(SITTING AT BURNLEY COMBINED COURT CENTRE)

ON APPEAL FROM THE BLACKPOOL COUNTY COURT

ORDER OF DISTRICT JUDGE WOOSNAM

Date: 5 September 2025

Before: His Honour Judge Richard Carter

Between:

Miss Emma Louise Fox

Claimant
- and –
(1) Mr Bernard Moroney
(2) Krista Whitley
t/a West Lodge Dental Practice Partnership
(3) Whitecross Dental Care Limited
Defendants
Tomas Folta
Fourth Party
Lucy Latus
Fifth Party

- -

Mr Mills (instructed by **The Dental Law Partnership**) for the **Claimant**
Ms Heyworth (instructed by **Clyde & Co LLP**) for the **Defendant**
Hearing dates: 1 May 2025
Handed Down: 5 September 2025

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Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

His Honour Judge Richard Carter:

1. This is an appeal by the Claimant against the Order of District Judge Woosnam ("the Judge") dated 4 July 2024 ("the order"). I granted permission to appeal on 24 February 2025. There is an associated application by the Defendants ("the Practice") for permission to amend their Defence. I was not willing to consider that as part of the Appeal even though it sought to address the underlying complaint made by the Claimant.

2. For the sake of convenience, I will continue to refer to the parties as the claimant and the defendant(s).

3. The Order subject to this Appeal followed a Costs and Case Management hearing at which the Judge gave various directions, including at §5:

Expert evidence is directed as follows.

In respect of breach of duty and causation of damages the parties each have permission to rely on the following written expert evidence:

…b) The Defendants:

An expert in general dentistry, namely Dr Gordon Boyle, whose report will deal solely with the treatment provided by the Fourth Party and must be served by 4pm on 19 September 2024.

4. The Appeal seeks the following:

… permission to appeal the original order at CCMC and for a variation such that :

i. Only the Claimant and the Part 20 Defendant have permission to rely on expert evidence in respect of breach of duty and causation; or in the alternative;

ii. Unless the Defendant applies to amend their Defence within 21 days, the particulars of negligence contained within the Particulars of Claim will be deemed to be admitted

5. As to (ii) the Claimant submits that an order should have been made "…to the effect that unless an application to amend the defence was made, the particulars of negligence would be deemed to be admitted". No application was made at the hearing before the Judge for such an Order, and no finding was made, although the issue was raised during submissions.

6. The Defendant has now applied to amend their Defence and sought that the application be considered at the Appeal. The Claimant does not consent to the application, and I did not consider it appropriate to be dealt with as part of the Appeal. Ground (ii) of the Appeal was therefore no longer pursued.

The Background

7. The Claimant brings this claim against the Defendant Dental Practice for what is alleged to be negligent treatment provided by four General Dental Practitioners ("GDPs") between 2016 and 2019. It is alleged that each of the GDPs failed to diagnose and remove caries and restore the UR6 tooth. That failure resulted in the Claimant suffering pain, infection and eventually requiring root canal treatment. Two of the original GDPs have been removed from the Claim so that only Drs Folta and Latus ("the treating dentists") remain as parties.

8. In accordance with the Court of Appeal decision in Hughes v Rattan [2022] EWCA Civ 107, the Claimant asserts that the Practice has a non-delegable duty of care to patients of the practice, which they cannot simply pass to the treating dentists. Previously, where a Claimant brought claims against the practice, it was usual for the Practice to seek to add the treating dentists as co-Defendants and for them to consent to such an application. However, in the Court of Appeal decision in Pawley v Whitecross Dental Care Ltd [2021] EWCA Civ 1827 it was held that it is a matter for the Claimant who to sue and what cause of action they wished to pursue, and it was not for the Defendant Practice to substitute or add parties. Consequently, it is now usual for the Practice to join the treating dentists as Part 20 Defendants and to claim an indemnity or contribution towards any judgment entered against them.

9. In its Defence the Practice pleaded:

"6. The Defendants are bringing additional claims under Part 20 of the Civil Procedure Rules against the four dental practitioners against whom the Claimant has made allegations of negligence, namely Dr Bate, Dr Folta, Dr Latus and Dr Patel. By joining the aforementioned associate dental practitioners to these proceedings, the allegations that have been made by the Claimant can properly be addressed directly by the dentists who provided advice and treatment to the Claimant….

9. The Defendants are unable to respond and accordingly do not admit the allegations and particulars of breach of duty and causation, as set out at paragraphs 7 to 10, due to lack of direct knowledge of the material events. The Defendants repeat that the allegations will be responded to by the named dental practitioners by way of a Part 20 additional claim. In respect of paragraphs 7 and 8, the Defendants repeat and maintain the denial of non-delegable duty of care and vicarious liability as set out above.

10. Without prejudice to its denial of non-delegable duty of care and vicarious liability, the Defendants will adopt the responses of the Part 20 Defences of the named dental practitioners in relation to the allegations of breach of duty and causation at paragraphs 7 to 10.

10. The Practice brought Part 20 proceedings against the four (now two) treating dentists seeking an indemnity or contribution in their capacity as joint tortfeasors. The Claim Form details the Part 20 claim as follows:

“The Defendant denies the Claimant's claim as appears from its Defence, but if contrary to that Defence the Defendant is found liable to the Claimant it seeks an indemnity, alternatively a contribution to such extent as the Court considers just from the Part 20 Defendants. The Defendant therefore issues this claim against the Part 20 Defendants in accordance with Part 20.7 of the Civil Procedure Rules.”

11. At §7 of the Particulars of Claim in the Part 20 claim, the Practice pleads:

“In the event that, contrary to the Defence, the Court finds that the Defendants are liable to the Claimant for the acts or omissions of the Third, Fourth, Fifth and Sixth Parties, and is found to be liable to pay any amount to the Claimant (whether that be damages, interest and / or costs), the Defendants adopt against the Third, Fourth, Fifth and Sixth Parties the factual background, allegations of breach, causation and injury / loss as are pleaded in the Claimant's Particulars of Claim, and seeks:

a) A contractual indemnity from the Third, Fourth, Fifth and Sixth Parties pursuant to the terms of the Associate Agreement;

b) An indemnity and / or contribution from the Third, Fourth, Fifth and Sixth Parties pursuant to section 1 of the Civil Liability (Contribution) Act 1978.”

The Judge’s decision

12. The Judge heard the CCMC on 4 July 2024 and gave an ex tempore judgment, a transcript of which is included in the Appeal bundle at 200. After setting out the background to this discrete issue, he outlines the Practice’s position:

"3. ….When it came to filing a defence, it pleads first …. and the third part that there has been no breach or rather they put them to proof of the particulars of breach of duty and causation. They did not plead in the defence a positive case as to what they said about there being a breach."

13. He then identified the issue which he needed to determine: whether the Practice should be able to obtain its own expert evidence on breach/liability. He noted there was no dispute that they should be permitted to obtain expert evidence on causation and prognosis. He set out the arguments of Counsel for the Appellant (Mr Corless-Smith) succinctly:

"The defence is pleaded at the option taken by the defendants as to how they put their defence and all that they have done is they have pleaded that they make no admissions. They have not pleaded denial and they have simply put the claimant to proof in this case and, therefore, it is just a matter for the claimant to prove their case. They do not plead any positive case and he says that they must plead that to put in issue the existence of liability between the parties.

14. Counsel for the Practice submitted that:

"….that is unfair to them and that that should not be allowed. He says that the putting to proof in this case means that it is for the claimant to prove their case. If their case relies on expert evidence, the defendants should be allowed to challenge that expert evidence and, in essence, the only way credibly that they can challenge that expert evidence on an equal footing is by obtaining their own expert evidence."

15. The Judge found that:

"9. It comes down to the point does putting to proof do any more than simply the claimant putting their own evidence in and does it remove the right of the defendant or a defendant to challenge that evidence? Clearly, it does not. A defendant must be able to challenge that evidence. In a case where it relies on expert evidence, there must, in my view, be scope for the defendant to have their own expert evidence to make a credible challenge to the expert evidence of the claimant."

Submissions on the Appeal

Claimant

16. The Claimant refers to CPR 16.5, which provides that a Defendant must answer every allegation with (i) a denial with reasons; (ii) admission; or (iii) where they are unable to admit or deny, to require the Claimant to prove the allegation. It is said that the Practice had information that could have addressed the allegations of negligent treatment, as it had access to the clinical records, could have liaised with the treating dentists, and could have then sought expert advice on the standard of care.

17. Because the defence to the part 20 claim is different to the Practice's defence to the primary claim, the Claimant contends that the Practice cannot simply adopt the treating dentists' defence. Further, although DJ Woosnam directed that the Claims be tried together, that does not mean that the Part 20 Defendants are Co-Defendants with the Practice.

18. By granting the Practice permission to rely on expert evidence in respect of breach and causation, the Claimant submits that the Judge was wrong in law. The White Book commentary provides as follows:

Comprehensive response to the particulars of claim

16.5.2 In respect of each allegation in the particulars of claim there should be an admission, a denial or a requirement for proof (r.16.5(1)). Rule 16.5(1)(b) does not use the language of "non-admission" and the practice of pleading numerous non-admissions can only be justified when a defendant is truly unable to admit or deny an allegation and so requires the claimant to prove it. Rule 16.5(1) raises a positive duty for a defendant to admit or deny pleaded allegations where he or she is able to do so and so to prevent merely "a stonewalling defence full of indiscriminate non-admissions" (per Lord Justice Henderson in SPI North Ltd v Swiss Post International (UK) Ltd [2019] EWCA Civ 7 at [48], although the same case went on to confirm there is no general obligation upon a defendant to make reasonable enquiries of third parties at such an early stage of the litigation but instead plead the defence on the basis of the knowledge and information the defendant has readily available to him: [49]).

Denials must be explicit; the defendants must state their reasons for denying the allegation and, if they intend to put forward a different version of events from that given by the claimant, they must state their own version (r.16.5(2)). Similarly, if they dispute the statement of value included in the claim form they must state why they dispute it and, if they are able, give their own statement of the value of the claim (r.16.5(3)).

…

The second way in which a defendant may respond to an allegation in the particulars of claim is to require the claimant to prove it (r.16.5(1)(b)). This form of response (which, in practice, is often indicated by the pleader stating that the allegation in question is "not admitted") is available for use only in relation to an allegation which the defendant "is unable to admit or deny". A breach of r.16.5 is committed if this form of response is used merely because the defendant is unwilling to admit an allegation. The defendant has no right to require the claimant to prove an allegation unless its truth or falsity "is neither within his [the defendant's] actual knowledge (including attributed knowledge in the case of a corporate defendant) nor capable of rapid ascertainment from documents or other sources of information at his ready disposal" (SPI North Ltd v Swiss Post International (UK) Ltd [2019] EWCA Civ 7; [2019] 1 W.L.R. 2865, CA, Henderson LJ at [48]).

19. Further at CPR 35.4 the commentary in the White Book provides:

The options available to the court in giving directions as to expert evidence include: (i) directing that no expert evidence is to be adduced at all, or no expert evidence of a particular type or relating to a particular issue; (ii) limiting the number of expert witnesses which each party may call, either generally or in a given speciality; (iii) directing that evidence is to be given by one or more experts chosen by agreement between the parties or, where

they cannot agree, chosen by a method stated in r.35.7(2); (iv) to require estimates of the costs of the proposed expert evidence (and limit the recoverable costs under r.35.4(4); and (v) when granting permission to specify the issues which the expert evidence should address: to ensure experts focus upon the issues in dispute on which the court requires assistance.

20. In effect, the Practice has elected not to plead to the allegations of breach of duty but has chosen to put the Claimant to proof, shifting the burden of defending those allegations onto the Part 20 Defendants. Counsel referred to the decision of Man v St George's University Hospitals NHS Foundation Trust [2024] EWHC 1304 (KB) where Master Sullivan held at §28:

"Taking matters in turn, it seems to me that the witness statement of Nurse Jabeen does deal with matters that are not properly in issue on the pleadings. The Defendant's position, that the complaint of extreme pain fell outside the knowledge of the Defendant and the Claimant is required to prove it, is not a proper pleading. Had the Defendant spoken to Nurse Jabeen and asked the question earlier than it appears they did, they would have been able to answer that and would have properly been able to put it in issue.

It is right that in the commentary to the White Book, at 16.5.2, it says, "The language of non-admission should not be used and a practice of pleading numerous non-admissions can only be justified where a defendant is truly unable to admit or deny an allegation and so requires the Claimant to prove it. [Rule 16.5(1)] raises a positive duty for a defendant to admit or deny pleaded allegations which he or she is able to do so and so to prevent merely "a stonewalling defence with indiscriminate non-admissions". (Per Lord Justice Henerson in API North Ltd v Swiss Post International (UK) Ltd [2019] EWCA Civ 7.".

The commentary continues to say the same case went on to confirm, "There is no general obligation on a defendant to make reasonable enquiries of third parties at such an early stage of the litigation but instead, plead the defence on the basis of knowledge and information the defendant has readily available to him."

It seems to me that the allegations against the very practitioner who is alleged to be negligent is not, in these circumstances, an obligation to make enquiries of third parties. This is a vicarious liability case, and Nurse Jabeen should have been asked what she recalled. It seems to me it is not appropriate for a NHS Trust, in a clinical negligence case, simply to say, "Oh well, we have not been able to ask", particularly when I note that Nurse Jabeen, although I have not seen it, made a note relatively early on in investigations. It does not appear that there is any evidence that she had disappeared or there is any reason why the Defendant was unable to speak to her before drafting a defence responding to allegations of negligence against her.

In those circumstances, that there is an onus on the Defendants to plead properly, and if there is a matter that is of central importance, such as the level of pain that a claimant was feeling at a particular time, then that has to be positively pleaded.

There is a purpose to pleadings, and it is to make clear what is in issue and what each party's case is on matters in issue. It is the scheme of Part 16, and always was, that if the Defendant is putting forward a different version of events, that that should be pleaded; and it has not been. The defence is in breach of part 16.5(1).

In any event "putting the claimant to proof" means just that. The Claimant must lead evidence to prove their allegation but the Defendant is not able to lead evidence on matters put in issue that way. That is consistent with the scheme of Part 16. It the Defendant is unable to plead because does not have knowledge of the issue, they can put to proof. If they have positive evidence they wish to rely on, they must plead a positive case.

21. The Claimant also referred to the decision of the Cape Court in Standard Bank Factors Limited v Furncor Agencies (Pty) Ltd [1985] (3) SA 410 (C) at 4171 – 418C:

"To my mind, there is a clear notional distinction between these two stances. A plaintiff faced with a positive denial must anticipate and prepare for the leading by the defendant of rebuttal evidence which contradicts the allegations he has made. A plaintiff faced with a non-admission need not anticipate and prepare to meet contradictory evidence to be adduced by the Defendant. Indeed, there no authority for the proposition that he need not even anticipate a limited challenge by way of cross-examination…while that may conceivably be going too far…I think, with respect, that it is undoubtedly correct insofar as a plea of non-admission…because of a lack of knowledge, will not entitle the defendant to contradict the plaintiff's averments by leading evidence to the contrary at trial [because a defendant who does not know something cannot competently put up a different version because he has already pleaded that he has no version to put up."

22. The effect of these authorities is that where the Defendant chooses to put a Claimant to proof, and does not advance an alternative case, it should not be permitted to adduce expert evidence on breach of duty. To allow a Defendant to adduce expert evidence in this way allows the Defendant two experts against the Claimant's single expert.

Defendant

23. The Defendant responds that this was a case management decision, and the well-established principles for successfully challenging such a decision apply:

i) Mere disagreement is insufficient – even strong disagreement.

ii) The Order of the Judge must be so "completely vitiated by error in principle that it falls outside the ambit of reasonable decision making".

iii) It is common and accepted practice for parties to rely on expert evidence on causation and prognosis without pleading a positive case.

iv) The Judge acknowledged that no positive case was advanced but accepted that for the Defendant credibly to challenge the Claimant's opinion evidence, they required their own expert.

24. The Defendant referred to CPR PD52A at §4.6:

Appeal in relation to case management decision

Where the application is for permission to appeal from a case management decision, the court dealing with the application may take into account whether—

(a) the issue is of sufficient significance to justify the costs of an appeal;

(b) the procedural consequences of an appeal (e.g loss of trial date) outweigh the significance of the case management decision;

(c) it would be more convenient to determine the issue at or after trial.

Case management decisions include decisions made under rule 3.1(2) and decisions about disclosure, filing of witness statements or experts' reports, directions about the timetable of the claim, adding a party to a claim and security for costs."

25. Tomlinson LJ held in Stokors SA & Others v IG Markets Ltd [2012] EWCA Civ 1706 at §24:

"Inevitably, not all judges will necessarily in such circumstances reach the same conclusion, but the question, as is well-known, is whether the decision reached by the judge was within the ambit of reasonable decision-making or whether it can be shown to be so vitiated by an error of principle in the approach that it ought to be revisited by this court."

26. An additional point was that the Practice was only permitted to rely on expert evidence regarding the allegations against Dr Folta (the 4th party). The Judge noted that the Practice could not rely on the expert evidence of the 5th party to defend itself regarding the allegations made against Dr Folta, and as Dr Folta has not engaged in the proceedings, there would be no expert evidence to counter the Claimant's expert evidence on that claim. The Claimant was not, therefore, being presented with two experts against their one expert, as they contend – rather, one expert on each side for each claim.

27. Ms Heyworth, in her oral submissions, noted that the Claimant had not identified how it was said that the Judge was wrong in law, i.e. whether he had misinterpreted the law, or had been in breach of CPR 35. She argued that the Claimant was treating CPR 16.5 as a sanction – unless you plead a positive defence, you are not entitled to an expert (on liability).

28. She also suggested that the Claimant was seeking to take a tactical advantage by bringing its claim against the practice and not the treating dentists, as it would be difficult for the practice to plead positive contentions when they are not apprised of all the facts (which are in the knowledge of the treating dentists).

29. If the complaint of the Claimant was that the judge had exercised his discretion wrongly, that was not the pleaded basis of the appeal, and she should not be permitted to criticise that exercise of his discretion by the back door. She suggested that although the Defendant is not entitled to put a positive case to the expert in the witness box, it is not prevented from adducing its own expert evidence.

Discussion

30. The starting point must be the status of the Practice's defence. Under CPR 16.5, Defendants must only require the Claimant to prove the allegation made where they "are unable to admit or deny" (see 16.5.2 of the White Book). As Henderson LJ stated in SPI North Ltd v Swiss Post International (UK) Ltd [2019] EWCA Civ

"The defendant has no right to require the claimant to prove an allegation unless its truth or falsity "is neither within his [the defendant's] actual knowledge (including attributed knowledge in the case of a corporate defendant) nor capable of rapid ascertainment from documents or other sources of information at his ready disposal"

31. The Practice has chosen not to challenge the Claimant's allegations of breach. Whether the Practice was right or wrong to do so is really a matter for the Court when it hears their application to amend their Defence. The Practice's position currently is that it does not know whether there has been a breach of duty and so cannot advance any positive case against the Claimant's allegations. The decision in the Cape Court summarises this clearly:

"…a lack of knowledge, will not entitle the defendant to contradict the plaintiff's averments by leading evidence to the contrary at trial [because a defendant who does not know something cannot competently put up a different version because he has already pleaded that he has no version to put up."

32. The Practice's case is that they are:

"…are unable to respond and accordingly do not admit the allegations and particulars of breach of duty and causation as set out at paragraphs 7 to 10, due to lack of direct knowledge of the material events…"

33. The Judge concluded that it "clearly ... does not" remove the right of the Defendant or a Defendant to challenge the evidence of breach of duty – "A Defendant must be able to challenge that evidence". He adopted the submissions of Mr Tabrizi (p 189) where he stated:

"We have put the claimant to proof, and she is required to prove the allegations against her. We are entitled to test her position, just as it would be in cross-examination in a simple factual dispute such as a road traffic accident

where the claimant is put to proof. Putting to proof does not mean that you simply lie on the sidelines and hope that the claimant does not come to much in front of a court. You are still entitled to test her position."

34. The difficulty with Mr Tabrizi's submission is that he is not limiting himself to testing the position of the Claimant (or her expert) but seeking to advance a positive case (presumably) as to whether there was a breach of duty by relying on their own expert evidence. The Practice does not advance any specific position on the breach of duty, and so their expert would presumably simply be providing a further view on the Claimant's claim – there is no positive case that the Practice is putting which could be considered. It is hard to see, therefore, what assistance to the Court a further expert instructed by the Practice would provide.

35. Further, if the Practice is unable to respond due to a lack of direct knowledge of the material events, then, although they can challenge the Claimant's expert's expertise, they cannot put to him or her a specific different set of facts. Any expert on the Practice's behalf would, by their very nature, be providing expert evidence on the same factual matrix as the Claimant's expert. The 4th party's expert (and the 5th if he joins the proceedings) would presumably provide evidence based on the treating dentists' pleaded case.

36. CPR 35 is clear that expert evidence is limited to "that which is reasonably required to resolve the proceedings".

37. It is hard to see how permission to rely on a second expert to provide an opinion on the same case advanced by the Claimants would be proportionate or necessary to resolve the proceedings. The comparison drawn by Mr Tabrizi does not apply to the need to adduce expert evidence. There is no reason why the Practice could not challenge the Claimant's expert, but they cannot put to that expert an alternative case, and therefore I consider that it would not be in accordance with Part 35 for them to be entitled to rely on their own expert.

38. I understand the concerns of the Judge that due to the failure of the 4th party to engage in the proceedings the allegations against Dr Folta are not going to be actively challenged in the Part 20 claim, and that there will be no expert evidence on Dr Folta's treatment to challenge the Claimant's expert but I do not consider that that concern means that the Practice should be entitled to run Dr Folta's case for him. The Practice cannot plead to those allegations (at present) and rely on its general defence against liability. It would be wrong to circumvent their position as the Judge did so as to remedy Dr Folta's failure to respond to this claim. It may well be that the application to amend, if allowed, would avoid this complication, but I bear in mind that the application has not been heard or determined, and that the Judge made his order based on the claim as it then stood.

39. I consider that the Judge was wrong in the exercise of his discretion to permit the Practice to rely on an expert on breach of duty. The Judge considered the wrong factors – the failure of the 4th party to defend the claim should not have played a part in this decision. Further, I consider that the Judge was wrong to conclude that the Practice should have the opportunity to challenge the Claimant's case on breach of duty where they had chosen not to advance any case. Those are errors that vitiate the Judge's approach and take his decision out of the ambit of reasonable decision making.

Conclusion

40. The Judge's order permitting the defendants to rely on expert evidence regarding breach of duty should be set aside, and the permission refused. I therefore make an order in those terms. If the parties can agree on the terms of the order, then I will approve the same if appropriate. I propose to hand this written judgment (subject to corrections/typographical errors) down remotely and at an unattended hearing unless there are any further issues which need to be determined. If so, then I would invite Counsel to provide an ELH and availability for a remote hearing.

Dated 5 September 2025