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TGC Clinical Negligence

The Newsletter of the TGC Clinical Negligence Team

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Editorial

By Lionel Stride

Welcome to the first issue of the TGC Clinical Negligence Newsletter.

It has been an extraordinary year of changed working practices in all domains (legal, medical and medico-legal) but it has not stopped important cases being heard. Whilst there was undoubtedly an initial increase in the number of claims resolving through ADR (whether mediation or JSMs), there have been substantial delays to the case management of numerous claims. Aside from the initial difficulties with adjourned listings, there have been inevitable logistical issues associated with examining claimants, as well as ensuring the availability of critical experts who may have been co-opted into providing additional medical assistance to the NHS. Recent experience also suggests that the pandemic may, at times, have been used as a convenient pretext to delay serving pleadings or medico-legal evidence tactically. The next twelve months will no doubt see a proportion of those delayed claims progressing to trial or ADR. There will certainly in due course be numerous instances of (negligently) delayed treatment, missed or incorrect diagnoses that will be blamed on the stretched resources at a time of an (inter)national emergency. It will be interesting to see how the Court approaches cases of medical negligence occurring during the worst of the pandemic when resources were under most strain but we will have to wait for those cases to unfold.

Returning to the theme of changed work practices, who really doubts that we will now see a permanent increase in remote interlocutory hearings and CCMCs? Judges and practitioners like them (although pre-hearing telephone contact with your opponent(s) is definitely a good idea to narrow the issues). This is also now likely to extend to some final hearings, where there may be more fully remote or 'hybrid' trials (a combination of attendance in person and remotely by the witnesses). Will expert witnesses ever physically attend the court room in future? To my mind, it is likely to be the exception; whilst much is then clearly lost (such as the ability to talk to your expert through the trial and discuss the witness and other expert evidence as it unfolds), I would expect many courts to consider that it is simply a more efficient use of expert time. Parties will therefore have to make sure that their experts are still available to observe the relevant evidence remotely and keep open channels of communication through the trial as necessary.

But that's enough of my predictions: before we can look forward, we must of course first take stock of recent developments. To whet your appetite, here is an overview of what you can expect:

Procedure, Limitation & Expert Evidence

- To kick off the Newsletter, James Yapp considers the impact of the Coronavirus-related restrictions on clinical negligence litigation, particularly the guidance given by the High Court in ***SC v University Hospital Southampton NHS Foundation Trust*** **[2020] EWHC 1445 (QB)** as to the holding of remote trials.
- Simon Browne QC and Olivia Rosenstrom examine the case of ***Azam v University Hospital Birmingham NHS Foundation Trust [2020]*** **EWHC 3384 (QB)** which focused on the court's discretion under s.33 of the Limitation Act 1980 where a claim was issued 21 years after alleged negligent surgery and the defendant surgeon had died 3 years prior to issue.
- Robert Boyle considers two recent High Court decisions – ***Quaatey v Guy's & St Thomas; Hospital NHS Foundation Trust*** **[2020] EWHC 1296 (QB) and** ***Magee v Wilmot*** **[2020] EWHC 1378 (QB)** - which hammer home the need for supportive expert evidence in clinical negligence claims.

Breach of Duty & Causation

- Turning to substantive issues, James Laughland examines the case of ***Meadows v Khan*** **[2019] EWCA Civ 152**, which confirmed that when considering liability for wrongful birth, the correct test is the 'scope of duty' test rather than the simple 'but for' causation test.
- Keeping on the causation theme, I consider the case of ***Schembri v Marshall*** **[2020] EWCA Civ 358** in which the Court of Appeal held that a claimant who is unable to establish the precise chain of events by which harm would have been avoided may still succeed on causation if their overall case is supported by persuasive statistical evidence.
- James Armey examines ***Ecila Henderson v Dorset Healthcare University NHS Foundation Trust*** **[2020] UKSC**, in which the Supreme Court reaffirmed the defence of illegality in a clinical negligence context.
- Anthony Johnson considers ***Hopkins v Akray & ors.*** **[2020] EWHC 3445 (QB)**, in which the High Court ruled as a preliminary issue that the Third Defendant NHS Commissioning Board did not owe the Claimant a non-delegable duty in respect of services that were outsourced to the Second Defendant pursuant to the NHS Act 2006. This had implications for the recoverability of the Claimant's damages (due to an indemnity limit).
- I consider the High Court judgment in ***Leach v North East Ambulance Service NHS Trust*** **[2020] EWHC 2914 (QB)**, which contains a useful case study on proving causation where the negligence has made a material contribution to the psychiatric harm suffered.
- Helen Nugent considers ***Evie Toombes v Dr Mitchell*** **[2020] EWHC 3506**, in which the High Court re-visited the issue of 'wrongful life' claims.
- Anthony Johnson considers ***ABC v St George's Healthcare NHS Trust & ors.*** **[2020] EWHC 455 (QB)**, which concerned the duty of health professionals to warn third parties of the risk of serious genetic mutation in circumstances where the patient does not want this information disclosed.
- I examine two recent High Court decisions that are now being appealed – ***Paul v Royal Wolverhampton NHS Trust*** **[2020] EWHC 1415 and** ***Polmear v Royal Cornwall Hospital NHS Trust*** **[2021] EWHC 196 (QB)**. They concern secondary victim psychiatric harm claims in the clinical negligence context where there is a material gap between the commission of the initial tort and the 'shocking event'.

Private International Law

- James Yapp considers the intriguing case of ***Harry Roberts v (1) Soldiers, Sailors, Airmen and Families Association, (2) Ministry of Defence and Allegemeines Krankenhaus Viersen GMBH (Part 20 Defendant)*** **[2020] EWHC 994 (QB)** in which the High Court was tasked with resolving a conflict of laws issue arising from alleged clinical negligence in a German hospital.

Calculation of Damages

- On the quantum side, James Arney QC considers the ground-breaking case of ***Swift v Carpenter*** **[2020] EWCA Civ 1295**, in which he acted for the Claimant/Appellant. The Court of Appeal's judgment in Swift represents a fundamental change in the way that alternative accommodation claims should now be assessed for disabled claimants.
- I consider ***Whittington Hospital NHS Trust v XX*** **[2020] UKSC 14** in which the Supreme Court held that a defendant hospital trust must pay for the cost of a commercial surrogacy arrangement abroad despite such arrangements being unlawful in the UK.
- Finally, Simon Browne QC and Olivia Rosenstrom analyse two recent cases – ***Rix v Paramount Shoplifting Co Ltd*** **[2020] EWHC 239 and** ***Head v Culver Hearing Co Ltd*** **[2021] EWCA Civ 34** – which concern the calculation of financial loss from the Deceased's business following a fatal accident.

Not remotely fair? *SC v University Hospital Southampton NHS Foundation Trust* [2020] EWHC 1445 (QB)

Clinical Negligence – Procedure – Coronavirus – Remote Trials

James Yapp considers the case of SC v University Hospital Southampton NHS Foundation Trust [2020] EWHC 1445 (QB) which provides guidance as to when it is appropriate to hold a remote trial in the clinical negligence context.

Johnson J decided that a substantial clinical negligence trial could fairly be conducted remotely. However, a remote hearing would be undesirable unless it was not possible to proceed in person. The trial would go ahead in person.

Background

The claim arose from an alleged 4 or 5-day delay in the diagnosis of meningitis. The Claimant, then 15 months old, developed hemiplegic cerebral palsy.

The trial was initially listed in January 2020, but this was adjourned. The trial was re-listed for the week beginning 8 June 2020. The Defendant applied to adjourn on 29 May citing the impossibility of a conventional trial.

The Defendant argued that a remote hearing would be unfair. The reasons for this included familiar concerns about assessing witness demeanour and judicial reactions; the importance of face-to-face communication for clinicians who were subject to stringent criticism; difficulty taking instructions during a hearing; and its legal team's unfamiliarity with virtual hearings.

The Judge accepted that, subject to the question of fairness, the overriding objective militated against a further adjournment. The trial had already been adjourned once and any further delay was highly undesirable. If the case was adjourned, there could be no certainty as to when it would be heard. The parties would have the stress and uncertainty of the litigation hanging over them in the interim.

Could a remote trial be fair?

Johnson J was satisfied that a remote trial could be fair. There were circumstances in which a remote trial would not be fair; for example, if one party was unable to access or effectively utilise the necessary technology. However, with careful case management, remote hearings had by June 2020 taken place fairly in many cases. This included a number of witness trials in the QBD. At that time, only one clinical negligence trial had taken place remotely. This did not mean it would be unfair to try a clinical negligence trial remotely. Whilst there would be disadvantages to a remote trial, these would fall upon both parties equally. Case management directions could be imposed to minimise these disadvantages.

Should it happen?

Having determined that a hearing could go ahead remotely, the Judge went on to consider whether it should. There were many reasons why such a hearing would be undesirable, including:

i. A significant departure from the familiar system designed to deliver justice.
ii. The difficulty of replicating the solemnity, formality and focus of a courtroom
iii. The complex multi-layered human communications and observations that take place during a substantial witness trial are significantly impeded by a remote trial.
iv. The likely length of the hearing.
v. The nature of the issues.
vi. The volume of written material.
vii. The complexity of the lay and expert evidence.

In the circumstances, the trial should not go ahead remotely unless a court hearing was *"simply not possible"*. Johnson J determined that an attended hearing would be possible, and the trial remained listed. Alternative directions were given in the event that a remote trial in fact could not be accommodated.

Summary

As Johnson J said *"[In March 2020], a remote hearing of a clinical negligence trial would have been almost unthinkable…"*. This decision is a helpful illustration of the matters to be taken into account when contemplating a remote trial in a clinical negligence context. While Johnson J was able to sidestep the issue in SC, this will not always be possible. In a clinical negligence context, the clinical demands associated with the ongoing pandemic will often be a significant factor, particularly when NHS capacity is tested. In approving an agreed request for an adjournment in ***Ludlow v Buckinghamshire Healthcare NHS Trust and Another [2020]* EWHC 1720 (QB)** (6 May 2020), Jay J said: *"I would place greater emphasis on the fact that a trial at this point would test an already overly-stressed NHS."*

Other guidance

A comprehensive summary of the guidance on remote hearings is beyond the scope of this article. That said, the decision of the Court of Appeal in ***Re A***[1] provides a useful framework. Whilst this was a family decision, the Court of Appeal provided a helpful 'cut out and keep' guide[2] [at paragraph 9] to some of the factors to take into account: -

"The factors that are likely to influence the decision on whether to proceed with a remote hearing will vary from case to case, court to court and judge to judge. We consider that they will include:

i) The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?

ii) Whether there is a special need for urgency…;

iii) Whether the parties are legally represented;

iv) The ability, or otherwise, of any lay party… to engage with and follow remote proceedings meaningfully;

v) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;

vi) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;

vii) The scope and scale of the proposed hearing. How long is the hearing expected to last?

viii) The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;

ix) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;

x) Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates."

What next?

One option seemingly not considered in detail in ***SC*** was that of a 'hybrid' trial with some participants in court and others attending by video. Such arrangements are sometimes seen as an attractive solution to capacity problems caused by the need for social distancing within courtrooms. Those who are opposed to remote hearings would be well advised to consider what steps might be taken to facilitate in person trials or hybrid hearings. Even if not determinative, a position that has been agreed between the parties is likely to be a significant factor in any case management decision. More than ever, coming to court with proposed solutions rather than problems is likely to pay dividends.

Any such proposals must inevitably be informed by the prevailing guidance from the Government and from the courts. Parties must keep these under review and be prepared to adapt, perhaps at short notice, to changes in this guidance. Ultimately, whether to proceed with a remote trial is a case management decision. Dissatisfied litigants must bear in mind the reluctance of appellate courts to interfere with such decisions.

By James Yapp JYapp@TGChambers.com

1. *A (Children) (Remote Hearing: Care And Placement Orders)* [2020] EWCA Civ 583
2. Recently cited as being of significant assistance to Marcus Smith J sitting in the Chancery Division in *Bilta (UK) Ltd & Ors v SVS Securities Plc & Ors* [2021] EWHC 36 (Ch)

Delay and prejudice after death: *Azam v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB)

Clinical Negligence – Procedure – Limitation Act – Claims Issued 21 Years After Alleged Negligent Surgery – Defendant Surgeon Died 3 Years Prior To Issue – Approach To Balancing Exercise In Allowing Claim To Proceed

Simon Browne QC and Olivia Rosenstrom consider this High Court appeal where the claim was allowed to proceed so long after alleged negligent surgery.

Johnson J decided that a substantial clinical negligence trial could fairly be conducted remotely. However, a remote hearing would be undesirable unless it was not possible to proceed in person. The trial would go ahead in person.

Introduction

The message from the High Court in this recent appeal is clear: (i) the defendant carries the evidential burden of proving prejudice for the purposes of section 33 of the Limitation Act 1980; (ii) assertions of prejudice must be backed up by evidence, which may include expert evidence where required; and (iii) the hurdle for an appellant is high when challenging the outcome of a discretionary balancing exercise.

Background

The instant case arose from the Claimant's gynaecomastia surgery which took place in March 1996. The procedure was performed by consultant surgeon Mr Campbell at a hospital for which the Defendant was responsible. Mr Campbell passed away in April 2014. The Claimant subsequently issued a claim in July 2017, complaining that Mr Campbell failed to obtain informed consent, and that the surgical procedure was of a poor standard and was undertaken using an inappropriate technique. As a result, the Claimant claimed that he suffered severe pain, chest wall distortion and significant scarring, and relied on expert evidence in support. The Defendant provided an outline Defence relying on a limitation argument and produced no evidence to counter the Claimant's expert report.

His Honour Judge Rawlings tried the preliminary issue as to limitation. HHJ Rawlings found that the Claimant had the knowledge required by section 14 of the Limitation Act 1980 ('LA 1980') almost immediately following the surgery. Thus, the primary limitation period expired in March 1999. Assertions of concealment for the purposes of section 32 of the LA 1980 were dismissed. HHJ Rawlings proceeded to consider section 33 of LA 1980 and directed himself that, whilst the Claimant had to prove that it would be inequitable not to disapply the time limit, the Defendant had the evidential burden of proving prejudice.

In relation to the allegation regarding informed consent, HHJ Rawlings refused permission under section 33 of the LA 1980. There was a risk of significant prejudice to the Defendant given Mr Campbell's unavailability. Had the claim been brought in time whilst Mr Campbell was alive, the Defendant could have relied on his evidence regarding his usual practice in relation to consent forms.

As to the standard of the surgery itself, however, HHJ Rawlings found that having regard to all the circumstances of the case, it was equitable to allow the Claimant permission to pursue his claim out of time. The Defendant had not demonstrated that the passage of time resulted in any real prejudice in relation to its ability to defend the claim. Even if the proceedings had been brought in time, it was unlikely that Mr Campbell's evidence would have added value, as he was unlikely to have remembered the surgery, and there were in any event contemporaneous medical notes. Moreover, the question of whether the surgery was carried out negligently would turn on expert evidence. Thus, HHJ Rawlings exercised his discretion under section 33(1) of LA 1980 and ordered that the applicable limitation period be disapplied.

The Defendant appealed, arguing that HHJ Rawlings failed to give further consideration and/or due weight to the collateral forensic prejudice faced by the Defendant, and that he had been wrong to conclude that the loss of Mr Campbell as a witness did not amount to significant forensic prejudice. Under its second ground of appeal, the Defendant further argued that HHJ Rawlings had failed to perform a balancing exercise of the factors under section 33 of the LA 1980.

Findings of the High Court

The Honourable Mr Justice Saini, who heard the appeal, reminded himself at the outset of the circumstances in which an appellate court can interfere with a discretionary evaluation. Essentially, Saini J noted, whilst the appeal court may have preferred a different answer, *"unless the judge's decision was plainly wrong, it will be left undisturbed"*. Likewise, the trial judge's attribution of weight to specific factors must be wholly unjustifiable for the appeal court to interfere. Thus, the hurdle for an appellant is high when challenging the outcome of a discretionary balancing exercise.

Considering the judgment of HHJ Rawlings, Saini J found that there was no misdirection in law. The relevant factors of section 33 were set out and considered by the judge. The judge had also directed himself correctly as to the burden of proof as well as the key questions for consideration under section 33(3) and as set out in ***Cain v Francis*** **[2008] EWCA Civ 1451**. HHJ Rawlings' directions in relation to the legal test applied in exercising his discretion was therefore "impeccable". Having reached this conclusion, Saini J noted that the remaining question for the appellate court is limited to whether the determination of the judge was within his discretion.

The first ground of appeal was rejected, as it was a *"thinly disguised attack"* upon the judge's exercise of discretion. The findings made by HHJ Rawlings were well within his discretion, and his approach to prejudice was justified on the evidence and correct in law. HHJ Rawlings had not ignored or failed to give due weight to collateral forensic prejudice. The care he had taken in relation to this issue being evident from his refusal to exercise his discretion in relation to the claim regarding informed consent. Rather, the Defendant had failed to adduce evidence to establish that it was likely that evidence at trial would be less cogent for the purposes of section 33(3)(b). Instead, the Defendant had relied on bare assertions in relation to the quality and availability of evidence, which the judge was entitled to exclude from his consideration or weigh against the Defendant.

HHJ Rawling was also entitled to his finding in relation to the limited added value of Mr Campbell's evidence. The Defendant had failed to evidence the asserted prejudice in relation to Mr Campbell's unavailability, and had chosen not to commission an expert report outlining the relevance of the evidence from the operating surgeon. Equally, it was open to HHJ Rawling to conclude that the claim turned on expert evidence and to give weight to the Claimant's medical evidence, which was uncontradicted given that the Defendant had chosen not to obtain expert evidence.

The Defendant's second ground of appeal was also rejected. It was plain that the judge had undertaken a balancing exercise in relation to both aspects of the claim. The Defendant's challenge was simply an attempt to reargue the case on discretion.

Thus, Saini J concluded that the judgment was unimpeachable and dismissed the appeal.

Comment

This judgment not only provides a useful reminder of the burden on defendants to substantiate assertions of prejudice in relation to historic claims, it also provides guidance as to what evidence may be useful in doing so. Whilst the evidence required will turn on the factual matrix of each case, it will often be important to obtain detailed supporting witness statements setting out the steps taken to trace witnesses and locate documents and specifying what documentary/witness evidence cannot or has not been traced. As noted by Saini J, expert evidence may be required to explain and substantiate gaps in the evidence causing prejudice to the defendant. Practitioners should therefore identify the prejudice faced in a particular case and consider what evidence is required to meet the evidential burden of proving prejudice.

The high hurdle for challenging discretionary evaluations is also driven home by the judgment, further underscoring the importance of a tactical and evidentially rigorous approach in relation to section 33.

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Experts know best: *Quaatey v Guy's & St Thomas; Hospital NHS Foundation Trust* [2020] EWHC 1296 (QB) and *Magee v Wilmot* [2020] EWHC 1378 (QB)

Clinical Negligence – Procedure – Expert Evidence – Part 35

It will, hopefully, not come as a surprise to readers that supportive expert evidence is needed to succeed in a clinical negligence claim. However, not all litigants are quite so savvy, as demonstrated by two High Court decisions of last year: Richard Boyle examines the cases of *Quaatey v Guy's & St Thomas; Hospital NHS Foundation Trust* [2020] EWHC 1296 (QB) and *Magee v Wilmot* [2020] EWHC 1378 (QB).

In ***Quaatey***, the Claimant was a litigant in person who sued the Defendant for allegedly negligent bowel surgeries in 1995 and 1999 and a failure to take informed consent. The Claimant was ordered to confirm that she was in possession of supportive expert evidence in respect of liability. Given the state of the Particulars of Claim, later described by Lambert J as repetitive and following no logical structure, the Master was concerned that the Claimant had drafted her case without the benefit of expert evidence, rendering it abusive as per ***Pantelli Associates Ltd v Corporate City Developments Number Two Ltd*** **[2010] 3189 (TCC)**.

The Claimant ultimately served two reports from a Consultant Colorectal Surgeon. However, the reports failed to identify any negligence and rejected some of the allegations made in the Particulars of Claim. Master Cook struck out the claim noting that the expert report did not support the pleadings and the claim was brought out of time.

The Claimant appealed. She produced a further report from the expert and alleged that it had been lost by the court at first instance. Lambert J had little trouble rejecting this, given the further report had not been in the bundle index or served on the Defendant. In the alternative, the judge held that the expert had not identified any negligence from the two surgical procedures. The Claimant also alleged that she had not provided informed consent for the insertion of mesh during the 1999 surgery. Lambert J noted that this was not solely dependent on expert opinion and would require a fact-finding exercise. However, the Claimant was doomed to fail on limitation grounds because she had been aware that the mesh had been inserted in 1999 and had approached solicitors around that time.

In ***Magee***, the Claimant claimed for a delay in diagnosing bowel cancer at two consultations in August 2012 and April 2013. The Claimant had been diagnosed at an appointment two days after the second consultation. She failed to plead a case on causation in relation to the second consultation, perhaps unsurprisingly given the challenges that claim faced. When expert evidence was exchanged, the Defendant pointed out that the Claimant's experts did not support many of the particulars of negligence and that there was no oncology causation evidence. A few days later, the Claimant applied for permission to rely on three new reports and the Defendant cross-applied for strike out. The Claimant was ultimately granted relief from sanction. The Recorder noted that the balance of prejudice lay in the Claimant's favour.

On appeal, Yip J held that the Recorder had failed to engage with all the relevant circumstances and the factors mentioned in r 3.9 CPR. The breach was serious and had resulted in loss of the trial. The judge found that the Claimant's solicitor had not been *"entirely frank"*. The Claimant's solicitor had suggested that the reports were served late due to an oversight and applied for *"updated"* medical evidence. In fact, disclosure showed that this was not the case and he had sought further evidence after the flaws had been identified by the Defendant.

The Claimant's claim in relation to the April 2013 consultation was struck out. The Claimant had no admissible medical evidence and there was no claim on causation. The pleading was abusive and disclosed no reasonable grounds for bringing the claim. The Recorder was wrong to leave this unsubstantiated part of the case for trial and doing so risked distracting from the real issues. However, the evidence was *"just sufficient"* to mount a claim in relation to the August 2012 consultation and it could not be said that there was *"**no** expert support for the claimed breach of duty"*. Reading between the lines of the judgment, the judge may have had in mind the costs consequences of strike out for the Claimant. Yip J stated that: *"I do not wish this to be taken as in any way encouraging a less than careful approach to allegations of professional negligence. It is of fundamental importance that such allegations are not made unless supported by an appropriate expert. All practitioners must take care to ensure that the pleadings properly reflect the expert opinion and do not contain unfounded allegations"*.

In terms of practice points:

i. It is obviously important for Claimants to take appropriate care over their pleaded case. All aspects of the pleading must be supported by expert evidence. Any attempt to stray beyond a report is abusive;

ii. Defendants should be keen to identify parts of pleadings for strike out;

iii. The Claimant must plead a case on causation for all aspects of the claim;

iv. The position in relation to consent is slightly different. The need for a fact-finding exercise will have an effect on limitation considerations; and

v. Finally, should it need saying, any failure to be frank with the court will be seriously harmful to prospects!

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Being born is the leading cause of death: *Meadows v Khan* [2019] EWCA Civ 152

Clinical Negligence – Causation – Wrongful Birth Claims – Scope Of Duty Test

James Laughland examines the case of *Meadows v Khan [2019]* EWCA Civ 152, which confirmed that when considering liability for wrongful birth, the correct test is the 'scope of duty' test, rather than the simple 'but for' causation test.

But for being born we would not die. But for having run out of milk we would not have made the car journey that ended in tragedy. But for a doctor's negligence that failed to avoid one unwanted thing, another unwanted thing also occurred.

But for; but for; but for. Lawyers are all too used to bandying around the phrase: "the *but for* test". But for how many situations is that sufficient or appropriate?

This was the issue facing the Court of Appeal in ***Meadows v Khan* [2019] EWCA Civ 152**. The Claimant's nephew had been born with haemophilia. The Claimant wished to know whether she was a carrier of the relevant gene before getting pregnant and so consulted her GP. Blood tests were taken, and she was led to believe that any child she had would not have haemophilia. This was wrong as blood tests could only determine whether she was haemophilic; genetic tests would be required to determine whether she could pass the condition to her children.

The Claimant became pregnant and gave birth to a child with haemophilia. Subsequent genetic tests confirmed that she was carrying the relevant gene. But for the GP's negligence she would have had foetal testing for haemophilia when pregnant, which in turn would have led to a termination. But for the GP's negligence she had had a child with the condition she had hoped to avoid passing on. Moreover, but for the GP's negligence she would not have had a child born with both haemophilia and autism, as was subsequently diagnosed when the child was aged 4. The development of autism was entirely unconnected with his haemophilia. It was a risk associated with every pregnancy and was not something that could be foreseen.

The GP admitted negligence in respect to the failure to arrange appropriate genetic testing and admitted liability for the costs associated with having a child with haemophilia. What was in issue was whether the GP was also liable for the substantially greater additional costs associated with autism. The Claimant argued that but for the negligence the child would not have been born with either condition and that the Defendant was liable for the whole. The Defendant resisted liability for the costs of autism. At trial the Claimant won and recovered all.

Not correct, says the Court of Appeal. Whilst the GP accepted that the 'but for' test of causation was made out; namely that it was reasonably foreseeable that as a consequence of her breach of duty the mother had given birth to a child where the pregnancy would otherwise have been terminated and that it was always possible that such child could suffer with a condition such as autism, was that the be all and end all of the issue?

The GP argued that in determining whether the additional costs of autism were recoverable the Judge ought to have applied the *'scope of duty test'* (established by ***South Australian Asset Management Corpn v York Montague Limited* [1997] AC 191** ('SAAMCO')). In order to protect a defendant from liability for every foreseeable factual consequence of their negligence, the courts have placed an additional test on the consequences of a breach that are considered to be within the appropriate scope

of the defendant's liability, namely the requirement that the particular loss claimed must be *"within the scope of the duty"*.

Put another way, where there is a duty to take reasonable care to provide information on which someone else would decide on a course of action, a defendant – if negligent – is responsible not for all the consequences of the course of action decided on but only for the foreseeable consequences of the information being wrong.

On the facts of the instant case, the purpose of the GP's acts and omissions were directed at the haemophilia issue and not the wider issue of whether, generally, the Claimant should become pregnant and thereby accept all the risks associated with any pregnancy. This Claimant had wanted to have a child, but did not want to give birth to a child with haemophilia. Viewed from this perspective one can see that it is fair that the Defendant was not held liable for the additional costs associated with a risk that would always have been present in any pregnancy the Claimant had.

The Court of Appeal placed weight on the fact that the risk of a child being born with autism was not increased by the GP's advice. Whether the same result would occur in a case where the additional condition did have an association with the primary condition that was to be avoided remains to be seen.

The three key questions identified by the Court of Appeal, adhering to the SAAMCO analysis, were:

i. What was the purpose of the procedure / information 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 correct procedure had been performed?

Applied to the facts, the Court held that the scope of the GP's duty had not been to protect the mother from all the risks associated with becoming pregnant and continuing with the pregnancy. The GP had had no duty to prevent the child's birth, that was a decision that could only be taken by the mother taking into account matters such as her ethical views on abortion, her willingness to accept the risks associated with any pregnancy and was outwith the limits of the advice / treatment which had been sought from the GP.

Accordingly, the trial judge's decision was overturned and the lower damages award substituted.

In articulating where the judge had fallen into error, the Court of Appeal stated that the mistake had been to look simply for a link between the negligence and the later stage in the chain of causation ('the *but* for test'). Following SAAMCO, the link to look for is between the scope of the duty and the damage caused. Likewise, they said the Judge had been wrong to draw favourable comparisons with the decision in ***Chester v Afshar* [2005] 1 AC 134**. In that case the misfortune which befell the claimant was the very misfortune that the defendant had a duty to warn against: a fundamental distinction with the facts in ***Meadows v Khan***. The Court of Appeal endorsed the analogy given by Lord Walker in ***Chester*** (para 94): -

"If a taxi driver drives too fast and the cab is hit by a falling tree, injuring the passenger, it is sheer coincidence. The driver might equally well have avoided the tree by driving too fast, and the passenger might have been injured if the driver was observing the speed limit. But to my mind, the present case does not fall into that category. Bare "but for" causation is powerfully reinforced by the fact that the misfortune which befell the claimant was the very misfortune which was the focus of the surgeon's duty to warn."

In the context of the instant case, the development of autism was a coincidental injury and not one within the scope of the GP's duty. Delineating the scope of that duty is a much easier exercise than listing what might be all the foreseeable consequences of a negligent act or omission.

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Statistics, damn statistics: *Schembri v Marshall* [2019] EWCA Civ 358

Clinical Negligence – Causation – Delayed Diagnosis – Statistical Evidence

Can a claimant in a clinical negligence case who is unable to prove the precise chain of events by which the harm sustained may have been avoided still succeed on causation? Yes, held the Court of Appeal in *Schembri v Marshall* [2020] EWCA Civ 385. Lionel Stride explores the judgment in more detail.

Background

On 25 April 2014, the deceased attended the defendant's GP Surgery with chest pain and breathlessness; she had a previous history of pulmonary embolism ('PE'). The defendant examined her and said that the most probable cause of her symptoms was muscular strain affecting her hiatus hernia. She died the following morning of an untreated PE occasioning cardiac arrest.

It was accepted that the defendant was in breach of duty by failing to refer her directly to hospital. Moreover, it was common ground between the parties that, had the deceased been referred to hospital the previous day, her PE would have been diagnosed and she would have been given anticoagulant treatment. The dispute between the parties focused on causation, specifically the question of whether the deceased would have received treatment in time to prevent her fatal PE but for the defendant's admitted negligence.

Just show me the figures

At first instance, Stewart J reviewed a significant amount of medical literature and evidence on this issue, and found that the claimant was unable to establish the specific chain of events which, absent the admitted negligence, would have saved the deceased; or that she would have been amongst the 64-75% of patients who, according to the medical literature, survive cardiogenic shock. Those points conceded, Stewart J approached the question of causation as follows: -

*"[…] As is accepted, the Claimant has the burden of proving causation. **Yet the Claimant needs to prove no more than that Mrs Marshal would have probably survived had she been admitted to hospital. The Claimant does not need to prove the precise mechanism by which her survival would have been achieved".***[3]

Finding in the claimant's favour, Stewart J further held that: -

"The expert medical evidence to which I have referred, and the statistical evidence demonstrate that at the time when Mrs Marshall should have presented at hospital, anybody rating her chances of survival would have put them at being very high. Tragically, she did in fact die out of hospital. In the situation which occurred, detailed analysis of such evidence as we have cannot lead the court to find that by such and such a mechanism, or at any particular stage, the course of events would probably have been different".[4]

Crying statistical

The defendant appealed, arguing that:

i. Having found that the claimant had not proven that the deceased would have survived had she been admitted to hospital on the basis of detailed analysis of the particular circumstances, the Judge should have concluded the claim must fail.

ii. The judge should not have posed a separate, overriding question based on general survival rates of patients who have suffered PEs whilst in hospital.

In coming to its decision, the Court of Appeal reviewed a number of authorities in the area. The defendant relied upon ***Wardlaw v Farrar* [2003] EWCA Civ 1719**, which involved similar circumstances. Brooke LJ held at paragraph 35 of Wardlaw that: *"while judges are of course entitled to place such weight on statistical*

evidence as is appropriate," they must not "blind themselves to the effect of other evidence which might put a particular patient in a particular category, regardless of general probabilities". The claimant cited ***Drake v Harbour*** **[2008] EWCA Civ 25** to support the contention that the court was entitled to draw an inference from the facts in circumstances where there had been an (admitted) breach of duty. Both parties relied on the case of ***Gregg v Scott*** **[2005] 2 AC 176**. In this latter case, Lord Nicholls acknowledged that, whilst statistical evidence is not strictly a guide to what would have happened in a particular case but for the defendant's negligence, there may be occasions when it will be the primary evidential aid.

Having reviewed those authorities, the Court of Appeal held that Stewart J's approach was appropriate in the circumstances. He had first considered whether the claimant had established a specific chain of events that would have saved the deceased. After determining that question in the negative, it was legitimate to *"pause for thought"* (paragraph 51) in the light of statistical evidence that was highly favourable to the claimant. This approach was appropriate because of the *"large number of unknowns"* (paragraph 51) and because the reason why the actual outcome was not known is that the admitted negligence prevented it becoming so. Therefore, Stewart J had been right to take a *"common sense and pragmatic view"* of the *"evidence as a whole"* (paragraph 53).

The Court of Appeal nonetheless re-emphasised that statistics are not determinative of causation and each case will turn on its own facts: -

> ***"This was not a case in which statistics were used to transpose a strong case in the Appellant's favour into a decision in favour of the Respondent*** *[…]* ***There is a legitimate place for statistical evidence in cases of this type.*** *The employment of that evidence by the judge in this case was closely linked by him to his assessment of the evidence as to the Deceased's own particular condition, in which* ***her prospects of survival (on hypothetical admission to hospital) were very good indeed."***

What does this all mean?

There is no (quantifiable) doubt that this decision will be encouraging to claimants who are unable to establish the precise chain of events by which the damage sustained may have been avoided but where their general statistical prospects would have been very good in the absence of the alleged breach of duty (whether admitted or proven). However, as the Court of Appeal has highlighted, every case is fact-specific. The *ratio* in ***Schembri*** does not give claimants a blank cheque to assert that causation is proved on the basis of a marginal statistical evidence (i.e., 51%) in their favour.

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1. *Schembri v Marshall [2019]* EWHC 238 (QB), paragraph 128

2. *Ibid*, paragraphs 145 – 146

Illegality will not be tolerated, sir: *Ecila Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC

Clinical Negligence – Breach Of Duty & Causation – Defence Of Illegality– Manslaughter By Reason Of Diminished Responsibility – Paranoid Schizophrenia

James Arney QC considers the case of *Ecila Henderson (A Protected Party, by her litigation friend, The Official Solicitor) v Dorset Healthcare University NHS Foundation Trust* [2020] UKCS in which the Supreme Court reaffirmed the defence of illegality in a clinical negligence context.

Background to the appeal

The Appellant suffered from paranoid schizophrenia and was under the care of the Respondent. Her condition deteriorated and, on 25 August 2010, she stabbed her mother to death whilst experiencing a serious psychotic episode.

The Appellant was convicted of manslaughter by reason of diminished responsibility. In her criminal trial, the judge said that the Appellant did not bear a significant degree of responsibility for what she had done. The judge sentenced her to a hospital order under Section 37, and an unlimited restriction order under Section 41, of the Mental Health Act 1983.

The Appellant sought general damages for the depressive disorder and post-traumatic stress disorder ('PTSD') by way of personal injury consequent on her killing of her mother, damages for her loss of liberty, and general damages for loss of amenity arising from the consequences to her of having killed her mother. She also claimed past loss for a share in her mother's estate which she is unable to recover under the Forfeiture Act 1982, and the cost of psychotherapy, a care manager and support worker by way of future loss.

The Appellant's case

The appeal was brought on behalf of Ms. Henderson by The Official Solicitor, having been dismissed in both the High Court and the Court of Appeal. Her case was as follows:

This case should be distinguished from that of *Gray v Thames Trains Ltd* [2009] UKHL 33

In *Gray*, the Appellant was involved in a major railway accident as a result of which he suffered PTSD. He killed a man whilst suffering from the disorder. At his criminal trial, Mr Gray was found to have had significant personal responsibility for his crime.

The House of Lords found that illegality barred the recovery of damages on both a "narrow claim", meaning the general damages for his detention and loss of earnings, and a "wide claim", covering damages as a result of the killing, including feelings of remorse.

However, judgment was reserved by some of the Lords as to the operation of the illegality doctrine. Lord Phillips reserved judgment as to whether it applies in a situation where defendants were detained for the protection of the public but bore no significant responsibility for their crime. The Appellant argued that other Lords also reserved their judgment on this point and that it therefore constituted a majority judgment.

If *Gray* cannot be distinguished it was no longer good law because of the Supreme Court's finding in *Patel v Mirza* [2016] UKSC 42

The Appellant then argued that *Gray* had been superseded by ***Patel***. In ***Patel***, the Supreme Court moved away from a reliance-based approach to the defence of illegality, to a policy-based approach, assessing relevant and competing public policy and proportionality considerations, finding:

"The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

The Appellant argued that the decision in Gray was an example of the rules-based approach which was rejected in ***Patel*** as it did not allow the court to consider any particular circumstances of the case, including personal responsibility or proportionality.

The Appellant also argued that ***Gray*** does not apply where there is no personal responsibility for a criminal act. Further, there was no inconsistency or incoherence between the civil and the criminal law in a case in which the claimant has no significant personal responsibility for a criminal act. The denial of a tort claim by means of the illegality defence would constitute a punishment in the civil law when the criminal law had decided to impose an order without a penal element.

Applying the new test set out in *Patel*, the Appellant should recover damages.

The Appellant argued that in any event she should recover damages. The *"trio of necessary considerations"* set out by the Supreme Court in ***Patel*** were as follows:

i. the underlying purpose of the prohibition which has been transgressed;

ii. any other relevant public policies which may be rendered ineffective or less effective by denial of the claim; and

iii. *"the possibility of overkill"* unless the law is applied with a due sense of proportionality.

With regard to the first stage of the test, the Appellant submitted that it was absurd to suppose that a person who is not deterred by a criminal sanction is unlikely to be deterred by being deprived of a right to compensation.

The relevant public policies advanced by the Appellant for the second stage of the test were:

i. encouraging NHS bodies to care competently for the most vulnerable;

ii. providing compensation to victims of torts where they are not significantly responsible for their conduct;

iii. ensuring that public bodies pay compensation to those whom they have injured;

iv. defendants in criminal trials receiving sentences proportionate to their offending.

The Supreme Court unanimously dismissed the Appeal.

On the first issue, the Court found that ***Gray*** could not be distinguished, finding that there was no consideration in that case as to the degree of personal responsibility of the defendant. They dismissed the Appellant's case that a majority of the Lords had reserved judgment on whether the illegality defence would apply in a case such as the Appellant's, holding that it was not a majority view.

On the second issue, the Court found that ***Patel*** did not represent a *"year zero"* before which all cases concerning illegality had no precedential value. In addition, the reasoning in ***Gray*** was consistent with that of ***Patel***. ***Gray*** had not followed the reliance-based approach which had been rejected in ***Patel***. In fact, the Court of Appeal had said it was a *"combination of public policy and causation"*.

Although the Court said that the Appellant's arguments had been formidable, they declined to find that the reasoning in ***Gray*** did not apply where a defendant bore no significant criminal responsibility. Allowing a claimant to recover damages for loss that results from a sentence imposed by the criminal court or for intentional criminal acts would give rise to inconsistency that would damage the integrity of the legal system. Perhaps more fundamentally, the Court found that it was unclear whether the Appellant had proven the appropriate threshold to be that of significant personal responsibility.

Finally, the Court applied *Patel*. They found that the principles which supported a denial of the Appellant's claim were:

i. consistency and public confidence in the law;

ii. the gravity of her offence;

iii. the proper allocation of NHS resources;

iv. that her claim and her wrongdoing were closely linked; and

v. the protection of the public.

To the Appellant's argument that it would be unlikely that those suffering from diminished responsibility would consider their prospect of civil damages, the Court made this observation [paragraph 131]:

"Looking at the matter more broadly there may well be some deterrent effect in a clear rule that unlawful killing never pays and any such effect is important given the fundamental importance of the right to life.

To have such a rule also supports the public interest in public condemnation and due punishment."

In relation to the second stage, these policy reasons were found to outweigh any in support of the claim.

Finally, the denial of the claim was not held to be disproportionate.

Commentary

It is perhaps unsurprising that the Court found this claim to be barred by the illegality defence, but nevertheless the case brings some clarity to practitioners.

This approach may provoke comment and critique by those working in mental health and clinical negligence law. The importance of emphasising that *"unlawful killing never pays"* as a policy consideration may pose little deterrent to those suffering with severe illnesses. It was common ground that the killing of the Appellant's mother would not have occurred but for the Respondent's negligence. Some will argue that policy considerations seeking a robust and accountable health service for vulnerable people were not given enough weight.

In finding that it was the Appellant's criminal conviction that was determinative, rather than her level of personal responsibility, it might be argued that the driving force of ***Patel***, being *'the principled and transparent assessment of considerations'* above, was eschewed for an assessment of criminal behaviour and mental health which some might find disappointing.

That being said, the Supreme Court was careful to point out that this question should not be considered solely at the *"granular level"* of diminished responsibility manslaughter cases [paragraph 131].

The Supreme Court did consider that there might be some circumstances where a criminal act will *not* automatically give rise to the illegality defence, including some (unnamed) trivial or strict liability offences. However, given the clear guidance from the unanimous Supreme Court, the approach in ***Henderson*** should now be followed in comparable cases.

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Clinical negligence and the outsourcing of healthcare: *Hopkins v. Akramy & ors.* [2020] EWHC 3445 QBD

Clinical Negligence – Breach Of Duty & Causation – Duty Of Care– Non-Delegable Duty– Outsourcing - Nhs Act 2006

Anthony Johnson considers the case of *Hopkins v. Akramy & ors.* [2020] EWHC 3445 (QB). The High Court ruled as a preliminary issue that the Third Defendant NHS Commissioning Board did not owe the Claimant a non-delegable duty in respect of services that were outsourced to the Second Defendant pursuant to the NHS Act 2006. HHJ Melissa Clarke, sitting as a Section 9 Judge, based her decision upon a narrow consideration of the relevant statute, although in the course of her judgment she conducted a thorough review of the authorities in relation to such non-delegable duties.

The underlying claim involves allegations against the First Defendant Nurse in relation to her treatment of the Claimant, who was 2½ years of age at the material time. The Claimant had developed unusual symptoms including weakness and unsteadiness. When her grandmother and Litigation Friend phoned her GP the following day, she received an automated message referring her to the Second Defendant, Badger Medical Centre at Selly Oak Hospital, with which the South Birmingham Primary Care Trust (the responsibilities of which were subsequently taken over by the Third Defendant) had contracted to provide out-of-hours services to patients in South Birmingham. The Claimant was discharged with advice to use paracetamol and see her GP if symptoms persisted. Two days later, she was admitted to hospital where an MRI scan revealed a number of serious neurological issues, which ultimately left her quadriplegic with severe epilepsy and a severe visual impairment. It was alleged that, *inter alia*, the First Defendant had been negligent in her 'safety net' advice and in initially discharging the Claimant; liability was disputed.

The hearing before HHJ Clarke solely involved consideration of the potential liability of the Third Defendant in the event that a claim in clinical negligence were ultimately made out against the First Defendant. It was an express term of the contract that the Third Defendant had entered into with the Second Defendant that it would carry adequate insurance against all liabilities arising from the negligent performance of such services. However, contrary to this term, the Second Defendant was uninsured for the purposes of any liability to the Claimant. The First Defendant's Royal College of Nursing insurance policy was limited to £3M inclusive of both sides' costs, which it was common ground would be insufficient to meet the Claimant's claim for damages and costs. It was this risk of under-compensation that had led the Claimant to add the Third Defendant as a party to the proceedings on the alleged basis that it owed the Claimant a non-delegable duty of care to protect NHS patients from harm, which was said to include harm caused by the negligent provision of medical services by a third party.

The relevant statutory provision that was in force at the time was Section 83 of the NHS Act 2006, which stipulated that the Third Defendant was under a statutory duty to *"provide primary medical services within its area, or secure their provision within its area."* Sub-section 83(2) specified that, in addition to providing primary medical services itself, the Trust may *"make such arrangements for their provision as it considers appropriate, and may in particular make contractual arrangements with any person..."*

The issue between the parties was effectively one of statutory construction of Section 83 of the 2006 Act. The Claimant alleged that the provision imposed an obligation upon the Third Defendant to *secure* the provision of services, which it was alleged went beyond a mere duty to arrange such services, thus justifying the imposition of the non-delegable duty that the Claimant contended for. It was averred that the application of the well-known criteria laid out by the Supreme Court in ***Woodland v Essex County Council* [2013] UKSC 66** ought to inform the interpretation of the statute. In contrast, the Third Defendant argued that the section allowed two alternate routes by which it could discharge its duty, i.e. to carry out the services itself or to instead secure their provision by a third party, which it was averred enabled them to rely upon an independent contractor defence pursuant to ***Myton v. Woods* (1979) LGR 28.**

Both parties' submissions referred to the Supreme Court's decision in ***Armes v Nottinghamshire County Council* [2017] UKSC 60** where it was held that a local authority did not owe a non-delegable duty to ensure that children in its care who had been placed with foster carers were treated with reasonable care. Lord Reed stated that "The expression 'non-delegable duties of care' is commonly used to refer to duties not merely to take personal care in performing a given function but to ensure that care is taken. The expression thus refers to a higher standard of care than the ordinary duty of care. Duties involving this higher standard of care are described as non-delegable because they cannot be discharged merely by the exercise of reasonable care in the selection of a third party to whom the function in question is delegated."

The authorities related to the question of whether or not a non-delegable duty of care should be imposed are dealt with in some detail in a section of the judgment headed 'the law relating to non-delegable duties of care' found between paragraphs 37 and 55. It is beyond the scope of this article to reproduce that analysis herein, but it is suggested that this section would be a useful first port of call for any reader seeking a summary of the legal position in relation to this issue.

The preliminary issue was determined in favour of the Third Defendant. At paragraph 69, the Judge emphasised that she considered the determinative point to be that if Parliament had intended to impose a non-delegable duty in relation to the services in question then it could have done so. The Trust had not delegated a duty that it was itself supposed to fulfil because the statute expressly authorised it to arrange the services via a third party. At paragraphs 71-72 she set out the following:

"...the effect of the statutory scheme is that if a PCT elects to discharge its section 83(1) duty by providing primary medical services itself (for example by directly employing healthcare professionals such as GPs), it is electing to discharge the duty to perform. It will take on the responsibility for doing so and will be liable for breach in accordance with ordinary principles.

If, however, a PCT elects to discharge its section 83(1) duty by securing the provision of primary medical services from others, it is electing to discharge its alternative duty which can properly be characterised as a duty to make arrangements for the provision of services. Section 83(2) gives it the power to do by means of entering into contractual arrangements with others. In this case, following Myton and Armes, subject to exercising reasonable care in selecting the contractor, and although the PCT retains overall responsibility to administer and arrange such arrangements pursuant to section 22 of the Act, the PCT retains no residual responsibility in relation to the manner in which the contractor performs the service. In particular it retains no responsibility to ensure that those providing that care do it safely."

One of the most superficially persuasive arguments advanced by Leading Counsel for the Claimant was that it was a 'startling proposition' that a patient who initially contacted the NHS for advice could be seen, assessed and advised by the Second Defendant as a private patient rather than an NHS patient. The Claimant's grandmother's evidence had been that if she had not heard the automated message from her GP then she would have instead taken the Claimant to her local Accident & Emergency Department of her local hospital where, it was submitted, that there would be no doubt that the NHS was responsible for any breach of duty, which it was submitted was

"inconsistent with the public's understanding of the NHS and as inconsistent with what the NHS purports to do as set out in the NHS Constitution."

The Judge addressed these concerns directly in paragraph 73 of her judgment, finding that the Claimant *"was not seen as a private patient, but as an NHS patient at an OOH facility arranged by the NHS with her care provided free at the point of use."* She accepted the Third Defendant's response that the position would be no different if she had been seen during the day at a GP surgery that was run as a private partnership working for the NHS pursuant to a contract. She emphasised that it was important for the Claimant's grandmother to understand that she had not by her actions unwittingly removed her from the umbrella of NHS provision.

It is to be hoped that this is an isolated case of underinsurance on the part of the Second Defendant rather than symptomatic of a wider malaise at industry level. If it were to transpire that the same issues arise in a large number of other cases, it is anticipated that there would be significant pressure on Parliament to intervene. Whilst HHJ Clarke's analysis and application of the law appears to this writer to be unimpeachable, one suspects that the average NHS patient would not enquire as to whether a Clinic located at an NHS Hospital (as in this case) was run by the NHS or by a third party, let alone appreciate that its insurance position may differ from an NHS Clinic. Even if not determinative of the outcome, there is much to be said for the Claimant's submission on policy grounds that the outcome is inconsistent with the public's understanding of the NHS.

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His Dark Materiality: *Leach v North East Ambulance Service NHS Trust* [2020] EWHC

Clinical Negligence – Causation – Material Contribution – Psychiatric Harm – Expert Evidence

Lionel Stride analyses the High Court decision in *Leach v North East Ambulance Service NHS Foundation Trust* [2020] EWHC 2914 (QB), which is a useful case study in the (correct) approach to determining causation when the 'but for' test is not determinative and the interpretation of expert psychiatric evidence.

Background

The Claimant, a 41-year-old woman, suffered a subarachnoid haemorrhage ('SAH') as a result of a ruptured aneurysm; she was upstairs in her home doing housework when she felt *"a pop and gush in [her] head and an immense pain"* (paragraph 5). She managed to call 999, and, as HHJ Freedman commented, *"there can be no doubt whatsoever that the claimant was very poorly (whatever the diagnosis was) and in severe distress [...] she made it known that she feared that she was going to die, that her condition was deteriorating, and that she urgently needed and ambulance."* (paragraph 10).

The ambulance eventually arrived – after a 109-minute wait – and the Claimant was taken into hospital, where she underwent surgery to treat the SAH which proved to be successful. Nevertheless, she still developed a significant Post-Traumatic Stress Disorder ('PTSD') which manifested itself, in particular, in severe anxiety.

The Defendant admitted that there had been a 31-minute negligent period of delay in the ambulance arriving at the Claimant's house to transport her to hospital. Causation was the only issue in dispute. Specifically, the question to be determined was whether the negligent period of delay caused or contributed to the onset of the claimant's PTSD.

'But for' versus 'material contribution'

HHJ Freedman (sitting as a Deputy High Court Judge) began by endorsing the approach to causation set out by Waller J in ***Bailey v The Ministry of Defence & Anor* [2009] 1 WLR 1052:**

"...I would summarise the position in relation to cumulative cause cases as follows. If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the claimant will have failed to establish that the tortious cause contributed [...]. If the evidence demonstrates that 'but for' the contribution of the tortious cause the injury would probably not have occurred, the claimant will (obviously) have discharged the burden. ***In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed."***

Applying the above principles, the test for causation was expressed as follows (paragraph 14): -

i. If it could be shown that the Claimant would have developed PTSD, in any event, irrespective of the negligent period of delay, then the claim would fail;

ii. If it could be shown that but for the period of negligent delay the Claimant would not have developed PTSD, then the claim would succeed;

iii. **If, on the other hand, the evidence was incapable of supporting either of the two positions set out above, then if it could be shown that the negligent period of delay made a material contribution to the PTSD, the claim would succeed.**

The Parties' Position/ Expert Evidence

The Defendant

The Defendant's case, predicated on the expert psychiatric evidence of Dr Bowers, was that the Claimant would have developed PTSD in any event, irrespective of the period of negligent delay.

Dr Bowers' evidence was criticised by HHJ Freedman on three material grounds.

Firstly, in the joint report, Dr Bowers *"was at pains to point out that the Claimant had (apparently) significantly minimised the extent of her pre-existing mental health problems."* However, this analysis was not supported by the primary medical evidence.

Secondly, Dr Bowers made no reference to any literature in his report but stated under cross-examination that: "the literature shows that up to 60% of patients who developed SAH go on to suffer PTSD". If true, the Judge held that this should have featured in the joint report. Dr Bowers later revised this statistic during his oral evidence to between 20% and 60%.

Thirdly, Dr Bowers stated unequivocally in his oral testimony that the Claimant had developed PTSD in consequence of the SAH itself but this view had not been included in the joint statement.

Dr Bowers' evolving opinion as to when the PTSD was triggered, alongside his attempt to challenge the Claimant's credibility, undermined the Judge's confidence in his conclusions.

The Claimant

The Claimant's case, predicated on the evidence of Dr Smith, was that it was not possible to say at which point the PTSD was triggered during the period between her suffering SAH and being taken to hospital in the ambulance. Further, it was contended that given the duration of the period of negligent delay, being approximately **one third** of the total period of delay, it could be said with confidence that the latter period of delay had made a material contribution to the onset of PTSD.

Decision

HHJ Freedman preferred Dr Smith's evidence and found for the Claimant. Medical science, he reasoned, was not capable of dissecting the 31-minute period of negligent delay from the rest of the relevant period so as to enable the inference that PTSD would have occurred in any event: -

"it is certainly possible that from the moment when the claimant suffered her SAH, she was destined to go on to develop PTSD but to come to such a conclusion, on the balance of probabilities, is a step too far. Put simply, medical science does not permit such a conclusion to be drawn." (paragraph 39)

HHJ Freedman further found that an apportionment exercise was inappropriate. This followed from the finding that, in light of the indivisible nature of the injury, it was impossible to say when the trigger for the PTSD occurred.

Comment

Leach contains a clear expression of the law of 'material contribution' in the clinical negligence context, i.e., that it can be substituted for the 'but for' test when it is simply not possible to prove that something would or would not have occurred on the balance of probability. Where, as here, the negligent delay formed a substantial part of the overall period waiting for treatment (1/3rd), it is perhaps little surprise that it was found to be more than negligible. A claimant is likely to face more difficulty establishing material contribution when the defendant's breach of duty is less clear (i.e. where the negligent period is not a third of the overall delay).

Of further interest is HHJ Freedman's criticism of the Defendant's psychiatric expert. This should be read as a warning to medico-legal experts and those who instruct them about the need to ensure that they address all material aspects of their opinion in their report and the joint statement. Tightly drafted agendas are likely to assist here. The Court is unlikely to look favourably on an expert who advances an evolving opinion on material aspects of the case during oral evidence at trial.

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Remedying pre-natal wrongs: *Evie Toombes v Dr Mitchell* EWHC 3506

Clinical Negligence – Breach Of Duty & Causation – 'Wrongful Life' Claims – Lipomyelomeningocoele

Can a disabled claimant pursue a claim for damages on the basis that they would not have been born but for the negligence of the Defendant? Helene Nugent examines *Evie Toombes v Dr Mitchell* [2020] EWHC 3506 which concerns this very question.

The matter arose from circumstances surrounding the Claimant's conception. Her mother had attended an appointment with the Defendant GP for the purposes of family planning advice. It was then standard GP practice to advise patients on the benefits of taking folic acid, which included reducing the risk of neural tube defects. The Claimant was conceived shortly after the GP attendance and at a time when her mother was in a folic acid deficient state.

The Claimant issued a claim in respect of her wrongful conception, alleging that she would not have been conceived but for the negligence of the Defendant. She also contended that her disability was consequent on the Defendant's breach of duty. Her claim related to the additional costs associated with that disability.

The Claimant was born on 19 November 2001. She was diagnosed with lipomylomeningocoele, an occult form of neural tube defect leading to permanent disability. She has a congenital defect causing spinal cord tethering; her mobility is compromised, and she is doubly incontinent.

The matter proceeded to trial on a preliminary issue: whether the claim disclosed a lawful cause of action. For the purposes of that preliminary issue, it was common ground that the Claimant would not have been born absent negligence on the part of the Defendant. It was also agreed, in principle, that claims for wrongful life (in the strictest sense) were excluded under statute.

The Defendant's response on the preliminary issue was that the Claimant's claim was one relating to her existence rather than her disability. It was, in effect, a claim for wrongful life. The Defendant's primary case was that such a claim was expressly excluded under the provisions of the Congenital Disabilities (Civil Liability) Act 1976 ('the Act'); and second, and in reliance upon the decision in ***McKay v Essex Area Health Authority* [1982] 2 All ER 771**, that it was not one recognised at common law.

Contrary to the Defendant's assertions, the Claimant maintained that her claim was not one for wrongful life, but one which fell within the scope of the Act. Her case could be (and in fact was) distinguished from that in ***McKay***.

The preliminary issue, which was decided in the Claimant's favour, focussed on the interpretation of Section 1 of the Act.

As a starting point, Section 1(1) provides that:

"If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) and a person (other than the child's mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child."

The term *"occurrence"* is intrinsically defined at Subsection 2. It is a term which must be construed by reference to the recommendations earlier made by the Law Commission.

In or around August 1974, the Law Commission published its report on Injuries to Unborn Children (Law Com No. 60). The report adopted the term *wrongful life*. Its terms of reference, in a post-Thalidomide era, were limited to liability for pre-natal injuries; and difficult questions on liability associated with the status of the claimant; where they have no existence at the time of injury, nor any existence separate to the mother. The recommendation by the Commission was that, where possible, claims for pre-natal injury should be equated to personal injury claims; such that where there is liability at common law to a parent causing pre-natal injury, the child should also be entitled to recover. The liability is a derivative one. It is derived from the duty owed by the defendant to the parent.

It was recognised that that approach, in the context of traditional principles, gave rise to several technical difficulties. For example, in the context of thalidomide, a pregnant mother who had been prescribed the medication may not have been physically affected by it. If she could not sustain a cause of action in her own right, then there would be no derivative liability for the child. The draft bill and its explanatory notes specifically addressed that point. Those provisions made clear that the child's right of action is not prejudiced by the inability of the mother to sue.

The Commission specifically considered cases where pre-natal injury is caused by events preceding conception (specifically relevant to ***Toombes***). It concluded, save for cases involving parental knowledge (not relevant in ***Toombes***), that there were various cases in which there should be a remedy for a child where their mother is affected by a tortious act or omission occurring prior to conception.

It was against that background that Lambert J held that a statutory claim had three components: i) a wrongful act; ii) an occurrence (defined within the Act); and iii) a child born with disabilities. It was the second of those components which required careful determination by the Court.

The Defendant submitted that there had been no occurrence for the claim to qualify under the statutory provisions. The term had to be given its ordinary and natural meaning. Here, the Defendant relied on the terms *event* or *occurrence* in the Commission's report; terms which were used interchangeably. Those terms suggested that something had to happen. The Defendant submitted that here nothing had happened: the state of the Claimant's mother had remained unchanged.

The Court accepted that the term should be given its ordinary linguistic meaning, but observed that the Act did not require the occurrence to involve a change or alteration in the mother's physiological state. That she may have been physically unaffected was specifically considered by the Commission. So too was the potential for sexual intercourse, in certain circumstances, to constitute a relevant occurrence. The Court concluded that intercourse when the Claimant's mother was in a folic acid deficient state was sufficient to constitute an occurrence for statutory purposes.

On the Defendant's secondary point, ***McKay*** was distinguished. The Act itself drew a clear distinction between pre-conception occurrences (relevant here) and occurrences which took place during the pregnancy (***McKay***). In the latter, the Court found that *"a negligent failure to prevent the birth of an already conceived child engages a range social and moral issues, not least the imposition upon the medical profession of a duty to advise abortion in possibly dubious circumstances"*. The same considerations did not engage in pre-conception cases.

Comment

In light of the decision in ***Toombes***, the answer to the title question must be yes: in principle, a disabled claimant can pursue a claim, where they would not have been conceived but for the negligence of the defendant. Those claimants would still of course need to prove a causal link between the sexual intercourse and the disability in order to succeed. It is an important decision, providing useful guidance in what is a controversial and sensitive area. In some respects, it may be taken to reflect the changing attitudes in modern times. Others may see it as being inconsistent with the decisions made elsewhere under the CICA scheme (to which the Court was specifically referred). On any view, it provides a valuable avenue for claimants who might otherwise have been limited to pursuing damages for wrongful birth through their parents. Claims pursued under the principles decided in ***Toombes*** may relate to the additional costs over the claimant's life-time as opposed to being limited to the life expectation of their parent (as is the case in claims for wrongful birth).

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What is the duty of a health professional in respect of third parties? *ABC v St George's Healthcare NHS Trust & ors.* [2020] EWHC 455 (QB)

Clinical Negligence – Breach Of Duty & Causation – Duty To Protect Third Parties – Huntington's Disease

Anthony Johnson considers *ABC v St George's Healthcare NHS Trust & ors.* [2020] EWHC 455 (QB). The High Court dealt with this extremely tragic and unusual case where it was ultimately held that the Defendant Health Trusts had not breached their duties of care to the Claimant ('ABC') by failing to warn her of the risk that she had inherited a serious genetic mutation. Yip J's judgment is of interest to all practitioners in the field due to the careful and detailed way in which she analyses the relevant factors relating to the successful establishment of the duty of care in novel circumstances, and then the lack of a breach thereof.

ABC's father ('XX') murdered her mother in 2007, for which he was convicted for manslaughter on grounds of diminished responsibility and made the subject of a Restricted Hospital Order. XX suffered from Huntington's disease (or Huntington's chorea), a serious chronic syndrome caused by a hereditary genetic mutation that causes progressive degeneration of nerve cells in the brain. XX had made it clear that he did not want ABC and her sister to know about his Huntington's disease, which remained the case even when he learned that ABC was pregnant. XX knew that his status meant that both she and her unborn child might also have Huntington's disease, and was aware that this might influence her decision about whether to continue with the pregnancy.

ABC came to learn of XX's Huntington's disease through an accidental disclosure by one of his treating physicians some months after she had given birth. She later underwent genetic testing which confirmed that she was suffering from Huntington's disease. The Claimant contended that the Defendants ought to have informed her of the risk that she had inherited the Huntington's gene at a time when it was still open to her to terminate her pregnancy.

At trial, the Claimant identified three potential routes to a duty of care being established. Firstly, that she was a patient of the Second Defendant, and so the case fell within the scope of the established duty of care arising out of the doctor-patient relationship. Secondly, the Second Defendant's forensic psychiatry unit had assumed responsibility for the Claimant by providing family therapy, and through her long-standing relationship with the team caring for XX and her involvement in his rehabilitation programme. The third alternative argued was that a duty of care should be imposed by 'incremental extension' pursuant to ***Caparo v. Dickman*** **[1990] 2 AC 605**.

Perhaps unsurprisingly, the Defendants contended that the imposition of a duty of care on the facts of the case would conflict with the duty of confidence that they owed to XX. It was argued that this was a novel claim that did not fall within either of the first two routes to the establishment of a duty that had been put forward by the Claimant, and that it would not be 'fair, just and reasonable' pursuant to *Caparo* (as interpreted in subsequent cases) to impose a duty in the circumstances.

The Judge found that the Claimant had not persuaded her of the existence of a duty of care in relation to the first two routes that had been proffered. Although the Claimant was a patient of the Second Defendant's family therapy team, the claim could not be properly characterised as badly performed family therapy because the relevant information did not become known to the Second Defendants within the context of that therapy. She held that there was no relevant assumption of responsibility because the Claimant had not relied upon the Defendants to undertake the balancing exercise as to whether she should be told of XX's diagnosis; in fact, it was her case that she knew nothing of it. The Second Defendant's assumption of

responsibility in relation to family therapy did not extent to all aspects of the Claimant's wellbeing and could not be interpreted as a general duty to prevent her father from causing her any further harm.

Consideration of the *Caparo* route to a duty of care necessitated a balancing act between the Claimant's interest in being informed about the risk of her suffering Huntington's, weighed against XX's interest in having the confidentiality of his diagnosis preserved. Having analysed a wealth of case-law put forward by both sides, in particular wrongful birth claims involving failed vasectomies, Yip J. concluded that *"the courts have been willing to recognise that a doctor or health authority may owe a duty of care to persons other than their primary patient but that such a duty is only capable of arising where there is a close proximal relationship between the claimant and defendant."*

Yip J. differentiated the position of the Second Defendant, whom she held did owe the Claimant a duty, with that of the other two Defendants. The Claimant was a patient of the Second Defendant and it had a significant amount of information about her and her circumstances, not least from the family therapy. In particular, it knew about the psychological harm that she had suffered as a consequence of XX's actions and had previously shared medical information about XX with her. The foreseeability of the Claimant suffering harm as a result of non-disclosure was not just foreseeable but was in fact foreseen. She rejected the Defendants' 'floodgates' argument, chiefly on the basis that the facts of the case were so unusual.

The Judge emphasised, however, that the scope of the duty was a relatively narrow one and acknowledged that different doctors may reach different conclusions when conducting the necessary balancing exercise identified. The applicable GMB and RCP guidelines allow for disclosure in the public interest to prevent 'serious harm'; the Judge commented that they do not mandate a particular outcome. She also made the well-tried observations that a decision is not negligent even though others may have reached a different decision, and that she was conscious of the need to afford latitude to clinicians under the pressure of day-to-day practice. At paragraph 193 she stated that *"If a defendant has conducted a balancing exercise properly in accordance with the professional guidance and has reasonably concluded that disclosure should not be made, they will have discharged their duty."*

Moving on to whether the duty that had been established had in fact been breached, Yip J. held that it had not. Her reasoning in this regard is summarised succinctly in paragraph 231 of the judgment:

"In short, this was a difficult decision which required the exercise of judgment. The relevant guidelines for psychiatrists made it clear that confidentiality should not be breached unless the doctor was certain that this was in the public interest. The GMC guidelines supported breaching confidentiality to avert a risk of death or serious harm. There was room for reasonable disagreement as to how the judgment should be exercised. That is demonstrated by the lack of consensus in the medical opinion before me. The claimant has not demonstrated that the views of the defendants' experts are illogical. I therefore conclude that the decision not to disclose was supported by a responsible body of medical opinion and cannot be considered to have amounted to a breach of the duty I have identified."

Although it was irrelevant to the outcome given her judgment on breach of duty, the Judge went onto find that the Claimant had not established causation in any event because she had not proven to the civil standard that she would have undergone a termination is she had been notified of the risk of Huntington's disease during pregnancy.

It follows, therefore, that whilst the decision in ABC stops well short of holding that health professionals are under a general duty to warn in similar circumstances, a claim in negligence could nevertheless be made out in a case that had appropriate facts. However, the Court's findings on breach of duty and causation, which are carefully reasoned, suggest that the situations in which that could occur are extremely limited.

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Once more unto the breach, dear friends: *Paul v Royal Wolverhampton NHS Trust* [2020] EWHC 1415 & *Polmear v Royal Cornwall Hospital NHS Trust* [2021] EWHC 196 (QB)

Clinical Negligence – Psychiatric Harm – Secondary Victim Claims – Alcock Criteria – Proximity – Shocking Event

Lionel Stride examines two recent High Court decision – *Paul v Royal Wolverhampton NHS Trust* [2020] EWHC 1415 and *Polmear v Royal Cornwall Hospital NHS Trust [2021]* EWHC 196 (QB) – which concerned secondary victim psychiatric harm claims in the clinical negligence context where there was a material gap between the commission of the initial tort and the 'shocking event'.

Claims by secondary victims arising from clinical negligence have long proved contentious, particularly where there is a temporal gap between the psychiatric damage that is the subject of the claim and the purported breach of duty in respect of the primary victim. The High Court has considered this complex issue in two recent judgments (*Paul* and *Polmear*).

Paul

On 9 November 2012, the Deceased was admitted to the defendant's hospital complaining of chest pain. He was discharged on 12 November 2012, following various investigations (but not coronary angiography). Over 14 months later, on 26 January 2014, he collapsed and died from a heart attack. His daughters both witnessed the shocking event. It was their case that, had the Defendant not failed to diagnose and treat their father's condition (heart disease and occlusive coronary artery atherosclerosis), he would not have suffered the cardiac arrest, and they would not have suffered consequent psychiatric injury. Significantly, the case was pleaded on the basis that the heart attack was the *first manifestation* of the earlier breach of duty.

The Claimants, as secondary victims, had to satisfy the 'control mechanisms' formulated in ***Alcock v Chief Constable of South Yorkshire* [1992] AC 310**. It was agreed between the parties that the only issue was whether they could satisfy the criterion of proximity.

The case, therefore, turned on the point at which this needed to be established. The Claimants contended that this was the occurrence of the 'shocking event' (their father's death); the Defendant contended that this was when the primary victim initially suffered actionable harm (the failure to diagnose/treat his condition).

Overturning the first-instance decision of Master Cook to strike-out the claims, Mr Justice Chamberlain preferred the Claimants' analysis: *"when the negligence and the damage are separate […]* ***the 'scene of the tort' can only mean 'the scene where damage first occurred"***. On the pleaded facts, the cause of action did not accrue until Mr Paul's eventual heart attack. The 'scene of the tort,' therefore, was the pavement where Mr Paul collapsed and died 14 ½ months later. The Claimants were present at that scene, thus potentially able to recover as secondary victims. Accordingly, their claims were reinstated and allowed to proceed.

Chamberlain J further considered, *obiter dicta*, the position if the Defendant's negligent failure of diagnosis had given rise to actionable damage before Mr Paul's death, concluding that the Claimants could still succeed because the qualifying 'event' would still be the heart attack in 2014: the 'event' only occurred when it became "manifest" or "evident".

Permission to appeal was granted in this case on 28 January 2021.

Polmear

In August 2014, the Claimants had taken their daughter, Esmee, to the GP following episodes where she could not catch her breath and turned blue. A referral was made to the Paediatric Department of the Defendant's hospital and it was decided that Esmee ought to undergo ECG monitoring for a 48-hour period. During

that period she had no attacks, and the conclusions was that symptoms were related to exertion only. However, Esmee's attacks continued and on 1 July 2015, whilst at school, she had a further attack as a result of which she passed away; it transpired that she had been suffering from Pulmonary Veno-Occlusive Disease. Both parents were present during the commencement of this fatal attack and witnessed the unsuccessful attempt of paramedics to resuscitate their daughter. Consequently, they developed significant psychiatric injury and brought secondary victim claims against the Defendant (who had admitted a failure to properly investigate Esmee's symptoms, and that with appropriate referral a diagnosis would have been made by mid-January 2015).

The Defendant applied to strike-out the secondary victim claims on the basis that Esmee's death had come many months after the negligent misdiagnosis. As such, there was insufficient proximity between the breach and injury to give rise to a cause of action since actional damage had already been sustained before that point. The application was resisted by the Claimants, as follows: -

i. The persisting episodes which occurred after the date by which a diagnosis ought to have been made were 'transient' and did not constitute manifest damage as a result of the Defendant's negligence for the purpose of the cause of action.

ii. Alternatively, if each episode did constitute 'damage,' then each episode constituted its own cause of action, and that included the one which occurred on the date of death for which there was clear proximity.

This time, Master Cook held that he was bound by the High Court's decision in Paul. The Master held that the episodes between the date of breach and Esmee's death were not 'transient,' but nonetheless took the following view: -

"On the facts pleaded, Esmee's collapse was a sudden event, external to the secondary victims, and it led very rapidly to her death. The event would have been horrifying to any close family member who witnessed it, and especially to the parents. ***In the circumstances the question is why should the fact that Esmee had suffered non-fatal episodes on previous occasions rule out the secondary victim claims of her parents. It seems to me that Esmee's final episode can be appropriately described as a fact and consequence of the Defendant's negligence. Mr Pitchers QC's submission that each episode should be treated as constituting "damage" to Esmee, so that each would constitute its own cause of action and not be a bar to recovery based upon the events of 1 July 2015 should be seen in this light."*** (paragraph 43)

Accordingly, the attack on 1 July 2015 was, by and of itself, a 'relevant event' even though it did not immediately coincide with, or precede, the first actionable damage to Esmee. The Defendant's application was therefore dismissed. However, Master Cook gave permission to appeal to the Court of Appeal pursuant to CPR 52.23. The *"compelling reason"* for this was the lack of clarity in the law, the slightly different facts to ***Paul*** (including symptoms and actionable damage prior to the sudden death) and the fact that a number of claims have already been stayed pending the Court of Appeal's upcoming hearing in ***Paul***.

Conclusion

We must now wait for further input from the Court of Appeal with the possibility that ***Paul*** and ***Polmear*** will be heard together. The outcome could have potentially profound consequences for secondary victim claims in a clinical negligence context where, in cases arising from a failure to diagnose or treat, there will often be a temporal gap between the initial breach of duty and the 'shocking event' on which such claims are based.

(Lionel Stride wrote in more detail about the case of ***Paul*** in the New Law Journal. This can be found here: https://www.newlawjournal.co.uk/content/back-to-square-one-)

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Jurisdictional war: *Harry Roberts v (1) Soldiers, Sailors, Airmen and Families Association, (2) Ministry of Defence and Allegemeines Krankenhaus Viersen GMBH (Part 20 Defendant)* [2020] EWHC 994 (QB)

Clinical Negligence – Private International Law – Conflict Of Law – Limitation

Foster J had to determine whether English or German law applied in a clinical negligence claim. If German law applied, was the claim time-barred? If it was, should the German limitation period be disapplied?

The Claimant was born at the AKV hospital in Germany in June 2000. His father was stationed in Germany with the British armed forces. The Claimant suffered from acute profound hypoxic brain injury, allegedly due to the negligence of a midwife.

The MoD had contracted with Guy's & St Thomas's Hospital NHS Trust ("Guy's") to procure healthcare services in Germany. Guy's contracted with AKV, a German hospital, to provide non-emergency healthcare to service personnel and their families. Midwifery care was provided by SSAFA, an armed forces charity, pursuant to another contract with the MoD. SSAFA provided English midwives who were required to work to English standards under the direction of AKV.

Applicable law?

German law applied. Per s.11(1) of the Private International Law (Miscellaneous Provisions) Act 1995, the *"general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur"*. The Claimant argued that this was displaced under s.12(1) as the *"significance of factors connecting the tort with another country"* meant it was *"substantially more appropriate"* for English law to apply. This is a high threshold, and the general rule has been displaced on very few occasions. There were factors going both ways. However, the Claimant had failed to show a *"clear preponderance"* of factors connected to the tort itself which tied the case to England.

Time-barred?

The Judge determined the claim was not time-barred under German law which required knowledge of misconduct or a deviation from professional standards for time to start to run against a party.

Disapplication?

If she was wrong about this, she would – exceptionally – have disapplied the limitation period pursuant to s.2 of the Foreign Limitation Periods Act 1984.

The case law emphasises the fact that different jurisdictions might make different policy choices. While German law did not protect minors and those under a disability in the same way as English law, this was not grounds for holding that the German limitation period was contrary to public policy.

However, she held (obiter) that applying the German limitation period to the specific facts of the case would impose *"undue hardship"* for the purposes of the Act because it imposed *"a detriment of real significance which should not be countenanced"*.

The factors taken into account included the stressful circumstances in which Mrs Roberts might be said to have acquired knowledge as a primigravida in a foreign country; the circumstances of the various legal proceedings; and the complicated background to the provision of care with the complicated and uncertain disposition of potential liability.

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Thou shalt be well housed: *Swift v Carpenter* EWCA Civ 1295

Clinical Negligence – Calculation Of Damages – Accommodation Claims – Purchase Of Specialist Alternative Property

James Arney QC considers the case of *Swift v Carpenter* [2020] EWCA Civ 1295, in which he acted for the Claimant/Appellant. The Court of Appeal's judgment in Swift represents a fundamental change in the way that the losses to a claimant of having to fund the purchase of special, alternative accommodation are assessed. This article looks at the history of the Swift case, the Court of Appeal's approach, and where Swift might go next. It includes some worked examples of the new formula.

At first instance, the Claimant's accommodation was just one of many issues in an eight-day contested quantum trial, where damages were initially secured at £4.1 million. A keen sportswoman and traveller, the Claimant recovered damages for 5 different prosthetic limbs, sports massage therapy for life, and the cost of flight upgrades for herself and her family (including children to age 18, including one not yet conceived).

Lambert J found that the Claimant needed to acquire special accommodation costing £900,000 more than her existing home, but awarded nil damages under that head of loss, finding herself bound to do so by the ***Roberts v Johnstone*** formula. She granted leave to appeal, noting historic anomalous results under ***Roberts v Johnstone*** and querying its suitability for the current economic climate.

The Court of Appeal

The issues before the Court were as follows:

- Whether the Court was bound by the decision in ***Roberts v Johnstone***;
- If not, whether the Court should alter the approach laid down in that case;
- If so, what approach should be adopted?

Was the Court bound by the decision in *Roberts v Johnstone*?

The Court of Appeal concluded that ***Roberts v Johnstone*** was guidance to achieve an end consistent with a principle, here the principle of restitution. The Court also looked at the nature of personal injury litigation, so often resolved by negotiation and settlement. Whilst this gives "the strongest possible need" for clear guidance and predictability, it also requires close attention to many changing circumstances (such as life expectancy, investment returns and changes in medical care).

Finding tension between these two aims, the Court found that Robert v Johnstone did apply, but it did so as authoritative guidance. It could therefore be revisited if it was ineffective in achieving the objective of the principle it was there to assist.

Should the Court alter the approach laid down in *Roberts v Johnstone*?

The Respondent challenged the assumption that the mechanism should be altered, advancing a *"cash flow approach"* in justification.

The Respondent argued that, based on historic house price inflation, Claimants do not in fact suffer a loss and would benefit from better returns on their investment in their more expensive home. Claimants could *"borrow"* money from other heads of loss and later resort to equity release to fund any needs in later life, by which time their fund would have grown.

This was rejected by the Court for two main reasons. Firstly, the degree of conjecture, complexity and uncertainty of outcome precluded this approach. Secondly, in an era of negative/very low positive returns on investments, forced investment of such a significant

proportion of a claimant's damages award in property purchase has identifiable negative effects. It can no longer be assumed that investment in property brings a return. This is discussed in full at paragraphs 140 to 149 in the judgment.

The Court of Appeal's approach: *Swift* awards

The Court's approach was put succinctly by Irwin LJ: -

"This Appellant showed at trial she has a need for £900,000 which can only be awarded as a lump sum. Is that to be withheld in total because of a potential capital windfall, very probably to her estate after her death, which will not be valued until then? My answer is no. Such an outcome does not represent fair or reasonable compensation." [paragraph 148]

A new, fairer mechanism was needed. The Court decided that the best way to calculate the current value of a potential windfall would be to award the full additional capital cost of the accommodation, reduced by way of the notional reversionary interest in the increased value of the Claimant's home, based on the Claimant's life expectancy. This adjusted amount would represent the Claimant's life interest in the property and avoid the Claimant's estate benefiting from a windfall on their eventual death.

The Court found the correct way to value reversionary interests would be via the small market that exists for their purchase and set the investment return on the reversionary interest at 5%. This *"cautious"* approach was decided by taking the lowest figure seen by experts in that market.

Where next?

Key to the judgment are the following two statements of the Court at paragraph 210:

i. *"This guidance should not be regarded as a straitjacket to be applied universally or rigidly. There may be cases where this guidance is inappropriate".*

ii. *"For longer lives, during negative or low positive discount rates, and subject to particular circumstances, this guidance should be regarded as enduring".*

So, there may well be instances where ***Swift*** is inappropriate. This is most obvious in cases with a short life expectancy, although the cut-off as to what constitutes *"short"* was not defined. Negotiations in obviously short life cases might therefore yield awards higher than a strict application of the Swift formula would produce. Alternatively, the practice may instead emerge for such short life claimants to sell their reversionary interest on the open market in order to bridge the gap and enable the appropriate property to be purchased. This will be an avenue that both parties would be wise to explore before running to the Court of Appeal for further guidance.

On what basis might the balance be tipped so that the ***Swift*** guidance would no longer *"endure"*?

i. Firstly, this judgment was given in response to the prevailing economic circumstances – if the economic circumstances were to change fundamentally, the guidance may have to evolve with it. In this event, it may be that the ***Swift*** approach provides the best starting point from which to consider justified departure.

ii. A second possibility may be found in the Court's discussion of the reversionary interests going forward, in which it envisaged a potential emerging market in the sale of these interests for Claimants needing to *"bridge the gap"* to buy their new property. The Court thought this may well give a better evidence base upon which to consider a revision of the 5% rate.

iii. In this way whilst there may be scope for an evidence-based medium-term variation in the 5% rate, the overall ***Swift*** approach should endure into the long term. For now, the Swift judgment brings much-needed clarity and predictability to an issue that had been unsatisfactory and uncertain for far too long.

Applying the Swift formula

The formula is as follows.

The value of reversionary interest is:
$R = (P – B) \times 1.05^{-L}$

Where:
R = reversionary interest
P = value of property now required
B = value of property owned but for the accident
L = predicted life expectancy

Damages award:
D = (P – B) – R

The calculation in the Appellant's case
P = £2,350,000
B = £1,450,000
L = 45.43 (normal life expectancy derived from Table 2)

Therefore:
§ R = (£2,350,000 - £1,450,000) x $1.05^{-45.43}$ = £98,087
§ D = £900,000 - £98,087 = £801,913

Practitioners will find helpful Annex 1 to the judgment, showing how the award works in different cases. Three further worked examples are below:

Scenario A: simple immediate purchase of £1m property. Life expectancy of 30 years.

- Applying the Swift formula, RI = £231,377, LI (damages) = £1m - RI = £768,623

Scenario B: As per Scenario A, but giving credit for a £150k but for property needed in 15 years.

- Using Table 35, the present value of £150k property needed in 15 years = £150k x 1.0383 = £155,745.
- Swift formula calculation for £155,745 over 15 year period: RI = £74,916, LI = £80,829.
- Damages = £768,623 (LI in new property: see Scenario A) -£80,829 life interest in but for property) = £687,794.

Scenario C: As per Scenario A, but giving credit for rent after 15 years at £6,500pa.

- Table 36 multiplier for 15 years = 15.29.
- Cost of but for rent = £6,500 x 15.29 = £99,385
- Table 36 deferment figure for 15 years = 1.0619
- Present value of but for rent = £99,385 x 1.0619 = £105,537
- Damages = £768,623 (LI in new property) --£105,537 = £663,086

Finally, in the course of the judgment, the Court gave the following helpful guidance for practitioners:

- The reversionary interest should be calculated to the predicted date of death in the great majority of cases, and not on prior sale of the property;
- A Claimant need not give credit for any "but for" mortgage costs;
- A Claimant's life expectancy is to be treated as a term certain.

For an in-depth discussion of the case, Derek Sweeting QC and James Arney gave this webinar on the key issues.

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Paid conception: *Whittington Hospital NHS Trust v XX* [2020] UKSC 14

Clinical Negligence – Damages – Infertility– Compensation To Undertake Commercial Surrogacy – Public Policy

Lionel Stride considers *Whittington Hospital NHS Trust v XX* [2020] UKSC 14 in which the Supreme Court held that a defendant hospital trust must pay for the cost of a commercial surrogacy arrangement abroad despite such arrangements being unlawful in the UK. The judgment provides an interesting analysis of compensatory damages in tort where the head of loss claimed might be considered to be against public policy.

Background

The Claimant was a young woman. She had cervical smear tests in 2008 and cervical biopsies in 2012 that were wrongly reported by the Hospital (liability was admitted). In 2013, when the errors were detected, her cervical cancer was too far advanced for her to have surgery. Instead, she was advised to have chemo-radiotherapy, which would result in her being unable to bear children naturally. Before having the treatment, she had eight eggs collected and frozen; the Claimant came from a large family and had always wished to have four children. Her preference was to enter into a commercial surrogacy arrangement in the USA (two with her own eggs and two with donor eggs fertilised by her husband's sperm) and she sought the cost of doing so as damages.

Fee-paying arrangements are unlawful in the UK but there is nothing in the criminal law stopping prospective parents from entering into a commercial agreement abroad. In the UK, surrogacy is permitted on a non-commercial basis where reasonable expenses can be paid.

At first instance the judge held that, following ***Briody v St Helen's & Knowsley Area Health Authority* [2000] EWCA Civ 1010**, the claim for commercial surrogacy must be rejected as being contrary to public policy, and that surrogacy using donor eggs did not restore the Claimant to her previous position (i.e., it did not restore her fertility or provide her with a genetically-related child) and as such no damages would be awarded. However, damages could be (and were) awarded for two own-egg surrogacies in the UK.

The Claimant appealed against the denial of her claim for commercial surrogacy and the use of donor eggs. The Hospital cross-appealed against the award for the two own-egg surrogacies. The Court of Appeal dismissed the cross-appeal and allowed the appeal on both points.

The Hospital then appealed to the Supreme Court. The appeal raised three issues: -

i. Can damages to fund surrogacy arrangements using the Claimant's own eggs be recovered?
ii. If so, can damages to fund arrangements using donor eggs be recovered?
iii. In either event, can damages to fund the cost of commercial surrogacy arrangements in a country where this is not unlawful be recovered?

By a 3-2 majority the Supreme Court upheld the Court of Appeal's decision. Lady Hale gave the majority judgment, with which Lord Kerr and Lord Wilson agreed. Lord Carnwath gave a judgment dissenting on issue three only, with which Lord Reed agreed.

Reasoning of the Majority

Lady Hale began by emphasising the restitutionary purpose of damages in tort. This principle is subject to limitations – for instance where the purpose for which damages are claimed would be contrary to legal or public policy – but it is nevertheless the starting point for any assessment of compensation: -

"The object of damages in tort is to put the claimant, as far as possible, back in the position in which she would

have been had the tort not been committed. Money has to compensate, as far as it can, for those injuries that cannot be cured. For some women, the ability to bear and to rear children is a vital part of their identity." (paragraph 1).

Lady Hale (with whom all members of the Court agreed on this issue) did not consider that the case involved consideration of the illegality defence as nothing which the Claimant proposed to do involved a criminal offence either here or abroad.

Next, Lady Hale affirmed that the Court was not bound by ***Briody***, and noted that the persuasiveness of that ratio had been undermined by various progressive changes. Specifically, at paragraphs 28 – 39, Lady Hale set out the numerous ways in which the law and social attitudes had developed since ***Briody*** to encompass a wider definition of 'family life' and to give women greater autonomy over the decision to become surrogates.

Therefore, on issue (i), the Supreme Court found that the costs of UK-based, non-commercial surrogacy were recoverable. Whether it was reasonable to seek damages for this head of loss depended on the chances of a successful outcome; in the Claimant's case, those chances were reasonable. Moreover, the primary argument to the contrary – that it might be contrary to legal/public policy to bring into existence a child who would not other have been born – was dismissed peremptorily.

As to issue (ii), the Supreme Court held that the costs of surrogacy using donor eggs were also recoverable. The view expressed in ***Briody***, that damages for donor-egg surrogacy arrangements could not be recovered as they were not restorative of what the Claimant had lost, was *"probably wrong then and is certainly wrong now"* (paragraph 45). Lady Hale identified four things a mother might cherish: *"the experience of carrying and giving birth to a child; the perpetuation of one's own genes; the perpetuation of one's partner's genes; and the pleasure of bringing up a child as one's own"* and said that the last two were available from surrogacy using donor eggs, making their use unavoidably incomplete but permissible restitution (paragraph 47).

On issue iii), the Supreme Court found that the costs of commercial surrogacy in the USA were recoverable. Lady Hale reasoned that, whilst UK courts will not enforce a foreign contract if it would be contrary to public policy, due to the developments in law and social attitudes it was no longer contrary to public policy to award damages for a foreign surrogacy arrangement, provided that certain limiting factors applied (predominantly centred on adequate safeguarding of the child). Again, Lady Hale highlighted that it is not a crime in the UK for the commissioning parent or surrogate to enter into a commercial agreement; *"it has never been the object of the legislation to criminalise the surrogate or commissioning parents"* (paragraph 51).

The Dissent

Lord Carnwath's dissenting judgment (with which Lord Reed agreed) differed from the majority on the third issue only and emphasised the principle of legal coherence: -

*"**The objective is consistency or coherence between the civil and criminal law within a particular system of law.** The fact that the laws of other jurisdictions and other systems may reflect different policy choices seems to me beside the point. **It would in my view be contrary to that principle for the civil courts to award damages on the basis of conduct which, if undertaken in this country, would offend its criminal law."*** (paragraph 66).

Lord Carnwath also suggested that public attitudes remained divided and difficult to ascertain.

Where next?

This is a landmark judgment that significantly extends the principle of compensatory damages to encompass circumstances where the means of achieving restitution would require the claimant to enter into a contractual arrangement in a different jurisdiction. Provided such conduct is not in itself illegal in the UK, there is no longer any bar to such damages being awarded.
The immediate and certain application is the right to recover the reasonable cost of commercial surrogacy arrangements abroad (such as in the US) but the principle could readily extend to other situations; for example, potentially it might include payment for adoption of a baby (if surrogacy were not feasible), which is common practice in the US (but not permitted in the UK). It might also extend to the purchase of treatment or equipment (for example new limb technology in amputation cases) where the same benefits are not achievable in the UK. It remains to be seen whether limits will be set on its application. On any view, though, it will be seen as common sense for many that a mother who has lost the ability to conceive, through the negligence of another, now has the right explore to the full extent all reasonable means of creating and raising her own family.

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But he was the business! *Rix v Paramount Shoplifting Co Ltd* [2020] EWHC 239 & *Head v Culver Hearing Co Ltd* [2021] EWCA Civ 34

Clinical Negligence – Damages – Negligence Resulting In Early Death – Calculation Of Loss Of Income From Claimant's Business

Simon Browne QC and Olivia Rosenstrom examine the Court's approach in two recent cases to the calculation of the financial loss from a Claimant's business following his death.

Introduction

Is a financial loss sustained when an individual dies prematurely, leaving behind a business which maintains, or increases, its profitability following their death and continues to generate income? If so, how is the loss quantified? Two recent personal injury cases provide useful guidance and analysis in relation to these questions, as well as other aspects of claims for lost years.

Background

Rix v Paramount Shopfitting

This judgment by Mr Justice Cavanagh considered the basis for, and quantification of, the Claimant's dependency claim under the Law Reform (Miscellaneous) Provisions Act 1934, and the Fatal Accidents Act 1976 ('FAA'). The Claimant's husband, Mr Rix, died from asbestos-related mesothelioma at the age of 60. Mr Rix had been exposed to asbestos whilst working for the Defendant in the 1970s. Having left the Defendant's employ, Mr Rix had spent his remaining career building a successful business. At the time of his death, he was running a profitable company, MRER Ltd.

The primary dispute between the parties was whether the Claimant had sustained any financial loss for the purposes of section 3 of the FAA. The Defendant denied that any loss had been sustained given that MRER Ltd was more profitable since Mr Rix's death. The Claimant argued that notwithstanding the thriving business, she had sustained a loss.

Cavanagh J considered relevant leading Court of Appeal authorities, including ***Wood v Bentall Simplex Limited*** **[1992] PIQR 332 (CA),** ***Cape Distribution v O'Loughlin*** **[2001] EWCA Civ 178, and** ***Welsh Ambulance Services NHS Trust and another v Jennifer Mary Williams*** **[2008] EWCA Civ 81**. From these cases, Cavanagh J derived the following principles: -

i. Whether there has been a loss of financial dependency is a question of fact, in relation to which the court takes a realistic and common-sense approach.

ii. There is no hard-and-fast approach to the determination or quantification of financial dependency.

iii. There is a difference between income-producing assets or investments which continue to produce an income, unaffected by the deceased's death, and a business which was benefitting from the labour, work, and skill of the deceased. There is no loss in relation to the former, but in the latter case the dependants have lost the value of the deceased's hard work.

iv. The question of whether a dependant has suffered a loss of financial dependency is fixed and determined at the date of death. Therefore, the success or failure of a business after the death of the deceased does not affect the existence or measure of loss.

Applying the above case law and derived principles to the facts of the instant case, Cavanagh J concluded that the Claimant had sustained a loss of financial dependency. The Defendant sought to distinguish the Claimant's case from ***Wood, O'Loughlin***, and ***Williams***, by pointing to differences in the corporate structure of Mr Rix's business as compared with these other cases.

Cavanagh J rejected these arguments and emphasized the need to consider the practical reality in relation to financial dependence rather than corporate, financial or tax structures. In the instant case, the reality was that the income from the business was the result of Mr Rix's hard work and flair.

As to the quantification of the claim, Cavanagh J reiterated the principles derived from case law, and emphasized the need to separate out income derived from capital, from that which was derived from labour, as only the latter forms part of the financial dependency.

The Defendant proposed to compare the profitability of MRER after Mr Rix's death with an estimate of its profitability, had he survived. Given the principle that dependency is fixed at the time of death, the Defendant's proposed method of quantification was rejected.

Cavanagh J agreed with the Claimant's preferred approach for quantifying her financial dependency by reference to her share of the annual income that she and Mr Rix would have received if he had lived. In ***O'Loughlin*** and ***Williams***, the court had quantified the loss by reference to the annual value of the deceased's services. However, Cavanagh J noted that the court must adopt the method of valuation which best suits the facts of the case. In the instant case, the dependency claim was limited to income produced by Mr Rix's labour; thus, the need to separate out income derived from capital did not arise, as it had in ***O'Loughlin*** and ***Williams***. On the evidence, the Claimant's preferred approach was more likely to lead to a fair and accurate figure for loss of dependency.

Head v Culver Heating Co Ltd

The factual background of this appeal is similar to that of *Rix*; however, it involved a claim for damages for personal injury and consequential loss rather than a dependency claim under the Fatal Accidents Act 1976. Similar to Mr Rix, Mr Head had been exposed to asbestos whilst working for the Defendant and died prematurely from asbestos-related mesothelioma. After working for the Defendant, he had become the founder and managing director of his own company, Essex Mechanical Services Ltd "EMSL". Prior to his death, he issued a claim for damages and was able to give evidence at the quantum only trial before Her Honour Judge Clarke in April 2019. When Mr Head passed away in November of the same year, the claim was continued by his widow and executrix, on behalf of his estate.

The key dispute between the parties was in relation to the quantification of damages for lost years. EMSL was a successful business and it was not disputed that Mr Head was the driving force behind the company. The forensic accountancy evidence indicated that it was more likely than not that the profitability of the company would not diminish following Mr Head's death. The Defendant argued that a relevant factor in the 'lost years' calculation was that Mr Head's dividend income, which constituted a substantial part of his earnings, would likely survive his death. The Defendant relied on ***Adsett v West*** **[1983] Q.B 826**, which emphasizes the need to distinguish between income arising from a claimant's capacity to work and income derived from capital which survived the claimant. Only in relation to the former could damages be recovered in a 'lost years' claim, subject to a deduction for living expenses. HHJ Clarke accepted these submissions and concluded that the surviving dividend income would be greater than the surplus income that Mr Head enjoyed at the time, because his estimated living expenses were greater than his director's salary. Thus, she found that there was no loss in the 'lost years'.

The appeal of this finding came before the Court of Appeal only three months after Cavanagh J's judgment in ***Rix***. Lord Justice Bean provided the lead judgment, with which Lord Justice Males and Lady Justice Andrews agreed. He endorsed the distinction drawn in ***Adsett*** between loss of earnings from work and loss of earnings from investments. However, for income to be properly classified as investment income, it must be return on a passive investment and cannot be the fruits of the Claimant's labour. Bean LJ offered the example of an individual living on investments from money won on the National Lottery. Likewise, had the Claimant retired from EMSL prior to his diagnosis, but retained his shareholding, there may have been a loss of pension but there would be no loss of future earnings. However, that was far from the reality in the instant case, it being accepted that Mr Head was the driving force behind the company. It had been wrong to classify all but Mr Head's modest salary as income from capital rather than earnings from work. Endorsing Cavanagh J's analysis in ***Rix***, Bean LJ found that at the time of his death, all the income received by Mr Head and his wife was the product of his hard work and flair, not a return on a passive investment.

Accordingly, the appeal was allowed, and the case remitted for an assessment of damages for lost years.

Comment

These decisions thus achieve consistency in relation to lost income and dependency associated with premature death. Whilst the classification of income in borderline cases is likely to remain a battle ground, some level of certainty is also achieved through the proper distinction between income from a passive investment and from work. In this regard, practitioners will need to carry out a practical and realistic analysis of the nature of earnings to determine whether they can genuinely be classified as income from a passive investment or income from work.

Another notable aspect, particularly evident from ***Rix***, is the fact specific approach taken to quantification. Keeping in mind the useful principles set out in ***Rix***, practitioners will need to take a flexible approach and consider the most appropriate method of quantification given the facts and circumstances of each case.

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