely to produce an annual gross return of Consumer Price Index (CPI) of plus 2% (before deduction for tax and expenses (CPI + 0.75%) and damage inflation (CPI +1%)).

iv. That the resultant figure was 2% less 1.75% = +0.25%. This was the figure which the Government Actuary described as being the annual rate of return he would expect the mid-range portfolio to

produce over the period (43 years) but acknowledged that it may produce more or less with equal likelihood.

The Lord Chancellor's decision

However rather than set the rate at positive 0.25% using this analysis, the Lord Chancellor adjusted the discount rate downwards by 0.5% to minus 0.25% because he felt that there may be '*too great a risk that the representative claimant will be undercompensated*" (risk 50%) or undercompensated by more than 10% (risk 35%). The adjustment has the consequence that the representative Claimant now has 67% chance of receiving of (at least) 100% compensation and 78% of receiving (at least) 90% compensation. The sceptic might turn those percentages around and say the representative claimant now has at least a 50% chance of being overcompensated, and a 22% (or at least 1:5) chance of being overcompensated by more than 10%.

The Lord Chancellor noted the GAD's analysis of dual rates, which was "*interesting with some promising indications*" but it was not appropriate at this stage to adopt a dual rate until it had received further detailed consideration and impact analysis.

Comment

One might have thought that if the aim of compensation *"is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss"* then the simplest thing for the Lord Chancellor to have done was to have set the rate at +0.25% on the basis of the GAD's advice. At +0.25% the risk is 50:50 between a Claimant recovering too much and recovering too little. That decision could easily have been justified as one that was fair to Claimants and Defendants alike. But the logic of the Lord Chancellor's decision - no doubt guided by his regard to the principle of full compensation - is that when setting a discount rate it is better to risk overcompensation then under-compensation and therefore a downward adjustment to the discount rate was justified. Nonetheless, while a negative discount rate might reflect short term investment risks e.g. (5, 10 and 15 year), the same is not true of longer term investment, where gross annual returns for medium risk investment as the GAD's appendix 4 shows, are more likely to be in the region of 3.75 - 4% resulting in a real rate of return (after deductions for damages interest, tax, fees and expense) of around 1.5%.

For those dealing with high value long life expectancy cases, a discount rate of -0.25% is still, objectively, a very favourable decision for Claimants. The GAD's suggestion that the Lord Chancellor should investigate dual rates (something that already operates in some other jurisdictions: Ontario and Jersey are mentioned) is to be welcomed. Indeed, in November 2018 we note that Jersey published a draft law proposing that the discount rates would be:

- +0.5% - where the lump sum is to cover a period of up to 20 years
- +1.8% - where the damages will cover a period of more than 20 years (applicable to the whole of the award, not just the costs arising after the first 20 years).

which are very significantly higher discount rates than that applied by the Lord Chancellor.

Overall, the long-awaited discount rate decision has been something of a surprise. It is lower than many expected and has come with an indication that dual rates may be something to be pursued in the future. Thus while there is some 'certainty' for now, one cannot help but think that at the next review there is a real possibility of the introduction of dual rates to avoid the substantial risk of overcompensation in cases where the damages are payable over a period of more than 15 years. Having regard to the relevant provisions of the Act, there is not much certainty as to when that next review will commence. The Act requires that "*each subsequent review of the rate of return must be started within the 5 year period following the last review"* and that it is for the *"Lord Chancellor to decide when, within the 5 year period following the last review, a …*[subsequent] *review is to be started*."

There will be many on the Defendant side who will say that such a review cannot commence too soon. In which case the uncertainty which led up to the present decision and was reflected in a large number of settlements

for Claimants at +0.5% or +1% may well be repeated until a rate is arrived at by the Lord Chancellor which the market accepts is a 'fair' one.

SCOPE OF DUTY

Dominic Ruck Keene

One of the recurring themes in negligence case-law over the past 12 months has been the extent to which some or all aspects of a claimant's claimed damage should be determined to lie within the scope of a defendant's duty of care.

The contours of the issue are shaped by the fact that in the vast majority of negligence cases, traditional 'but for' causation and the existence of a duty of care are both necessary but not always sufficient conditions for establishing liability. As Lord Hope observed in *Chester v Afshar* [2004] UKHL 41 at [51] that *"…damages can only be awarded if the loss which the claimant has sustained was within the scope of the duty to take care*."

One difficulty with the issue of scope of duty was created by the somewhat Delphic judgment in *Chester* itself – in which the House of Lords had held that the issue of causation was to be addressed by reference to the scope of the doctor's duty, and since the injury sustained was within the scope of the defendant's duty to warn and was the result of the risk of which the claimant was entitled to be warned, the injury was to be regarded as having been *caused* by the defendant's breach of that duty. The potentially wide consequences of that exception or 'modification' to traditional causation principles has been a series of decisions since *Chester* in which the courts have sought to confine the authority and scope of the judgment in a number of ways.

It should of course be highlighted that despite the attempts made using *Chester* and also *Montgomery* v *Lanarkshire Health Board* [2015] UKSC 11 to argue that there is a freestanding cause of action for invasion of personal autonomy where there had been a failure to obtain informed consent, the lack of any such cause of action has been recently and authoritatively confirmed in both *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307 and *Diamond v Royal Devon & Exeter NHS Foundation Trust* [2019] EWCA Civ 585.

The most significant way in way the decision in *Chester* has been confined is by building on the analysis of the scope of duty in *South Australian Asset Management Corporation v York Montague Ltd* ("SAAMCO") [1997] AC 191 – a case that was not cited or considered in *Chester*. Lord Hoffmann held that, "*[r]ules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful*." He emphasised that the general principle was that "*a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties.*"

Lord Hoffman used the example of a mountaineer who was about to undertake a difficult climb and was concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee. Lord Hoffman held that, "*[o]n what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct*." Imposing liability in such circumstances, "*offends common sense because it makes the doctor responsible for consequences which, though in general terms foreseeable, do not appear to have a sufficient causal connection with the subject matter of the duty*" – i.e. that the damage in question was not within the relevant scope of duty.

The Court of Appeal in *Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40 considered the question of when *SAAMCO* applied to restrict the scope of duty at [54]:

"(1) It is first necessary to consider whether it is an "advice" case or an "information" case. This is a necessary first step because the scope of the duty, and therefore the measure of liability, is different in the two cases.

(2) It will be an "advice" case if it can be shown that it has been "left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction", that "his duty is to consider all relevant matters and not only specific matters in the decision" and that he is "responsible for guiding the whole decision making process".

(3) If it is an "advice" case, then the negligent adviser will have assumed responsibility for the decision to enter the transaction and will be responsible for all the foreseeable financial consequences of entering into the transaction.

(4) If it is not an "advice" case, then it is an "information" case and responsibility will not have been assumed for the decision to enter the transaction.

(5) If it is an "information" case, the negligent adviser/ information provider will only be responsible for the foreseeable financial consequences of the advice and/or information being wrong.

(6) This involves a consideration of what losses would have been suffered if the advice and/or information had been correct. It is only losses which would not have been suffered in such circumstances that are recoverable."

In reality, of course, the distinction between information and advice cases may be, in practice, difficult in cases about informed consent where, despite the weight post-*Montgomery* on the patient as decision maker, many patients if pushed on the question 'what would you have done if given all the information required to make an informed choice?' will in all honesty respond that they would have done what the doctor advised them to do. Does that make the doctor an adviser or an information giver?

In *Khan v Meadows* [2019] EWCA Civ 152, the Court of Appeal considered a case where the Claimant was given negligent advice about whether she was at risk of giving birth to a child with haemophilia. She subsequently gave birth to a child with that condition. The Defendant accepted that, but for the negligent advice, the Claimant would have chosen to terminate the pregnancy and the child would have been born. The child was subsequently diagnosed with autism and the issue was whether, in a wrongful birth claim, the Defendant was liable for the costs attributable to the upbringing of a child with both haemophilia and autism or whether Defendant was liable for the costs in relation to haemophilia alone.

In the High Court Mrs Justice Yip had held that "*those circumstances produce a much closer analogy to Chester v Afshar than to the mountaineer's knee in SAAMCO...The focus of the defendant's duty, or the purpose of the service to put it another way, was to provide the claimant with the necessary information so as to allow her to terminate any pregnancy afflicted by haemophilia, as this pregnancy was*."

However, in the Court of Appeal Davies LJ summarised the questions in light of SAAMCO as being: "*(i) What was the purpose of the procedure/information/advice which is alleged to have been negligent; (ii) What was the appropriate apportionment of risk taking account of the nature of the advice, procedure, information; (iii) What losses would in any event have occurred if the defendant's advice/information was correct or the procedure had been performed*?" Accordingly, "*The SAAMCO test requires there to be an adequate link between the breach of duty and the particular type of loss claimed*."

The Court of Appeal held that "*The focus of the consultation, advice and appropriate testing was directed at the haemophilia issue and not the wider issue of whether, generally, the respondent should become pregnant. It was no part of that consultation, still less was any advice sought, that in the event that the respondent did give birth a child of hers could suffer from a condition such as autism*." Accordingly, it was not within the scope of duty to protect the Claimant from all the risks associated with becoming pregnant and continuing with the pregnancy. The court distinguished *Chester* by holding that the misfortune in *Chester* that befell the Claimant was the very

misfortune that the doctor had a duty to warn against: "*That was a fundamental difference with the facts of this case. The autism here was likewise a coincidental injury outside the scope of the defendant's duty*."

It is difficult to see how the injury in *Khan* was any more coincidental to the breach than was the injury in *Chester*. However, this judgment was another illustration of how scope of duty arguments may be used to try to evade liability.

Another example is *Kennedy v Frankel* [2019] EWHC 106 (QB), in which a Claimant alleged that the Defendant had failed to advise her of the risk of impulse control disorder associated with dopamine agonist medication for Parkinson's. The Claimant had gone on to develop psychosis. The Defendant at a very late stage sought to argue based on *Khan* that that the Claimant's psychosis was a coincidental injury, falling outside the scope of the Defendant's duty, since the duty to warn related to the risk of ICD alone and did not extend to a risk of psychosis, which was an extremely rare complication. The issue was deferred by Mrs Justice Yip to any subsequent quantum hearing.

In *Pomphrey v Sec of State for Health and another* (2019 WL 01995493), (see the case/comment in QMLR 1) Judge Cotter QC found that the scope of duty in question did not encompass avoiding a non-negligent risk of a dural tear that was inherent in the surgery in question, the risk of which was not affected by the breach of duty through the surgery being delayed. The judge found that the dural tear would have occurred even if there had been no delay as the surgical technique and anatomy would have been the same. Moreover, he held that "… *given the scope of the relevant duty which was breached in this case (to avoid unreasonable delay) I would have declined Mr Samuel's invitation to follow the reasoning/approach in Crossman and would have found that establishing simple "but for" causation; based solely on the operation taking place on a different day (or Mr Samuel suggested even at a different time on the same day) would not have been sufficient, without more, for the Claimant to establish causation. Indeed, to do so would drive a coach and horses through well-established causation principles*."

By contrast, in *Mills v Oxford* [2019] EWHC 936 Karen Steyn QC heard a claim for lack of informed consent to neurosurgery which resulted in a stroke through failure to discuss alternatives. The Claimant argued that if he had opted for one of the alternatives, namely a microscopically-assisted resection procedure, whether on 4 December 2012 or another date, then provided the choice of technique made it more difficult to control the bleeding then he would have suffered the very injury that was the focus of the duty to warn and causation would be established. The Trust argued in reliance on *Khan* that the complication would be outside the scope of the duty to warn. The judge concluded that the Claimant would have chosen to have had microscopically-assisted resection if he had been given appropriate information about the alternatives. Such a technique would have significantly reduced the risk of the bleeding that led to his stroke, and that was the risk about which the Claimant should have been warned. Accordingly, this was a case where, according to the judge, "*the misfortune which befell the claimant was the very misfortune which was the focus of the surgeon's duty to warn*" citing *Chester*.

Conclusion

It is clear that arguments based on 'scope of duty' and on the judgments in *SAAMCO* and *Khan* are now commonplace, particularly in 'information' or 'advice' cases. What is critical for both claimants and defendants is to define exactly what is the alleged duty, its scope and crucially the relevant breach. Issues to consider will include what was the extent of any responsibility assumed by the defendant (see also *Poole v GN* [2019] UKSC); was the injury purely coincidental, and/or can it be linked physically to any injuries that could have been contemplated at the time of the negligence.

Andrew Kennedy appeared for the Defendant in Pomphrey. *Robert Kellar QC appeared for the Appellant in Diamond. Philip Havers QC acted for the Respondent in Khan. They did not contribute to this article.*

BESPOKE LIFE EXPECTANCY EVIDENCE

Matthew Flinn

Dodds v Arif & Anor [2019] EWHC 1512 (QB)

The court refused a Defendant's application at a CMC to admit evidence from an expert specifically in the field of life-expectancy statistics and calculations. It provided guidance as the types of cases where: (a) expert evidence on life expectancy was required at all; and (b) where it would be appropriate for that evidence to come from a bespoke life-expectancy expert.

Background facts

The substantive claim related to a car accident in which the Claimant had suffered a serious head injury, leaving her in a condition in which she required substantial assistance and support. Her legal representatives submitted expert evidence from a neurologist and a geriatrician. The neurologist commented in his report that, unless the claimant developed epilepsy, the injury was unlikely to impact on her life expectancy significantly. It was implied, however, that if epilepsy did develop, the impact could be significant. The Defendant's proposed expert report considered the impact of the Claimant's high blood pressure and raised cholesterol. In conjunction with the impact of the accident, it was suggested that there should be a reduction to the normal life expectancy of around 5 years.

Master Davison's decision

The application was refused.

First, Master Davison explained that expert evidence on life expectancy was required whenever it was genuinely in issue in a personal injury case. That could be because the injury itself impacted on life expectancy, or because the Claimant was "*atypical*" and likely to live for a measurably shorter or longer period than those set out in the Ogden tables (which apply to a general population cohort). In the latter regard, the court made reference to *Edwards v Martin* [2010] EWHC 570, a decision which demonstrates that the courts should not take an overly broad approach to the factors which can render someone "*atypical*". For example, someone being very fit, or someone being a smoker, would not, in and of itself, require expert evidence, since such common conditions were adequately accounted for in the Ogden Tables.

Where expert evidence on life expectancy is needed, the normal route for adducing it will be via the expert clinicians instructed in the case, who can be asked to expand on the issue in more detail through Part 35 questions or the joint meeting process if required. Master Davison explained that life expectancy tended to be more of a medical issue rather than a matter for strict statistical analysis (although reference to statistics by those clinicians might be useful and appropriate). Furthermore, it is much more efficient and cost effective for clinicians to deal with this issue.

He went on to confirm that the court would only be likely to grant permission to adduce evidence from a specific life expectancy expert if:

(a) the other experts could not offer an opinion at all;

(b) the clinicians provided a specific reason why such evidence was required; or

(c) the clinician experts were relying on statistical data but there was a significant disagreement as to how to approach that data.

Comment

It is worth comparing this decision to *Mays (by his litigation friend, the Official Solicitor) v Drive Force (UK) Ltd* [2019] EWHC 5 (QB) which was covered in Issue 1 of QMLR. Arguably, *Dodds* adopts a more restrictive approach, in contrast with the approach in *Mays* which appears to place more emphasis on the discretion of the courts based on specific factors arising in each case. However, *Dodds* is useful in that it poses a clear list of questions,

the answers to which should give a good indication to litigating parties as to whether or not it is appropriate to seek a life expectancy report in any particular case.

FUNDAMENTAL DISHONESTY

Suzanne Lambert

Introduction

There are two separate and distinct regimes relating to fundamental dishonesty in litigation which have been available in personal injury claims since 2013. However, in the last year or two, there has been increasing attention focused on the perils and opportunities of the fundamental dishonesty provisions. Those representing both claimants and defendants should be aware of these provisions and the developing principles and case-law governing this area. They have serious costs consequences and can affect damages recoverable, even where a claimant would successfully establish liability otherwise.

Unsuccessful claimants: CPR r.44.16(1)

CPR Rule 44.16(1) was introduced as a counter-balance to the Qualified One-Way Costs Shifting regime ("QOCS") that came into force in 2013 as part of the Jackson reforms. It creates an exception to the QOCS regime by imposing liability on unsuccessful claimants to pay costs where they are found to be fundamentally dishonest on the balance of probabilities.

The court will usually determine the question of fundamental dishonesty at trial where such an allegation is raised by the defendant. However, as set out in PD44.12(4), where the matter is settled, the court will not, save in exceptional circumstances, determine issues arising out of an allegation that the claim was fundamentally dishonest. In contrast, if the Claimant has simply discontinued proceedings, the court may direct that issues arising out of an allegation of fundamental dishonesty be determined.

Where the court makes a finding that the claim is fundamentally dishonest, the court may determine the costs attributable to the claim having been found fundamentally dishonest as it thinks fair and just.

Successful claimants: s.57 Criminal Justice and Courts Act 2015

Section 57 of the Criminal Justice and Courts Act 2015 ("the CJA") applies to cases where the claimant successfully establishes liability but where the defendant alleges that the claimant is fundamentally dishonest in relation to the primary claim or a related claim.

It is important to note, however, that a court may make a finding of fundamental dishonesty even if that has not been pleaded expressly, provided that the claimant has had fair notice of the challenge to his or her honesty and an opportunity to deal with it at trial (see *Howlett v Davies* [2017] EWCA Civ 1696).

The court must be satisfied on the balance of probabilities that the claimant has been fundamentally dishonest (s57(1)) but once so satisfied the court must dismiss the entire claim, unless the claimant would suffer *"substantial injustice"* (s57(2)).

In such cases, the otherwise successful claimant, who is found to be fundamentally dishonest, is required to pay the defendant's costs subject to a deduction of damages as assessed by the court and that would have been awarded but for the finding of fundamental dishonesty (s57(5)). In cases where the claimant's notional damages are higher than the defendant's assessed costs then it follows that the costs recoverable are nil. However, in cases where the notional damages are lower than the assessed costs, the claimant will have to pay the difference to the defendant.

In addition to dismissal of the claim with consequential loss of damages, and a costs sanction, a claimant found to be fundamentally dishonest also faces a potential threat of subsequent criminal proceedings and proceedings for contempt of court (s57(6)).

The meaning of fundamental dishonesty

As was explained in *Menary v Darnton*, 13 December 2016 unrep., in relation to CPR 44.16(1), a fundamentally dishonest claim is one where the dishonesty *"strikes at the very root"* of either the whole of the claim or a substantial part of it. A *"peripheral matter"* would not be *"fundamental"*. As to dishonesty, *"it is the advancing of a claim without an honest and genuine belief in its truth"* and it is to be distinguished from *"the exaggerations, concealments and the like that accompany personal injury claims from time to time"*. Subsequently, the Court of Appeal in *Howlett v Davies,* approving HHJ Moloney in *Gosling v Hailo,* 29 April 2014 unrep., explained that it is *"a claim which depended as to a substantial or important part of itself upon dishonesty"*.

The requirement in the CPR is that the fundamental dishonesty relates to the claim rather than the claimant. The court in *Menary* took the view that the focus on the claim must have been *"deliberate on the part of those who drafted the CPR. It is the claim that the defendant has been obliged to meet, and if that claim has been tainted by fundamental dishonesty, then in fairness and in justice, and in accordance with the overriding objective, the defendant should be able to recover the costs incurred in meeting an action that was proved, on balance, to be fundamentally dishonest."*

Whether that means that the subsequent focus on the claimant rather than the claim in s57 of the CJA was intended to make a deliberate distinction is unclear. However, when considering the meaning of fundamental dishonesty specifically in relation to s57, Knowles J. in *London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield* [2018] EWHC 51 (QB) *("LOCOG")* considered a number of cases on the meaning of fundamental dishonesty, including *Howlett v Davies,* and held that *"… a claimant should be found to be fundamentally dishonest within the meaning of s.57(1)(b) if the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim … and that he has thus substantially affected the presentation of his case, either in respect of liability or quantum, in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation".*

As to the meaning of dishonesty itself, Knowles J referred to the test for dishonesty set out by the Supreme Court in *Ivey v Genting Casinos Limited (t/a Crockfords Club)* [2017] UKSC 67, and explained that *"… whilst dishonesty is a subjective state of mind, the standard by which the law determines whether that state of mind is dishonest is an objective one, and that if by ordinary standards a defendant's mental state is dishonest, it is irrelevant that the defendant judges by different standards"*.

Recent authorities

Recent authorities suggest that both CPR 44.16(1) and s57, but particularly the latter, are being deployed more frequently and with increasing success.

For example, in *Razumas v MOJ* [2018] EWHC 215 (QB), the MOJ raised s57 at trial on the basis that the court had found the Claimant to have lied in pleadings and in evidence about having sought medical attention while he was on release from prison. The MOJ asserted that the claim for damages arising from the alleged clinical negligence in prison should be dismissed on the basis of fundamental dishonesty. The court *"gratefully adopted"* the approach in *Gosling v Hailo* and held that the Claimant had acted dishonestly in relation to his claim which had *"substantially affected the presentation of his case … in a way which adversely affected the defendant in a significant way"*. The court dismissed the claim for other reasons but held that, had there been a successful claim, it would have been dismissed on the basis of s57. Additionally, the court held that, in order to avoid the consequences of s57, the Claimant would have to show something more than the loss of damages to demonstrate substantial injustice. To do otherwise would be *"to cut across what [s57] is trying to achieve"*.

In *Pinkus v Direct Line* [2018] EWHC 1671 (QB), the Claimant sought substantial damages for injuries suffered following an RTA. The Defendant admitted causing the collision but disputed the nature and severity of the

damage and consequential injuries. Although fundamental dishonesty had not been pleaded expressly, the claim was dismissed at trial in accordance with s57 on the basis that the Claimant was found to have deliberately and consciously exaggerated the facts around the accident, his consequential symptoms, and his pre-index situation. The Claimant's Facebook posts were used to undermine his claims and his experts were found to lack objectivity and to have failed to acknowledge the inconsistencies in his evidence. The dishonesty was found to be *"close to the heart"* of the claim. The Claimant would have been awarded damages but for s57, but his claim was dismissed, and he was ordered to pay the Defendant's costs on an indemnity basis.

Similarly, in *Sudhirkumar Patel v Arriva Midlands Limited* [2019] EWHC 1216 (QB), the Defendant insurer relied on surveillance evidence in support of a successful application made shortly before trial to amend the Defence in order to plead fundamental dishonesty. The Claimant, who had been assessed previously as lacking capacity, was found to have capacity at trial. His expert's previous assessment was found to have been made on the basis of incorrect information gleaned from the Claimant's dishonest presentation and from false information from the Claimant's son. Notwithstanding what was left of the claim, the lifetime care needs claimed to be consequential upon the untenable psychiatric diagnosis were fundamentally dishonest and there would be no substantial injustice in dismissing the claim.

That said, defendants should not rush to deploy s57 in every case. In *Spencer Smith v Ashwell Maintenance*, 23 January 2019 unrep., the court found that whilst there had been exaggeration as to the effect of the Claimant's injury, it was not a case of outright faking of pain or gross exaggeration as had been submitted by the Defendant employer in support of its application for dismissal. The Defendant relied on covert surveillance evidence, bank statements, and evidence of the Claimant's appearance on a television show and argued that his presentation to the medical experts and his approach to the claim overall was so exaggerated as to amount to fundamental dishonesty. In declining to dismiss the claim, the court noted that, although the Defendant eventually admitted breach in relation to the index accident at work, the Defendant had shown a determination to avoid compensating the Claimant fully so that the Claimant's exaggerations were *"the result of an attempt by him to convince, rather than to deceive"*.

This article is adapted from a longer talk co-written with Jo Moore at 1 Crown Office Row.

RECOVERABILITY OF ATE PREMIUMS

Jeremy Hyam QC

Suzanne West v. Stockport NHS FT and Demouilpied v Stockport NHS FT [2019] EWCA Civ 1220

In these conjoined appeals the Court of Appeal (Sir Terence Etherton MR, Irwin and Coulson LJJ) have taken the opportunity to deal with a number of issues relating to the reasonableness and proportionality of costs in clinical negligence cases and the proper approach to costs assessments.

The case is important because it considers and explains the unique position of ATE insurance premiums in clinical negligence cases. In clinical negligence it is almost always necessary for an ATE insurance policy to be obtained by a claimant to insure against the risk of incurring a liability to pay for an expert report(s) relating to liability or causation. Specifically, the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (no.2) Regulations SI 2013/739, provide (by way of exception to the general rule in s.46 LASPO 2012) that such premium (insofar as it relates to the risk of incurring liability to pay for expert reports relating to liability or causation in respect of clinical negligence in connection with the proceedings) may be recovered.

Brooke LJ had stressed in *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 701 that the availability of such ATE insurance and the recoverability of the relevant premium is an important means by which access to justice continues to be provided in clinical negligence cases. It was therefore unsurprising that the present Court of Appeal began their analysis of the issues in the instant case by affirming: *"[a]ccess to justice*

must therefore be the starting point for any debate about the recoverability of ATE insurance premiums in any dispute about costs".

Background

The facts of the instant appeal were that the Claimants, D and W, had each brought successful clinical negligence claims against the Respondent Trust. The claims had settled without proceedings being issued. D's claim had settled for £4,500, W's for £10,000. Their respective cost bills were £18,376 and £31,714. Both had taken out 'block-rated' ATE insurance. Under the Regulations, £5,088 of the premium was recoverable, yet when it came to assessment the Respondent Trust successfully challenged the recoverable amount and reduced it to £650 in D's case and in W's case £2,500. On appeal from the district judge, the judge upheld both assessments saying that – on the evidence – the district judge had been entitled to reduce the recoverable amount to what he considered *"reasonable and proportionate."*

The appeal

The Court of Appeal allowed the appeal from the judge. In doing so they reviewed the authorities on challenging insurance premiums and stated the proper approach to apply, having regard to *Rogers v Merthyr Tydfil*; *Peterborough and Stamford Hospitals NHS Trust v McMenemy* [2017] EWCA Civ 1941; and *Kris Motor Spares Ltd v Fox Williams LLP* [2010] EWHC 1008 (QB). The principles which the Court helpfully distilled at [56] are as follows:

i. Disputes about the reasonableness and recoverability of the ATE insurance premium are not to be decided on the usual case-by-case basis. Questions of reasonableness are settled at a macro level by reference to the general run of cases and the macro-economics of the ATE insurance market, and not by reference to the facts in any specific case [*McMenemy*];

ii. Issues of reasonableness go beyond the dictates of a particular case and include the unavoidable characteristics of the ATE insurance market [*Rogers*];

iii. District judges and cost judges do not have the expertise to judge the reasonableness of a premium except in very broad-brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces [*Rogers*];

iv. It is for the paying party to raise a substantive issue as to the reasonableness of the premium which will generally only be capable of being resolved by way of expert evidence [*Kris*].

The court explained that these principles, *"must be applied in every case because the insurance market is integral to the means of providing access to justice in civil disputes [now limited to clinical negligence cases] in what may be called the post-legal aid world".*

Reasonableness

The court then went on to clarify the correct approach to assessment, making clear that they were not saying that a paying party is bound to accept the reasonableness of whatever premium has been paid. The mere fact that ATE insurance provides access to justice does not mean that the relevant premium must automatically be regarded as reasonable. The approach rather should be that:

i. If the ATE policy is bespoke, then the grounds of challenge will be relatively wide.

ii. If the ATE policy is 'block rated' then the grounds of challenge will be more restricted and will usually have to relate to the market and expert evidence is likely to be necessary.

iii. Comparing the value of the claim to the amount of the premium was inapposite. It was not a reliable measure of reasonableness. It would ignore the way a block rated policy was calculated by reference to a wide range of cases. The cost of a reasonable 'block-rated' policy was something the paying part would simply have to bear. In saying so court drew a similarity with the fixed costs regime about which

Briggs LJ (as he then was) had commented in *Sharp v Leeds City Council* [2017] EWCA Civ 33 at [41] as follows: "*… The fixed costs regime inevitably contains swings and roundabouts and lawyers who assist claimants by participating in it are accustomed to taking the rough with the smooth, in pursuing legal business which is profitable overall*."

Proportionality

On the issue of proportionality, (as distinct from reasonableness) the court was asked to decide whether a proportionality challenge was limited to the particular circumstances of the case ("*the narrower interpretation*") or whether it was to be assessed by reference to all the circumstances, and so encompass matters which were not necessarily related to the case in question ("*the wider interpretation*"). The court's answer was the latter. Questions of proportionality were not limited to the particular circumstances of the case but rather to be considered by reference to the specific matters in CPR 44.3(5) and, if relevant, any wider circumstances identified under CPR 44.4(1).

That led on to the question whether, if an ATE insurance premium was held to be 'reasonable' could it still be subject to a proportionality assessment? In the case of a relevant block-rated premium (such as in the instant cases) the court said that once assessed as "*reasonable*" it could not be then assessed as disproportionate.

That was so for two reasons. First, being a block rated policy, its amount bears no relationship to the value of the claim, still less to the amount for which the case settled. Second, because ATE is critical to access to justice in clinical negligence claims: when it comes to proportionality there are some issues which cost judges must simply leave out of account. These exceptional items will be those items of costs which are fixed and unavoidable or which have an irreducible minimum without which the litigation could not be progressed. The block rated ATE premium was one such exceptional item.

Approach to assessment

Finally, the court summarised its views on the 'right approach' to costs assessment by judges, noting the absence of any consistent approach being applied around the country to the assessment of costs bills in clinical negligence cases. The suggested approach from the Court of Appeal is as follows:

i. The judge should go through the bill line by line, assessing the reasonableness of each item, if possible, the proportionality of each item should be assessed at the same time.

ii. This exercise should produce a total figure which the judge considers to be reasonable.

iii. The proportionality of that figure has then to be assessed by reference to CPR 44.3.5 and 44.4(1). If it is proportionate no further assessment is required.

iv. If a further proportionality assessment is required, then that should not be line by line but should consider various categories of costs e.g. disclosure of experts' reports or specific periods where particular costs were incurred etc. In respect of such categories the judge may then make reductions as appropriate on grounds of proportionality but this part of the exercise would have to exclude those elements of costs which are properly regarded as unavoidable, such as court fees, the reasonable element of the ATE premium in clinical negligence case etc.

The net result in the instant case was that both appeals were allowed and the 'reasonable' sum of the ATE premium was recovered in each case without any discount for proportionality (i.e. £5,088).

Comment

The appeal has highlighted the inconsistency of approach by costs judges to assessments of reasonableness and proportionality of bills of cost in clinical negligence cases. It has also clarified the integral role of the ATE insurance market for ensuring access to justice in clinical negligence cases and explained that, if block-rated policies are used, then proportionality has little or no role to play because the policy will bear no relation to the sum claimed, still less to the settlement value, but will be set at a figure by reference to the wider basket of

cases which is necessary to allow access to justice for all claimants. If the paying party has to pay a premium which is (as it was in D's case) higher (at £5,088) than the sum he actually recovered viz. £4,500, that is just part of the 'swings and roundabouts' in this subset of civil litigation which is dependent upon a buoyant ATE insurance market for maintaining access to justice in the 'post-legal aid world'. For the paying party in clinical negligence, usually NHSR, it might reasonably be said: civil litigation of this kind is not a playground - these further restrictions on the NHS's ability to reduce its liability to costs for disproportionately expensive low value cases are yet more burdens which the NHS (and we all as taxpayers) must bear as the consequence of successive governments' practical extinction of the legal aid system and the transfer of the cost of access to justice to the insurance market.

A different version of this article has previously appeared on the UK Human Rights Blog.

MEDICAL INQUESTS AND ARTICLE 2

Matthew Flinn

R (Maguire) v HM's Senior Coroner for Blackpool and Fylde [2019] EWHC 1232 (Admin)

The High Court has re-affirmed that, in most cases, inquests involving allegations of medical failings do not engage the State's positive obligations under Article 2 of the European Convention on Human Rights.

Jackie Maguire had Down's syndrome, moderate learning difficulties, and severely compromised cognitive and communication abilities. On 22 February 2017, she tragically died from a perforated ulcer at the age of 52, having developed symptoms starting with a sore throat around one week previously. For around 20 years prior she had been living in care and, at the time of her death, following a capacity assessment under sections 1 – 3 of the Mental Capacity Act 2005, she was being maintained by Blackpool City Council in a care home from where she was not allowed to leave without supervision.

An inquest hearing before the Senior Coroner for Blackpool and Fylde proceeded on the basis that the state's positive obligations to protect life under Article 2 of the European Convention on Human Rights ("ECHR") were engaged, and it was accordingly an 'Article 2 inquest'. However, at the conclusion of the inquest and prior to considering his summing up and the matters to be left to the jury, the Coroner decided that, in light of the High Court decision in *R (Parkinson) v Kent Senior Coroner* [2018] EWHC 1501 (Admin) (see further below), Article 2 was not, in fact, engaged based on his assessment of the evidence he had heard. He also decided that it would not be appropriate to leave the potential conclusion of 'neglect' for the jury's consideration. Those two decisions were challenged by Jackie's family in judicial review proceedings. This article focuses on the Coroner's decision regarding the engagement of Article 2.

In the inquest hearing itself, the Coroner had heard evidence of what might be characterised as a series of deficiencies (or at least missed opportunities) to assess and provide treatment to Jackie as her condition deteriorated, including omissions to call a GP when first requested by Jackie, decisions not to take Jackie to hospital, and failures by GPs who were consulted to elicit and act upon all pertinent information about her condition. The question for the court was whether such failings engaged Article 2.

Article 2 obligations

At paragraphs 30 – 49 of the judgment, the court gave a useful and succinct summary of the structure of the substantive Article 2 obligations imposed on the state, and how and when they are engaged. In summary, under Article 2 there is:

1. A substantive negative obligation not to take life unlawfully;

2. A substantive positive 'framework' obligation to have in place effective criminal and other legal provisions together with enforcement machinery for the prevention and punishment of crime and the protection of life; and

3. A substantive positive 'operational' obligation to take steps to protect people where the state knows or ought to know that someone is at risk at real and immediate risk of death.

As the court explained, the 'operational' obligation originally arose in the criminal context (i.e. a need to protect people at real and immediate risk of having fatal crimes perpetrated against them), but it has extended beyond that point to arise whenever someone is in such a dependent position that the state can be said to have assumed responsibility for protecting that person's life. Template examples of this situation are where someone is in prison or detained in a mental health facility.

Outside of those cases where there has been a sufficient assumption of responsibility and an arguable failure to take steps to protect people who are at 'real and immediate risk of death', the court emphasised that, in cases of alleged medical failings, Article 2 would not be engaged save for a systemic failure.

Parkinson and Lopes de Sousa Fernandes

This was held to flow on from *Parkinson*, which involved allegations that there had been failings in the treatment of an elderly patient presenting at a hospital's Accident & Emergency department, see [38]:

"The Coroner in the present case applied the guidance in Parkinson which held, at paragraph 87, that where a state has made provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as errors of professional judgment or negligent coordination among health professionals in the treatment of a particular patient will not be sufficient to engage article 2. In reaching this conclusion, the court in Parkinson reflected the reasoning of earlier cases such as Powell v United Kingdom (2000) 30 EHRR CD 362. Parkinson is now authority for the proposition that a medical case (in which negligent medical treatment may incur liability in tort) will not generally engage article 2."

Parkinson itself drew heavily from a recent judgment of the ECtHR Grand Chamber in *Lopes de Sousa Fernandes v Portugal* (app. no. 56080/13), in which the court restated and clarified its jurisprudence in relation to the invocation of Article 2 in medical cases. The key principles are summarised at [65] to [76] of the judgment in *Parkinson*, the essence of which is that, outside of circumstances in which the operational Article 2 obligation may arise, a breach of Article 2 is only arguably made out where there has been a denial of emergency life-saving treatment, pursuant to some kind of systemic dysfunction or failing.

Returning to the *Maguire*, the court determined as follows at [45]:

"Applying these principles to the present case, we have carefully considered the chain of events in the days before Jackie's death: Dr Adam's failure to make a home visit; Dr Fairhead's failure to triage properly or to elicit a full history from carers; the paucity of advice from NHS111; the difficulties experienced by Ms Ayres and her colleague who had not been notified that Jackie had Down's syndrome and who found themselves unable to take Jackie to hospital. It may fall to others to decide whether any failures give rise to individual civil liability or professional disciplinary proceedings. They are not, however, capable of demonstrating systemic failure or dysfunction. Such failings as there may have been were attributable to individual actions and do not require the state to be called to account."

Similarly, the court did not interfere with the Coroner's conclusion that the operational Article 2 obligation arose on the facts of the case, finding that he had made no error of law in that regard.

Conclusion

The cases of *Fernandes*, *Parkinson* and *Maguire* mark a "*reining in*" of Article 2 in the medical context, and are likely to feature prominently in legal submissions to Coroners in the coming months, particularly by clinicians and hospitals who seek to resist inquest proceedings on the more detailed and extensive Article 2 footing.

A different version of this article has previously appeared on the UK Human Rights Blog.

INTERPRETATION OF THE ABORTION ACT 1967

Matthew Flinn

R (On the Application of British Pregnancy Advisory Service) v Secretary of State for Health and Social Care [2019] EWHC 1397 (Admin)

The court considered the meaning of the phrase *"the pregnancy has not exceeded its twenty-fourth week"* in section 1(1)(a) of the Abortion Act 1967 and concluded that a woman would have exceeded her 24th week of pregnancy from midnight on the expiration of her 24th week.

Background

Section 1(1) of the Abortion Act 1967 provides, in summary, that a doctor will not be guilty of an offence if he/she terminates a pregnancy in certain defined circumstances. The first circumstance (in section 1(1)(a)) is that *"the pregnancy has not exceeded its twenty-fourth week".*

On 23 July 2018 the Chief Medical Officer wrote to all doctors explaining that the Department of Health and Social Care's interpretation of that phrase, based on legal advice, meant that all parts of the abortion procedure had to be completed within the completion of 23 weeks and 6 days. The Claimant British Pregnancy Advisory Service challenged that "decision" (imputed to the Secretary of State) in judicial review proceedings, arguing that it represented a change to long-standing practice with the effect of shortening the lawful period for an abortion under the provision by one day.

The parties' positions

It is helpful to quote from the judgment of Mr Justice Supperstone at [33] to [34] to reiterate the parties' positions:

"The Claimant's case is that a pregnancy does not exceed 24 weeks on the day that it reaches 24 completed weeks, but on the day after that. Week 24 plus 0 is the day that a pregnancy has reached the end of its twenty-fourth week, but not exceeded it. A pregnancy does not exceed its twenty-fourth week until it has reached week 24 + 1 day.

The Secretary of State's case is that the 24th week is reached when the 23rd week ends, at the end of week 22 + 6, and runs from week 23 + 0 to week 23 + 6. After that it is exceeded. The Secretary of State accepts that his previous interpretation was wrong."

Judgment

Mr Justice Supperstone agreed with the Secretary of State, holding that the natural meaning of "*exceed*" in the section had the effect that pregnancy "*exceeded*" 24 weeks from midnight on the expiration of the 24th week from the first day of the last menstrual period. This meant at the end of 23 weeks + 6 days. He explained his reasoning by reference to the way we describe someone's age: their life begins on the day they were born, but they are not considered to be one day old until the expiry of the first day, and likewise we do not refer to someone as one year old until the expiry of their first year. Similarly, when someone is 23 weeks old, they have in fact entered their 24th week. The first day of that week is day 0, and at the end of day 6, the period has expired.

In the absence of some clear indication of a contrary parliamentary intention, the court said that natural meaning should be given effect. Further, it rejected an argument that the advice posited an interpretation contrary to how the phrase had been understood by all properly informed parties since its enactment. Supperstone J said that Parliament had not approved or enacted any measure that indicated it took a particular view of the interpretation of the words concerned, over any period, let alone a long period. The evidence did

not indicate a settled construction of practice in line with the Claimant's proposed construction. Accordingly, the decision handed down by the Chief Medical Officer was lawful.

Aside from setting out some principles of construction in relation to time periods, which might have some general application, this is clearly a very specific decision of statutory construction. The decision makes for enjoyable (if slightly esoteric) reading, however, and it is worth including the following passage from the Chief Medical Officer's decision letter, if only to count the number of times it must be read in order to make sense!

"This advice is based on the fact that, clinically, a pregnancy is dated from the 1st day of the woman's last menstrual period (LMP). As you will be aware, this day is counted as day 0 of her pregnancy. Therefore, when the woman reaches 23 weeks + 0 days she will have entered her 24th week of pregnancy, which will run from 23 weeks + 0 days to 23 weeks + 6 days (7 completed days of pregnancy in total). Using this method of calculation, a woman will have exceeded her twenty-fourth week of pregnancy once she is 24 weeks + 0 days pregnant, or in other words, from midnight on the expiration of her 24th week of pregnancy. On the expiration of her 24th week of pregnancy, she will have been pregnant for a total of 168 days; an abortion on the 169th day (24 weeks + 0) would, in the view of DHSC's legal services, be unlawful."

DISCIPLINARY PROCEEDINGS AND SERIOUS PROCEDURAL IRREGULARITIES

Jeremy Hyam QC

Beard v General Osteopathic Council [2019] EWHC 1561 (Admin)

This was an appeal by the registrant osteopath against the GOC's Professional Conduct Committee (PCC's) decision to impose conditions on her registration. Her real complaint on appeal was that the hearing of the PCC was unjust because of serious procedural irregularity. The first and principal ground of appeal asserted apparent bias and unfairness arising from the conduct of the hearing and in particular from questions by one Ms Neville, appointed as a lay member to the panel, although a qualified solicitor.

The original hearing and decision

The appeal is of interest because as part of the appeal the judge was asked not only to read the transcripts of the hearing but to listen to the tape recording of the questioning of the relevant witnesses. This was because counsel for the registrant relied not just on the content but the tone of some of the questioning. In his findings Kerr J recorded that until that part of the disciplinary hearing where the panel are entitled to ask questions to the witness (i.e. after the parties' representatives have examined and cross-examined) the evidence given by the complainant and the evidence given by the registrant was "*unremarkable"*. It was only the Panel's questioning which was relevant to the argument of serious procedural irregularity, and the focus was squarely on the hostile questioning of the lay member Ms Neville. She formulated a series of questions which were plainly upsetting to the registrant, so much so that a break had to be taken. After that break the questions continued but they were directed through the Panel chair. The total time taken by the Panel's questions was 1 hour and 45 minutes.

The Panel then received closing submissions and announced (after consideration) their conclusion that all the charges which had not been admitted had been proved in their entirety. They adjourned the case for consideration of whether the conduct found proved amounted to unacceptable professional conduct.

Between that decision and the adjourned hearing the registrant instructed leading counsel who sought transcripts of the hearings and made, what was described as, a '*rather unusual'* application that, either, Ms Neville should recuse herself, or, the other two members should recuse her, or, if they did not, should recuse themselves on the ground of "*clear appearance of bias or at least pre-judgment"*. Those submissions were renewed orally at the hearing but failed. The PCC made a 12-month conditions of practice order.

The appeal

The registrant appealed (which had the effect of suspending the effect of the decision). Allowing the appeal, Kerr J referred to the long recognised judicial duty to stay above the fray – *Yuill v Yuill* [1945] 1 All ER 183 CA. While the authorities point to the need for judicial restraint, they also support the proposition that excessive judicial intervention does not justify appellate interference unless the trial is rendered unfair. Helpfully, for those who practice in this area, the court distilled the principles to be obtained from the authorities into six propositions. Of those six, the key proposition in the instant case was that: "*on appeal, the issue is whether the interventions indicate that a fair trial has been denied because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and 'into the perils of self-persuasion*".

On the registrant's behalf it was argued that Ms Neville's questioning amounted to "*assuming the role for a second prosecutor and stepping into the ring*"; was "*hostile and oppressive"*; deprived Ms Beard of the opportunity to give her evidence clearly and coherently; and amounted to bullying.

The judge agreed, holding that Ms Neville was allowed for too long to pursue hostile lines of questioning, the unstated relevance of which was "*nil or so tenuous as to amount to vexing the witness rather than illuminating the factual issues*". Ultimately the judge concluded that there was a procedural irregularity and a serious risk that one of the committee's member's descent into the arena may have hampered her ability properly to evaluate and weigh the evidence before her so as to impair her judgment.

Comment

For those appearing in disciplinary hearings before employers or professional panels such as the GOC, GDC, and GMC, the strange incongruity of 'panel questions' outlasting the parties' representatives questioning is not unknown. This clearly was a peculiarly bad example, where both the tone and the content of the lay member's hostile questioning was found to do little to illuminate the factual issues the panel was there to determine.

The real value to practitioners in the case lies in the succinct summary of the six propositions to be derived from the case-law on serious procedural irregularity in the trial process and the ultimate conclusion that excessive intervention or pejorative comment will create a real danger of unfairness where a panel member's descent into the arena is such to have created a real danger that the panel member's ability properly to evaluate and weigh the evidence before her has been impaired. As was observed in one of the cases cited by the judge: *Jones v National Coal Board* [1957] 2 QB 55, the words of Lord Bacon remain as true today as they did in the 17th century: "*Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal'.*

CAPACITY, RESIDENCE, CARE, SOCIAL MEDIA AND SEXUAL RELATIONS

Shaheen Rahman QC

B v A Local Authority [2019] EWCA Civ 913

A 31 year old woman with learning difficulties had, through social media, shared intimate images of herself and become involved with a 71 year old convicted sex offender ('Mr C'), with whom she wished to live and start a family. The Local Authority ('LA') applied for declarations as to her capacity to make decisions regarding residence, care, contact, social media and sexual relations. The Claimant lived with her parents and lacked capacity to litigate. Proceedings were conducted on her behalf by the Official Solicitor ('OS').

The first instance judgment

Cobb J considered that the Mental Capacity Act 2005 ('MCA') required a strict decision-specific approach, despite the potential for inconsistent results for closely related decisions. Applying this approach, he held that the Claimant had capacity to understand the relevant information as to residence decisions, having regard to the list of criteria set out in *LBX v K,L,M* [2013] EWHC 3230 (Fam) at [43]. He expressed misgivings as to how to

apply these criteria on the issue of the Claimant's understanding of who she would be living with and what sort of care she would receive. However, in broad terms he considered she would understand these matters, even if she had not fully thought through the implications of the move.

By contrast, when considering the *LBX* criteria specific to the issue of whether the Claimant understood information relevant to care decisions, he held she did *not* have capacity. Amongst other things, she could not identify the type or amount of support she required or understand her own care needs on a day-to-day basis, nor would education enable her to do so. The judge made a declaration to this effect and also in relation to her lack of capacity to make decisions about contact, again applying the *LBX* criteria specific to this concern and concluding that she lacked understanding in relation to the Mr C's criminal convictions or how to distinguish between good and bad persons online. Again, the judge did not think guidance would enable her to understand these matters.

In relation to the unique threats posed by the use of social media, Cobb J referred to his own recent judgment in *Re A* [2019] EWCOP 2 which also involved a claimant with learning disabilities who had shared intimate photographs of himself online but who had additionally shown an interest in accessing extreme pornography with paedophilic content. The judge identified a number of matters required to demonstrate capacity in this context, including an understanding that posting rude or offensive material could upset others or constitute a criminal offence. In the Claimant's case, the judge considered that she lacked capacity as she did not understand who was a stranger online or contemplate that such people might lie or be capable of harming her. He made a declaration, but only on an interim basis because, with assistance, she might acquire capacity to use social media for the purposes of developing or maintaining connections with others.

The judge also considered that the Claimant lacked capacity to consent to sexual relations. Whilst she understood the nature and mechanics of the act of intercourse and her right to say no, she did not, on the evidence, currently understand the risk of STDs or how to reduce this risk. However, with assistance she might understand this, hence an interim declaration was also made in this respect.

The OS's grounds of appeal

The OS argued that Cobb J's formulation of what was required to demonstrate capacity to use social media and the internet was flawed by the inclusion of criteria from his judgment in *Re A* that were irrelevant to the Claimant's case, namely the potential to cause offence to others or commit crimes by sharing media. Secondly, he had erred in relation the Claimant's capacity to consent to sexual relations by considering further irrelevant criteria and in his approach to her understanding of the right to say no and the prevention of STDs.

In dismissing the OS's grounds of appeal the court recognised, at [37], that it must always be careful not to discriminate against persons suffering from a mental disability so as to impose too high a standard of capacity.

As to the capacity to use social media, the fundamental problem with the OS's position was that it constituted an attack on the judge's reasoning rather than an appeal against the judge's finding that the Claimant lacked capacity to use social media as desired [43]. The court did observe that any list or guideline of relevant information is no more than guidance to be adapted to the facts of the particular case and noted the LA's acceptance that, to the extent that such a list concerned things that the Claimant had never done, intended to do so or was likely to do, they would be irrelevant. It also noted that the Claimant's carers would act in her best interests which may allow use of social media with appropriate safeguards in future.

As to the capacity to consent to sexual relations, it was noted that the test was *"general and issue specific, rather than person or event specific"*, although this was currently under consideration by Hayden J in the case of *London Borough of Tower Hamlets v NB* [2019] EWCOP 17 (see In Brief section below) [49]. The court disagreed with the OS's submission that Cobb J had confused the relevant information for determining the capacity to consent to sexual relations with the actual decision whether or not to give consent [51].

As to the need to understand the risk of STDs and how to reduce that risk, the court noted that section 3(4) of the MCA provides that *"information relevant to a decision includes information as to the reasonably foreseeable*

consequences of deciding one way or another". This is reflected in paragraph 4.16 of Chapter 4 of the Code of Practice which provides that "*relevant information includes the likely effects of deciding one way or another or making no decision at all"* [56].

The court concluded that to demonstrate capacity in this context the Claimant must have the ability to understand the risk of STDs and the protection provided by the use of a condom when explained to her, and the ability to retain that information for a period of time so as to use it or weigh it in deciding whether to consent to sexual relations [57]. The court noted that further work was required to see if the Claimant had sufficient understanding of these matters, having been assessed as having had it on previous occasions [61].

The LA's grounds of cross-appeal

The LA also criticised Cobb J's use and application of the *LBX* criteria and the Court noted again that *"we see no principled problem with the list provided that it is treated and applied as no more than guidance to be expanded or contracted or otherwise adapted to the facts of the particular case"* [62]. The LA argued that the judge's conclusion that the Claimant had capacity to decide where to reside failed to take into account relevant information as to the consequences of the decision and produced an irreconcilable conflict with his decisions on capacity elsewhere, making the LA's task in caring for the Claimant practically impossible. The court agreed, noting again the requirements of section 3(4) of the MCA and the relevant paragraph 4.16 the Code of Practice. The decision that the Claimant had capacity to decide where to live directly conflicted with the conclusion that she did not have capacity to make decisions as to contact, care and whether to have sexual relations.

Comment

Key points:

(i) However nuanced or complex an area of law, the basic principle remains that appeals lie against the orders of the court, not its reasoning.

(ii) Guidelines such as those that appear in *LBX* or *Re A* must be tailored to the individual case.

(iii) Whilst the approach to individual capacity questions is decision-specific, it is necessary to step back and consider whether those individual questions lead to fundamentally incompatible conclusions.

(iv) The interim declaration and the court's observations in relation to the use of social media reflects the importance of social media to those with learning disabilities. Cobb J in *Re A* had noted at paragraph 2 of his judgment that "*the internet and associated social media networks are particularly important for people who have disabilities, and/or social communication problems. They enable ready access to information and recreation, and create communities for those who are otherwise restricted in leaving their homes."*

(v) The declaration that the Claimant lacked capacity to consent to sexual relations was also made on an interim basis, subject only to her demonstrating, as she has in the past, an understanding of the risk of STDs and how to reduce that risk. This is a reminder of the key principle, as enshrined in s.1(4) of the MCA, that a person is not to be treated as unable to make a decision merely because he or she makes an unwise decision. As recognised by the court, *"cases such as this involve two broad principles of social policy which, depending on the facts, may not always be easy to reconcile. On the one hand, there is a recognition of the right of every individual to dignity and self-determination and, on the other hand, there is a need to protect individuals and safeguard their interests where their individual qualities or situation place them in a particularly vulnerable situation: comp. A.M.V v Finland (23.3.2017) ECtHR Application No.53251/13"* [35].

IN BRIEF

ARB v IVF Hammersmith Limited [2018] EWCA Civ 2803

On 17 July 2019, the Supreme Court refused to grant permission for ARB to appeal the 17 December 2018 decision of the Court of Appeal [2018] EWCA Civ 2803. The Panel consisting of Lady Hale, Lord Hodge and Lord Kitchin held that the application "did not raise a point of law which ought to be considered at this time". As a consequence, it remains good law that the recovery of damages for the birth of a healthy but unwanted child is barred by legal policy, regardless of whether the claim is brought in contract or tort. Jeremy Hyam QC and Suzanne Lambert acted for the respondent clinic, IVF Hammersmith Limited, instructed by Hempsons.

Swift v Carpenter

The Court of Appeal have adjourned the hearing in this important appeal, listed on 23 to 24 July 2019, concerning accommodation claims and *Roberts v Johnstone*, until at least early 2020. The adjournment is to allow the parties to obtain further expert evidence. The Court made it clear that it considered the appeal a test case.

AB (Termination of Pregnancy), Re [2019] EWCA Civ 1215

AB, aged 24, had moderate learning disabilities and functioned at about the age of a 6-9 year old. She became pregnant and, by the time the matter came before Lieven J, she was 22 weeks pregnant. She lacked capacity to consent to a termination but had expressed a wish to complete the pregnancy. Lieven J ordered that it was lawful for a doctor to carry out a termination in her best interests. That order was overturned by the Court of Appeal.

The Court noted at [27] that: "*However one looks at it, carrying out a termination absent a woman's consent is a most profound invasion of her Article 8 rights, albeit that the interference will be legitimate and proportionate if the procedure is in her best interests. Any court carrying out an assessment of best interests in such circumstances will approach the exercise conscious of the seriousness of the decision and will address the statutory factors found in the Mental Capacity Act 2005 (MCA) which have been designed to assist them in their task.*"

The Court of Appeal found that the judge fell into error by extrapolating from certain facts to reach findings which erroneously impacted on the best interests' analysis. The Court also found that the judge failed to take sufficient account of AB's wishes and feelings. The judge also failed to make reference to CD's (AB's adoptive mother) views about AB's best interests. She also did not give any weight to the views of AB's social worker or the Official Solicitor. The Court ultimately concluded that her conclusion was anchored in the medical evidence which did not, in itself, convincingly demonstrate the need for such profound intervention.

In relation to the timing of the application the court said at [14]: *"Given the critical urgency of such a case, it may be that, where it appears to a Trust that there is a potentially intractable divergence of views with the family, consideration should be given to an application being made at an early stage following the making of the "best interests" decision. The application should then be listed as a matter of urgency, even if it is subsequently withdrawn."*

Sanusi v The General Medical Council [2019] EWCA Civ 1172 (16 July 2019)

The MPT conducted a hearing in the Appellant's absence. After it had made found a number of allegations amounting to serious misconduct proved, it found that his fitness to practice was impaired. It then moved on to consider sanction and concluded that erasure was appropriate. The Appellant challenged the MPT's failure to adjourn the hearing after the adverse findings but before the decision on sanction, in order to allow him to make submissions in mitigation of sanction. The High Court dismissed the appeal and the Court of Appeal agreed with this decision.

The GMC also failed to place before the Tribunal certain mitigation documents. The Appellant argued that the failure to put those documents before the Tribunal amounted to a procedural irregularity. Both the High Court

and Court of Appeal agreed that this failure amounted to a procedural failing however both courts found that the mitigation material would not have made any difference to the sanction outcome.

London Borough of Tower Hamlets v NB (consent to sex) [2019] EWCOP 27

In an extensive judgment Hayden J considered further the case of a woman with learning difficulties who made remarks to her dentist that raised concerns that she lacked capacity to consent to sexual relations with her husband, to whom she had been married for many years, with whom she had a child and who she was acknowledged to have a clear attachment to. A safeguarding assessment found that she lacked capacity and her husband agreed that he would not have sexual relations with wife. The case attracted significant media attention as a result of the judge's refusal to approve a consent order finalising these arrangements and his comments about the husband's Article 8 right to have sex with his wife. The husband left the marital home, concerned he may be prosecuted for an offence and disengaged from the proceedings.

Held: (1) The case raised concerns as to the protection of the vulnerable from media intrusion in cases of this sort which needed to be addressed by the Court of Protection ad hoc Rules Committee [16]; (2) Whilst the test for capacity to consent to sexual relations was issue specific, rather than person or event specific, it required the incorporation of the individual's characteristics and circumstances and there would on occasion be a subjective or person specific context to the application of the test, in accordance with the approach in *B v A Local Authority* [2019] EWCA Civ 913 (see case comment above). The court was not persuaded to identify a category of people for whom it would be appropriate not to address aspects of the test such as the understanding of pregnancy or STDs [43]-[50]; (3) A monogamous relationship of some thirty years duration with no history of STDs was probably a secure base from which to predict a very low risk for the future [56]; (3) the preponderance of the evidence suggested that the woman had capacity and reassessment was suggested, depending on whether the marriage survived [65].

United Lincolnshire Hospitals NHS Trust v CD [2019] EWCOP 24

CD was a woman detailed pursuant to s.3 of the Mental Health Act 1983. She was 35 weeks pregnant. She lacked capacity to conduct legal proceedings. She did not, at the time of the decision, lack capacity to make decisions in relation to the birth of her child and/or the treatment and necessary procedures related to the birth. However, her clinicians agreed that there was a substantial risk that she may become incapacitous in relation to such decisions at a critical moment in her labour. They sought, effectively, an anticipatory and contingent order that, if she did lose capacity, the clinicians would be able to deliver care and treatment to her in accordance with her care plan.

Referring to the MCA 2005, the court found: *"I acknowledge that I am not currently empowered to make an order pursuant to section 16(2) because the principle enunciated in section 16(1), namely incapacity, is not yet made out. However, as I have already said, there is a substantial risk that if I fail to address the matter now I could put the welfare, and even the life, of CD at risk and would also put the life of her as yet undelivered baby at risk. As I have said, I am not prepared to take that risk. I am prepared to find that, in exceptional circumstances, the court has the power to make an anticipatory declaration of lawfulness, contingent on CD losing capacity, pursuant to section 15(1)(c)."*

A Clinical Commissioning Group v P (Withdrawal of CANH) [2019] EWCOP 18

The CCG applied for a declaration that clinically assisted nutrition and hydration ('CANH') could be withdrawn from a minimally conscious patient who had suffered an overdose in 2014 in her best interests. The family and the Official Solicitor supported the application; however the matter came to court given that certain contrary views had been expressed by staff who cared for the patient as to her levels of consciousness and her treating clinicians had taken a neutral position. It was held that it was in the best interests of the patient, who had expressed a clear view that she would not want to be kept alive in these circumstances and where there were negligible prospects of improvement, for CANH to be withdrawn.

Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust v TG & Anor [2019] EWCOP 21

It was in the best interests of a patient in a vegetative state to continue life-sustaining treatment, notwithstanding the contrary view of her treating doctors and that at any improvement would be limited to her entering a minimally conscious state and becoming aware of pain. Her known beliefs were consistent with the desire for continuance of life. Moreover, she had been in a vegetative state for only 2 months and her condition would not be regarded as permanent until 6 months had passed according to the guidelines of the Royal College of Physicians.

AB v KL [2019] EWHC 611 (QB)

In this Fatal Accidents Act claim, adult children of deceased successfully claimed for financial dependency towards, *inter alia,* contribution to the costs of a first home, contribution to the cost of weddings, presents to age 30, university expenses, etc.

JLE v Warrington & Halton Hospitals NHS Trust Foundation Trust [2019] EWHC 1582 (QB)

The Claimant beat its own Part 36 offer and the court ordered that the Claimant was entitled to the sums set out in CPR 36.17(4) sub-paragraphs (a) – interest on the sum awarded, (b) costs on the indemnity basis and (c) interest on those costs.

However, the court refused to order the sum set out in 36.17(4)(d), i.e. the additional amount of 10% of the amount awarded (up to £500,000, if the sum awarded is above £500,000 then 10% of the first £500,000 and 5% of anything above that figure, up to a max total of £75,000), on the basis that it was unjust.

The Master's decision to refuse to award the additional amount was overturned – all three reasons given by the Master were inadmissible. In particular, at [40] the court found that it is not open to judges to take into account in the exercise of the discretion the amount by which a Part 36 Offer has been beaten.

Fullick & Ors v The Commissioner of Police for the Metropolis [2019] EWHC 1941 (QB)

Concerned an appeal against an award of a Deputy Master of all the costs of an inquest into the death of the subject of a civil claim as costs in that claim. The Defendant conceded that the costs of attending the inquest could be recoverable. The main issue was proportionality of the costs allowed. On almost all points the Claimant was successful.

AB v Mid Cheshire Hospitals NHS Foundation Trust [2019] EWHC 1889 (QB)

The Defendant unsuccessfully appealed against an order of the Regional Costs Judge declaring that the additional liabilities of the Claimant were recoverable. Those additional liabilities were success fee claimed at 100% and an insurance premium.

The Claimant had decided to discharge their legal aid certificate and enter into a pre-LASPO CFA as they wished to instruct experts in circumstances where the Legal Services Commission was limiting the field of available witnesses through the imposition of unattractive hourly rates. In particular, due a dispute between their existing experts, they wanted to instruct a further causation expert. The NHS Trust argued that the Claimant had the benefit of legal aid funding and the change to CFA funding was unreasonable.

The judge found that, *"in this case the decision to have "the freedom of the CFA" and to be "free of the shackles of the Legal Services Commission" was reasonable because of the need to instruct another expert in substitution for the expert already instructed as a result of the dispute between the experts on the issue of causation."*

Gray v Commissioner of Police for the Metropolis [2019] EWHC 1780 (QB)

The Claimant unsuccessfully appealed against a costs budgeting decision in the context of an action against the police. The Claimant argued that the judge placed too much weight on the low value of the claim but did not take into account the importance of the case, its complexity, and the level of work it required. It was further

argued that the sums allowed were manifestly too low and it would be impossible for the Claimant to litigate the action. The judge also allegedly made a number of other 'free-standing' mistakes.

The Claimant's appeal was dismissed. The judge was obliged to take into account the low value of the claim. She was entitled to conclude that the issues were relatively straightforward – no novel legal issues would be raised. The transcript did not reveal any errors of law. Whilst the judge's costings were low, it was not so low so as to prevent the litigation being conducted.

Farrington v Menzies-Haines [2019] EWHC 1297 (QB)

This judgment concerned a refusal to order an interim payment where significant causation issues remained. The court found at [37] that: *"Thus, where there are genuine and substantive challenges to causation, in my judgment the court cannot award damages by assuming, whether on the balance of probabilities or otherwise, that the causation issues will be decided in favour of the claimant. This is not least because otherwise interim payment applications would run the risk of turning into mini trials of causation at an early stage and without the court hearing the necessary evidence it would need to hear in order to decide such issues."*

University Hospitals Plymouth NHS Trust v B (A Minor) (Urgent Medical Treatment) [2019] EWHC 1670 (Fam)

The NHS Trust sought permission to administer intravenous fluids and insulin (intravenous and subcutaneous) to the B in the absence of her consent. B was suffering from diabetes ketoacidosis and was refusing treatment. She had capacity and was aged 16. The court made the order sought by the Trust, finding that: *"the law is clear that the court is not mandated to accept the wishes and feelings of a competent child where to honour those wishes and feelings would result in manifest, and even fatal, harm to that child."*

Cardiff and Vale University Health Board v T (A Minor) (Urgent Blood Transfusion) [2019] EWHC 1671 (Fam)

The Board sought permission to treat baby T with a blood transfusion, where his mother, a Jehovah's Witness, had not given her consent to the treatment. The court found that it was manifestly in T's best interests to have the blood transfusion. Without the transfusion his life was at very significant risk.

EVENTS & NEWS

A seminar aimed at providing **different perspectives on major inquests and inquiries** will be held on the evening of **10th October 2019** in London. Please contact Olivia Kaplan at events@1cor.com for more details.

New Tenant

We are delighted to announce that Cara Guthrie has joined 1 Crown Office Row, effective from Thursday 20th June 2019.

Podcast

Podcast enthusiasts can listen to barristers from 1 Crown Office Row on **Law Pod UK.**

If you enjoyed Dominic Ruck Keene's article in Issue 2, look for Episodes 82 and 83 on the same topic. Furthermore, in Episode 79 Christopher Mellor discusses causation in inquests.

Further news and events information can be found on our website.

Letters to the Editor

Feel free to contact the team at medlaw@1cor.com with comments or queries.

CONTRIBUTORS & EDITORIAL TEAM

Jeremy Hyam QC (Call: 1995, QC: 2016)

Jeremy is a specialist in clinical negligence, administrative and public law, inquests, public inquiries, and professional regulatory work. He has particular experience in all aspects of health law and has appeared in a number of leading cases in the field at all levels including in the Supreme Court and Privy Council.

Shaheen Rahman QC (Call 1996, QC: 2017)

Shaheen Rahman QC specialises in public law, clinical negligence and professional discipline. Recognised by the legal directories as a leading practitioner in multiple areas, she is instructed in complex and high value clinical negligence matters including catastrophic brain injury cases, has particular expertise in judicial review challenges to healthcare funding decisions, appears at inquests involving detained or otherwise vulnerable patients and acts for healthcare professionals in regulatory and MHPS proceedings.

Suzanne Lambert (Call: 2002)

Suzanne has a broad practice, with a particular focus on healthcare/medical law. She has experience mainly in clinical negligence and inquests, but also in disciplinary law and judicial review. Suzanne is instructed by claimants and defendants in a wide variety of cases involving serious and catastrophic injuries e.g. cerebral palsy, spinal injuries, loss of fertility, and delayed diagnosis of cancer. She has experience with complex legal issues such as contributory negligence, apportionment between defendants, and consent.

Matthew Flinn (Call: 2010)

Matt's practice spans all areas of Chambers' work, including clinical negligence, personal injury, public law and human rights. He is developing particular expertise in inquests, and clinical and dental negligence claims, acting for both claimants and defendants. He undertakes a wide range of advisory and court work. He also has experience in information law and has advised in private litigation stemming from the Data Protection Act 1998.

Dominic Ruck Keene (Call: 2012)

Dominic has considerable experience of acting in clinical negligence claims for both claimants and defendants: drafting pleadings, advising on merits, quantum and settlement; successfully representing parties at RTMs and at mediation; as well as appearing in case management hearings, application hearings, and at trial in both the county and High Courts. As a result of his background in the Army, Dominic has a particular interest and expertise in all nature of cases involving service personnel and national Security. He is on the Attorney General's C Panel.

Rajkiran Barhey (Call: 2017)

Rajkiran accepts instructions in all areas of Chambers' work and is developing a broad practice, particularly in clinical negligence, personal injury, inquests and public law and human rights. Kiran joined Chambers as a tenant in September 2018 following successful completion of a 12-month pupillage. She is currently instructed by the Grenfell Tower Inquiry and is also undertaking a secondment at a leading clinical negligence law firm.