

Next Talk: 14:00 – 14:40

Clinical negligence: Update on duty of care



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Outline

- ▶ Non-delegable duties
- ▶ Scope of duty

Non-delegable duties and vicarious liability

- ▶ Several recent cases in the context of NHS treatment
- ▶ Commonly considered together in these cases BUT separate and different questions

County Court dental cases

- ▶ *Ramdhean v Agedo & FDPL*, 28/1/2020, HHJ Belcher, Leeds County Court
- ▶ *Breakingbury v Croad*, 19/4/2021, HHJ Harrison, Cardiff County Court

Hughes v Rattan [2021] EWHC 2032 (QB)

- ▶ 21/7/2021, Heather Williams QC sitting as Deputy High Court Judge
- ▶ Transferred from Central London CC
- ▶ Trial of preliminary issue: vicarious liability or non-delegable duty of care?

Hughes v Rattan [2021] EWHC 2032 (QB)

- ▶ Parties agreed that

- ▶ Non-delegable duty of care: *Woodland v Swimming Teachers Association & Ors* [2013] UKSC 66
- ▶ Vicarious liability: *Various Claimants v Barclays Bank plc* [2020] UKSC 13

Woodland v Swimming Teachers Association & Ors [2013] UKSC 66

▶ Lord Sumption's five cumulative factors

- ▶ (1) C is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury
- ▶ (2) There is an antecedent relationship between C and D, independent of the negligent act or omission
 - ▶ (i) which places C in the actual custody, charge or care of D, and
 - ▶ (ii) from which it is possible to impute to D the assumption of a positive duty to protect C from harm, and not just a duty to refrain from conduct which will foreseeably damage C
- ▶ It is a characteristic of such relationships that they involve an element of control over C, which varies in intensity from one relationship to another

Woodland v Swimming Teachers Association & Ors [2013] UKSC 66

- ▶ Lord Sumption's five cumulative factors (cont.)
 - ▶ (3) C has no control over how D chooses to perform those obligations, i.e. whether personally or through third parties
 - ▶ (4) D has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards C, and TP is exercising, for purposes of that function, D's custody or care of C and the element of control that goes with it
 - ▶ (5) TP has been negligent not in some collateral respect but in the performance of the very function assumed by D and delegated by D to TP

Hughes v Rattan: non-delegable duty

▶ C argued

- ▶ (1) applied – no distinction of principle between dental patients and hospital patients
- ▶ (2) applied – context of antecedent relationship with the practice. Treated under GDS contract between NHS and D.
- ▶ (3) applied – no control over how D chose to perform obligations to provide dental services. Could only request particular dentist.
- ▶ Relied upon *Ramdhean* and *Breakingbury*

Hughes v Rattan: non-delegable duty

▶ D argued

- ▶ Before consideration of *Woodlands*, must show that there was a specific duty on D to do the specific task that was negligently performed
 - ▶ C disagreed
- ▶ (1) did not apply – administrative service
 - ▶ *A (A Child) v MoD* [2005] QB 183
 - ▶ *Farraj v King's Healthcare NHS Trust* [2010] 1 WLR 2130
- ▶ Therefore (2) not established either
- ▶ (3) not made out – free to choose dentist, or go to a different practice entirely

Hughes v Rattan: non-delegable duty

▶ Held:

- ▶ No need for D to assume personal responsibility to provide with dental treatment – no such requirement identified in *Woodland*
- ▶ Sumption: “The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant’s. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own.”

Hughes v Rattan: non-delegable duty

▶ Held:

▶ Factor (1) made out

- ▶ Was a patient of the practice
- ▶ *A (A Child)* and *Farraj* distinguished

▶ Factor (2) made out

- ▶ GDS contract is relevant
- ▶ C's perception not directly relevant, but factors that led to that perception are relevant objective indicators
- ▶ Goodwill relating to patients
- ▶ Clinical freedom of dentists not relevant – control of C, not environment

▶ Factor (3) made out

Various Claimants v Barclays Bank plc [2020] UKSC 13

▶ Baroness Hale

- ▶ "Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other... The second is the connection between that relationship and the tortfeasor's wrongdoing."
- ▶ "The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant."
- ▶ "The boundaries of vicarious liability have been expanded by recent decisions of the courts to embrace tortfeasors who are not employees of the defendant, but stand in a relationship which is *sufficiently* analogous to employment."

Various Claimants v Barclays Bank plc [2020] UKSC 13

▶ Baroness Hale

- ▶ "There appears to have been a tendency to elide the policy reasons for the doctrine of the employer's liability for the act of his employees, set out in para 35 of *Christian Brothers*... with the principles which should guide the development of that liability into relationships which are not employment but which are sufficiently akin to employment to make it fair and just to impose such liability."
- ▶ "It would be going too far down the road to tidiness for this court to align the common law concept of vicarious liability, developed for one set of reasons, with the statutory concept of worker, developed for quite a different set of reasons."

Christian Brothers: 5 policy reasons

- ▶ (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability
- ▶ (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer
- ▶ (iii) the employee's activity is likely to be part of the business activity of the employer
- ▶ (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee
- ▶ (v) the employee will, to a greater or lesser degree, have been under the control of the employer

Hughes v Rattan: vicarious liability

- ▶ C argued:
 - ▶ Sufficiently akin to employment
 - ▶ Example of 'doubtful case' where Lord Phillips' 5 incidents were relevant
 - ▶ Integral part of D's business activity – enabling him to fulfil commitment to PCT
 - ▶ Associate Agreement reinforced this position

Hughes v Rattan: vicarious liability

- ▶ D argued:
 - ▶ Associates were independent contractors
 - ▶ No obligation to work and could work elsewhere
 - ▶ Bore some profit/loss risk
 - ▶ D no control over their work

Hughes v Rattan: vicarious liability

▶ Held

- ▶ Sufficient degree of control (can be relatively slight)
- ▶ Key questions = whether working as part of their own independent businesses or as an integral part of D's business when they provided dental treatment at the practice
- ▶ Was integral part of practice and sufficiently akin to employment
- ▶ Unnecessary to consider Lord Phillips' 5 policy incidents in any detail

What does this mean?

- ▶ Aligned with medical position
- ▶ Easier for C
 - ▶ But name practitioners too?
- ▶ D indemnity from associates
 - ▶ Check insurance
- ▶ Private vs NHS

Hopkins v Akramy & Ors [2020] EWHC 3445 (QB)

- ▶ 15/12/2020, HHJ Melissa Clarke sitting as High Court Judge
- ▶ Preliminary issue: whether PCT owed a non-delegable duty of care for health services provided to NHS patients by a private company
 - ▶ D1 = nurse practitioner at D2's medical centre
 - ▶ D2 = operated out of hours medical centre under contract with D3
 - ▶ D3 = PCT

Hopkins v Akramy & Ors [2020]

EWHC 3445 (QB)

- ▶ S.83 NHS Act 2006:
- ▶ (1) Each PCT must, to the extent that it considers necessary to meet all reasonable requirements, exercise its powers so as to provide primary medical services within its area, or secure their provision within its area.
- ▶ (2) A PCT may (in addition to any other power conferred on it) -
 - ▶ (a) provide primary medical services itself (whether within or outside its area),
 - ▶ (b) make such arrangements for their provision (whether within or outside its area) as it considers appropriate, and may in particular make contractual arrangements with any person...

Hopkins v Akramy & Ors [2020]

EWHC 3445 (QB)

▶ C argued:

- ▶ S.83(2) cannot, and does not, define the scope or content of the duty imposed on PCTs by s.83(1)
- ▶ Cases involving duty to arrange (*Armes* etc) can be distinguished – duty in this case to “provide” or “secure [the] provision” goes further than mere duty to arrange
- ▶ Inconsistent with public understanding of NHS
- ▶ Long established law that hospital owes a non-delegable duty to take reasonable care in the performance of medical services (ref *Woodland* criteria)
- ▶ Non-delegable duty at statute and common law

Hopkins v Akramy & Ors [2020] EWHC 3445 (QB)

- ▶ D3 argued:
 - ▶ Duty was mandatory but in alternate terms
 - ▶ Duty to “secure [the] provision” was no more than a duty to arrange
 - ▶ *Woodland* criteria only apply to non-delegable duty of care at common law and not relevant where an applicable statutory regime - but can operate as a “cross-check”

Hopkins v Akramy & Ors [2020] EWHC 3445 (QB)

► Held:

- *Woodland* criteria only apply to “cases where the common law imposes a duty on the defendant” (para 7 of *Woodland*). See also Lord Reed JSC at para 38 of *Armes v Notts County Council* [2018] AC 355.
- “Where the Court finds a statutory non-delegable duty, the fact that without such statutory provision(s) a non-delegable duty would not be imposed by a common law analysis cannot affect the position imposed by parliament, and so the *Woodland* criteria do not provide a cross-check. Where the court finds that the statute is silent on delegability, again the *Woodland* criteria do not provide a cross-check although they will provide the answer to the question of whether the common law imposes a non-delegable duty. However, if the court finds that the statute provides that the duty is delegable, the common law cannot override that.”

Hopkins v Akramy & Ors [2020]

EWHC 3445 (QB)

▶ Held:

- ▶ Distinction between duty to arrange and duty to perform (*Armes*)
- ▶ Duty in s.83(1) is mandatory but expressed in the alternative and so can be discharged in two alternate ways – by providing primary medical services, or by securing the provision of primary medical services
- ▶ If Parliament intended only a duty to perform, would not have used those words
- ▶ C was seen as an NHS patient at an OOH facility arranged by the NHS with her care provided free at the point of use

What does this mean?

- ▶ Just a matter of statutory interpretation
- ▶ But policy concerns
- ▶ For parliament to act?

Scope of duty

- ▶ Birth defects from negligent pre-conception advice
 - ▶ *Meadows v Khan* [2021] UKSC 21
 - ▶ *Toombes v Mitchell* [2020] EWHC 3506 (QB)
- ▶ Secondary victims:
 - ▶ *Polmear v Royal Cornwall Hospitals NHS Trust* [2021] EWHC 196 (QB)
 - ▶ *King v Royal United Hospitals Bath NHS Foundation Trust* [2021] EWHC 1576 (QB)
- ▶ Miscellaneous
 - ▶ *Ismail v Joyce* [2020] EWHC 3453 (QB)
 - ▶ *XM v Leicestershire Partnership NHS Trust* [2020] EWHC 3102 (QB)

Scope of duty

- ▶ Pre-conception advice

- ▶ *Meadows v Khan* [2021] UKSC 21

- ▶ *Toombes v Mitchell* [2020] EWHC 3506 (QB)

Meadows v Khan [2021] UKSC 21

- ▶ C given negligent advice by D which led to her believing that she was not a carrier of a haemophilia gene
- ▶ C was a carrier – could have been discovered with genetic testing
- ▶ C later gave birth to a son, who had haemophilia and autism
- ▶ Parties agreed that the autism was not caused by the haemophilia nor made more likely by it
- ▶ C claimed against D for the additional costs of raising her son

Meadows v Khan [2021] UKSC 21

- ▶ D accepted additional costs related to haemophilia were recoverable, but not those arising from raising a child with autism
- ▶ At first instance, claim was allowed in full
- ▶ D was successful on appeal
- ▶ Case then went to Supreme Court where C's appeal was dismissed – leading judgment by Lord Hodge and Lord Sales

Meadows v Khan [2021] UKSC 21

- ▶ C argued:

- ▶ The scope of duty principle as applied in SAAMCO does not apply to claims arising out of clinical negligence
- ▶ If the court were to conclude that that principle did apply generally, an exception should be crafted for cases of clinical negligence.

Meadows v Khan [2021] UKSC 21

- ▶ *SAAMCO: South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191
- ▶ What is often called the SAAMCO principle or the scope of duty principle is that a defendant is not liable in damages in respect of losses of a kind which fall outside the scope of his duty of care [36, *Meadows v Khan*]
- ▶ Lord Hoffman, p211 of *SAAMCO*: "Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action."
- ▶ Counterfactual test: if the information that was wrong was actually correct, would the loss have still been suffered?

Meadows v Khan [2021] UKSC 21

- ▶ Para 28 “[...] a helpful model for analysing the place of the scope of duty principle in the tort of negligence [...]”
 - ▶ (1) *Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)*
 - ▶ (2) *What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)*
 - ▶ (3) *Did the defendant breach his or her duty by his or her act or omission? (the breach question)*
 - ▶ (4) *Is the loss for which the claimant seeks damages the consequence of the defendant’s act or omission? (the factual causation question)*
 - ▶ (5) *Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant’s duty of care as analysed at stage 2 above? (the duty nexus question)*
 - ▶ (6) *Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)”*

Meadows v Khan [2021] UKSC 21

- ▶ Issue was scope of duty
- ▶ Para 38 *“In our view it is often helpful to ask the scope of duty question before turning to questions as to breach of duty and causation. It asks: what, if any, risks of harm did the defendant owe a duty of care to protect the claimant against? The question is appropriately asked and answered at this stage, if it can be”*
- ▶ Para 49 *“The scope of duty question may also arise in relation to the extent of damage. There may be elements of loss which the claimant has suffered as a consequence of a defendant’s acts or omissions which are within the defendant’s duty of care, and elements which are outside the scope of that duty. In such circumstances, which arose in SAAMCO and the other valuer’s negligence cases, the duty nexus question falls to be addressed after the court has determined that there is a (factual) causal connection between the defendant’s act or omission and the loss for which the claimant seeks damages”*

Meadows v Khan [2021] UKSC 21

▶ Lord Hodge and Lord Sales [65]

- ▶ The scope of duty question depends principally upon the nature of the service which the defendant has undertaken to provide to the claimant
- ▶ The question is what is the risk which the service which the defendant undertook was intended to address?
- ▶ Where a medical practitioner has not undertaken responsibility for the progression of the pregnancy and has undertaken only to provide information or advice in relation to a particular risk in a pregnancy, the risk of a foreseeable unrelated disability, which could occur in any pregnancy, will not as a general rule be within the scope of the clinician's duty of care.

Meadows v Khan [2021] UKSC 21

▶ Lord Hodge and Lord Sales

- ▶ Necessary in every case to consider the nature of the service which the medical practitioner is providing in order to determine what are the risk or risks which the law imposes a duty on the medical practitioner to exercise reasonable care to avoid [63]
- ▶ What is the purpose for which the C obtained the GP's service? In this case the service was concerned with a specific risk [67]
- ▶ Whilst there was a causal link between D's mistake and the birth of C's child, that was not relevant to the scope of D's duty [68]

Meadows v Khan [2021] UKSC 21

- ▶ Lord Burrows: There is no good reason why the SAAMCO principle should not apply to information or advice given by a doctor to her patient just as it applies to the advice or information given by other professionals. Indeed, Lord Hoffmann's famous mountaineering hypothetical example given in SAAMCO involved a doctor giving negligent information to a patient. [72]
- ▶ Lords Hodge and Sales: One can also apply the SAAMCO counterfactual as an analytical tool by asking what the outcome would have been if Dr Khan's advice had been correct and Ms Meadows had not been a carrier of the haemophilia gene. The undisputed answer is that Adejuwon would have been born with autism. [68]

Meadows v Khan [2021] UKSC 21

▶ Lord Burrows [77]

- ▶ The purpose of the advice or information is of central importance. The claimant had approached the general practice surgery, as the defendant knew or ought to have known, for the specific purpose of ascertaining whether or not she was a carrier of haemophilia [...] The purpose of the advice or information was not to ascertain the general risks of pregnancy, including the risk of autism.
- ▶ In the light of that purpose, it was fair and reasonable that the risk of the child being born with haemophilia should be allocated to the doctor; but that the risk of the child being born with autism should be allocated to the mother.
- ▶ Applying the SAAMCO counterfactual test as a cross-check, it supports a decision that the autism losses were outside the scope of the doctors duty of care. [...] would the claimant have suffered the same loss had the information/advice been true, the answer is yes as regards the autism losses (so that the scope of the duty of care does not extend to the recovery of the autism losses) but no as regards the haemophiliac losses (so that the scope of the duty of care does extend to the recovery of the haemophiliac losses).

Meadows v Khan [2021] UKSC 21

▶ Lord Leggatt

- ▶ The appeal turns on whether or not there was also a causal connection between the fact that the claimant was carrying a gene for haemophilia and the autism from which Adejuwon suffers. That question is answered conclusively by the parties agreement that the autism was not caused by his haemophilia nor made more likely by it. It follows that the costs associated with his autism are not within the scope of the defendant's duty of care. [93]
- ▶ [...] as I said at the start of this judgment, it is straightforward. The subject matter of Dr Khan's advice was limited to whether Ms Meadows was carrying a haemophilia gene and accordingly only losses causally connected (or, if the terminology is preferred, which have a sufficient nexus) to that subject matter are within the scope of the defendant's duty. [98]

Toombes v Mitchell [2020] EWHC 3506 (QB)

- ▶ C suffered from a congenital development defect causing spinal tethering, giving her limited mobility and double incontinence
- ▶ C alleged that her disability was due to D's failure to advise her mother to take folic acid prior to conception
- ▶ C advanced the claim as one for wrongful conception and birth (wrongful life claims by the mother would only last for the mother's lifespan)
- ▶ D argued that the claim was one for wrongful life and thus excluded under the Congenital Disabilities (Civil Liability) Act 1976
- ▶ Trial was of a preliminary issue to determine whether there was a cause of action

Toombes v Mitchell [2020] EWHC 3506 (QB)

- ▶ C succeeded
- ▶ D argued that this was an action for wrongful life, which was barred by policy reasons, because “but for” the negligence, C would not have been conceived at all and thus never had a chance of being born other than disabled
- ▶ Section 1(2)(a) of the Act had no express prohibition on such claims
- ▶ Para 52 “[...] *A negligent failure to prevent the birth of an already conceived child engages a range of social and moral policy issues, not least the imposition upon the medical profession of a duty to advise abortion in possibly dubious circumstances. However, claims based upon a wrongful act before conception which leads to the intercourse and conception raise no such difficulties.*”

Secondary victims

- ▶ Secondary victims:

- ▶ *Polmear v Royal Cornwall Hospitals NHS Trust* [2021] EWHC 196 (QB)

- ▶ *King v Royal United Hospitals Bath NHS Foundation Trust* [2021] EWHC 1576 (QB)

Polmear v Royal Cornwall Hospitals NHS Trust [2021] EWHC 196 (QB)

- ▶ Appeal outstanding
- ▶ Parents claimed for psych injury from witnessing their young daughter's death
- ▶ Cause of death was undiagnosed pulmonary veno-occlusive disease
- ▶ Daughter had been suffering episodes of pallor and poor breathing
- ▶ On day of death, C2 had walked to school with daughter, who was white and clammy
- ▶ Once daughter was dropped off, C2 was phoned and returned to find daughter collapsed and being given first aid
- ▶ C1 was phoned and arrived to daughter being given resus attempts
- ▶ Cs and daughter were conveyed by ambulance to hospital, but continued resus attempts were unsuccessful
- ▶ Death was months after failure to diagnose

Polmear v Royal Cornwall Hospitals NHS Trust [2021] EWHC 196 (QB)

- ▶ Strike out application by D
- ▶ Before Master Cook (who struck out the claims in *Paul v The Royal Wolverhampton NHS Trust*)
- ▶ D argued that actionable damage was manifest through the episodes the daughter suffered and that *Paul* was distinguishable
- ▶ C argued *Taylor v A Novo* was distinguishable – actionable damage was manifest at the point of the daughter’s collapse, and the preceding episodes were transient and did not constitute negligence becoming manifest
- ▶ Master Cook rejected D’s submission that prior actionable damage was a bar to recovery, and he declined to strike out the case because he was unable to say it was bound to fail

King v Royal United Hospitals Bath NHS Foundation Trust [2021] EWHC 1576 (QB)

- ▶ Claim for psych damage by a father, based on visiting his new born son for the first time in the neonatal ICU
- ▶ Thereafter, the family had to decide to switch to palliative care
- ▶ The event was held not to be a sudden shocking and horrifying event within the meaning of the *Alcock* criteria
- ▶ *"38. What is clear from the authorities is that "shock" in the Alcock sense requires something more than what might be described as "shocking" or "horrifying" in ordinary speech. It may be for that reason that the word "exceptional" has crept in, not as an addition to the test, but as an explanation that the shocking event must be outside ordinary human experience in the context in which it occurs."*
- ▶ *"39. In ordinary language, what happened to the Claimant was "horrifying" [...] But from time to time such things happen, with or without clinical negligence, and hospital staff have to prepare the parents and allow them to see their damaged child."*

Miscellaneous

- ▶ *Ismail v Joyce* [2020] EWHC 3453 (QB)
 - ▶ Rate of TB in C's area was almost 10x the national average, so D should have had a high suspicion as to signs of TB
- ▶ *XM v Leicestershire Partnership NHS Trust* [2020] EWHC 3102 (QB)
 - ▶ Standard of care re. health visitors measuring baby's head circumference – had to act in accordance with published guidance

Summary

- ▶ Wider scope for cases to be brought against dental practice owners
- ▶ Scrutiny of third party provision of NHS services
- ▶ Boundaries of duty of care in pre-conception negligence cases have been clarified
- ▶ Likewise, the limits of secondary victim cases have been explored and tested