Plenary Address: The 2022 Legal Update

Thursday 24 March 10.45am New Dock Hall (main hall)

Mr Eliot Woolf QC

Barrister
Outer Temple Chambers

Eliot Woolf QC was called to the Bar in 1993 and specialises exclusively in the fields of clinical negligence and personal injury (domestic and international). Since taking Silk in 2018, his clinical negligence practice is primarily concerned with maximum severity obstetric, spinal and brain injury claims, as well as wrongful birth claims. However, his work covers most areas of clinical practice and he has appeared in contested trials in the fields of spinal surgery, haematology, accident and emergency medicine, cardiology, general surgery, vascular surgery, orthopaedic surgery and ophthalmology. More recently, he acted on behalf of the Claimant alongside Philip Havers QC in the Supreme Court case of Meadows v Khan [2021] UKSC 21, concerning the scope of the duty of care in a wrongful birth claim. He is regularly ranked as a Leading Individual in each of his practice areas in The Legal 500 and Chambers and Partners. In his clinical negligence practice, he acts on behalf of both Claimants and NHSR.

Feedback

Please remember to leave feedback for this presentation at:

https://bit.ly/2022LegalUpdate

SCAN ME

Liability

a) Scope of Duty

KHAN V MEADOWS

[2021] UKSC 21; [2021] 3 WLR 147; [2021] 4 ALL ER 65; [2021] PIQR Q3; [2021] MED LR 523

UKSC (Lord Reed; Lord Hodge; Lady Black; Lord Kitchin; Lord Sales; Lord Leggatt; Lord Burrows) 18/6/21

- **Summary:** This claim concerned the ambit of the scope of the duty principle identified in *South Australia Asset Management Corp v York Montague Ltd ("SAAMCO") [1997] AC 191* and its applicability to claims for clinical negligence. The facts of the claim related to a claim for wrongful birth. C wished to know if she was a carrier of the haemophilia gene, her nephew having been born with haemophilia. As a result of negligent advice given, C was led to believe that blood tests she had undergone demonstrated she was not a carrier, when in fact they only established that she did not have haemophilia. She subsequently gave birth to a child who was diagnosed as suffering from haemophilia. Four years later, he was also diagnosed as suffering from autism which was unrelated to the fact that he had haemophilia. C sought to recover damages arising from both conditions. D admitted that but for her negligent advice, C would have undergone foetal testing for haemophilia whilst she was pregnant and would have discovered that the foetus was affected and terminated her pregnancy. It also accepted that the autism was a foreseeable consequence of the pregnancy and birth. However, it argued that C should not recover costs associated with the autism in accordance with the principles in *SAAMCO*. At first instance, Yip J found that C could recover in relation to both conditions, but the Court of Appeal allowed D's appeal. C appealed.

- **Held:** C's appeal dismissed. D was only liable for losses of a kind which fell within the scope of his or her duty of care and there was no principled basis for excluding clinical negligence from the application of that principle or for confining it to pure economic loss arising in commercial transactions. In assessing the scope of a defendant's duty of care in the context of the provision of advice or information, the court had to identify the purpose for which the advice or information was given and in the case of a medical practitioner, it would be necessary to consider the nature of the service which the practitioner was providing in order to determine what were the risks of harm against which the law imposed on the practitioner a duty to take care. As D had not undertaken responsibility for the progression of a pregnancy and had 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 would not as a general rule be within the scope of the practitioner's duty of care. As C had approached D with the specific purpose of discovering whether she carried the haemophilia gene, the law did not impose on D liability of any

unrelated risks which might arise in any pregnancy; and accordingly, D was not liable for the additional costs of raising a child with autism.

- Per Lord Reed PSC, Lord Hodge DPSC, Lord Kitchin, Lord Sales JJSC and Lady Black: Answering the following six questions assists in determining the extent of a claimant's entitlement to damages on a claim in negligence. (1) The actionability question: is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (2) The scope of duty question: what are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (3) The breach question: did the defendant breach his or her duty by his or her act or omission? (4) The factual causation question: is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (5) The duty nexus question: 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)? (6) The legal responsibility question: 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? [28]

- **Comment:** Whilst the scope of the duty principle articulated in SAAMCO has historically largely played centre stage in claims for pure economic loss in a commercial context, this decision firmly establishes that the principles apply equally to claims for clinical negligence. Further, the Supreme Court has made it clear that its applicability does not depend upon whether the claim is characterised as one for economic loss consequent upon a physical injury or as pure economic loss [62]. Whilst it will cause no difficulty in the majority of cases where D's actions directly cause physical injury to a claimant, it is likely to have greater implication in consent cases where advice is sought and given solely for a specific purpose. Even then, it will be very fact specific. As Lord Leggatt noted, "a doctor's duty will sometimes extend to addressing a matter on which the patient has not asked for advice but which the doctor recognises or ought to recognise poses a material risk to the patient." [84]

- On a positive note for wrongful birth claims, concerns over the status of the Court of Appeal's decision in *Parkinson v St James and Seacroft University Hospital NHS Trust [2001] EWCA Civ 530* appear to have been put to rest. The Supreme Court had no difficulty in accepting the concession that the costs associated with raising a disabled child are recoverable, provided that they fall within the scope of the duty of care.

b) Breach of duty

CASE NAME	JUDGE	OUTCOME	TYPE OF CLAIM
McGowan v Ayrshire and Arran Health Board [2021] SAV (Civ) 20; (24.5.21)	Sheriff Principal Anwar	Claim dismissed (appeal)	Death from DVT; failure to administer anticoagulant not substandard; would not have altered the outcome in any event
Doyle v Habib [2021] EWHC 1733	HHJ Auerbach	Claim dismissed	Liver surgeon not negligent in failing to diagnose a lesion pre-operatively or in advising surgery
Sheard v Cao Tri Do [2021] EWHC 2166	HHJ Robinson	Judgment for C	Failure by GP to refer resulting in a delayed diagnosis of an epidural abscess
HRR v Nottingham University Hospitals NHS Trust [2021] EWHC 3228	Cotter J	Judgment for C	Failure properly to heed a complaint of reduced fetal movements in an antenatal clinic.
Dalchow v St George's University NHS FT [2022] EWHC 2022	Hugh Southey QC	Claim dismissed	Delay in diagnosis and treatment of Fournier Gangrene. Succeeded on breach but failed on causation
Watson v Lancashire Teaching Hospitals NHS FT [2022] EWHC 148	Ritchie J	Claim dismissed	Admitted breach of duty for failing to include TIA in the differential and prescribe aspirin. Claim failed on causation (analysis of *Rothwell* and effects of aspirin)
Traylor v Kent and Medway NHS Social Care Partnership Trust [2022] EWHC 260	Johnson J	Claim dismissed	Claim against the Trust for failing to take steps to avoid a patient suffering a relapse of psychosis resulting in his stabbing his daughter and being shot by the police. Not liable to daughter

c) Consent

Negus v Guy's and St Thomas' NHS Foundation Trust

[2021] EWHC 643 (QB)
QBD (Eady J) 19/03/2021

- **Summary:** C sought damages following the death of B after a heart operation performed in March 2014 by D's consultant cardiothoracic surgeon. It involved the implantation of a 19mm mechanical valve. C contended that the implantation was negligent and a larger

valve should have been implanted even though it would have required an aortic root enlargement (ARE). B subsequently underwent re-do surgery by way of ARE with insertion of the larger valve, but she subsequently died due to complications. In addition to contending that an ARE with insertion of a larger valve should have been performed at the outset, C contended that D should have explained to B as part of the consent process that the largest possible valve should be implanted to avoid the risk of cardiac dysfunction.

- **Held:** Claim dismissed. The decision to implant the smaller valve was a reasonable exercise of D's clinical judgment and was an entirely logical view balancing risks and benefits. In relation to consent, the test that had to be applied required the court to look beyond the opinion of a reasonable body of surgeons and to ask whether, in the relevant circumstances, a reasonable person in B's position would have been likely to attach significance to it. There was a negligent failure to warn B as part of the consent process of the potential risk that an ARE might have to be undertaken but that was not causative as B would have consented to the surgery in any event. Further, there was no breach of duty in failing to go beyond that and to provide the explanation suggested by C. Even if he had found differently on that issue, it would have made no difference to the outcome. To insert a larger valve would have required an ARE and the same complications would have followed. The difficulties were not to do with re-do with the size of the valve fitted at the first operation.

- **Comment**: This is an interesting case highlighting the limits on what must be discussed by way of intra-operative risks. The surgeon will not necessarily be able to predict precisely what problems will be encountered until the operation is under way and at that point, the patient has to rely on the skill and judgment of the surgeon to decide what options are open to him or her. In this case, Eady J accepted that D should have discussed the possibility that an ARE might have to be undertaken during the course of surgery, a risk which doubled the risk involved in that surgery. However, the duty did not extend to presenting C with the various possible choices that might arise intra-operatively at that stage such as the size of the valve as, "this involved highly technical decision-making, requiring a specialist level of understanding and experience; it would be false to represent this as a simple or bilinear choice of treatment."

McCulloch & Others v Forth Valley Health Board

[2021] CSIH 21
CSIH (Lord Justice Clerk; Lord Menzies; Lord Pentland) 01/04/2021

- **Summary**: The Deceased was admitted to hospital in 2012 after suffering from severe chest pain, worsening nausea and vomiting. An ECG showed abnormalities compatible with pericarditis. An echocardiogram showed a moderate pericardial effusion which was found to have reduced in size on a second echocardiogram and he was discharged home. He was then readmitted and a repeat echocardiogram showed a small pericardial effusion.

D, a consultant cardiologist, was asked for advance on interpreting the echo and determined it showed an absence of significant features indicating tamponade and attended him to ensure his clinical presentation was consistent with her interpretation. He was discharged home and died the following day from a cardiac arrest secondary to cardiac tamponade related to pericarditis and pericardial effusion. C had alleged that D had failed to prescribe NSAIDs or repeat the echo prior to discharge; and failed to advise the Deceased of any material risks associated with the treatment recommended to him in line with *Montgomery v Lanarkshire Health Board [2015] UKSC 11.* At first instance, it was held that D was negligent in failing to order a further echocardiogram but the claim failed on causation. C appealed.

- **Held**: Appeal dismissed and D's cross appeal allowed. The patient's right to decide whether or not to accept a proposed course of treatment could only be exercised on an informed basis which meant that a patient must be advised or the risks involved in opting for that course of treatment or rejecting it. If alternative treatments were options reasonably available in the circumstances, the patient was entitled to be informed of the risks of those accordingly. But where the doctor had rejected a particular treatment on the basis that it was not a treatment which was indicated in the circumstances of the case, then the duty did not arise. *Montgomery* had no application to the present case. The judge at first instance was entitled to find that D's decision not to prescribe NSAID's was not negligent. D was also successful in its cross appeal against the finding in relation to the failure to order a repeat echocardiogram. The Deceased was not under the care of the cardiologist but instead had been asked to review the echocardiogram rather than review the patient as a whole.

- **Comment**: At first instance, Lord Tyre held that *Montgomery* does not impose an obligation to disclose and discuss alternative treatments that the doctor does not regard as reasonable in the exercise of professional judgment. This was approved on appeal. Providing it withstands logical analysis, this approach puts the assessment of whether an alternative treatment is reasonable back in the hands of the medical profession. Lady Dorian, stated: "The patient's right is to decide whether or not to accept a proposed course of treatment. That right can only be exercised on an informed basis, which means that the patient must in such a situation be advised of the risks involved in opting for that course of treatment, or rejecting it. If alternative treatments are options reasonably available in the circumstances the patient is entitled to be informed of the risks of these accordingly. But where the doctor has rejected a particular treatment, not by taking on him or herself a decision more properly left to the patient, but upon the basis that it is not a treatment which is indicated in the circumstances of the case, then the duty does not arise" [40].

MALIK V ST GEORGE'S UNIVERSITY HOSPITALS NHS FOUNDATION TRUST

[2021] EWHC 1913 (QB)
QBD (HHJ Blair sitting as a Judge of the High Court) 12/07/2021

- **Summary:** The case concerned the extent to which C had been counselled over viable treatment alternatives to neurosurgical decompression. C had a history of spinal problems and leg weakness. An MRI scan revealed that his spinal cord was compressed at T10/T11 and there was cauda equina compression at L3/L4. He underwent emergency surgery performed without criticism by Mr Minhas, Consultant Neurosurgeon, to decompress at T10/T11. However, he suffered neurological damage and experienced ongoing numbness and weakness in his left leg. He then returned to see Mr Minhas as an outpatient who ordered further MRI scans which were reviewed with C at a consultation in July 2015. Mr. Minhas advised that further surgery be undertaken at T10/T11 and L3/L4. This second surgery took place in August 2015. No criticism was raised about the surgery itself, but the second surgery left C suffering from incomplete paraparesis, confined to a wheelchair, and significantly worse off than he was before. Both parties provided divergent accounts of what symptoms C had reported to Mr Minhas at the July 2015 consultation. C contended that that he was suffering from some leg weakness and sciatic pain, but that there had been a huge improvement and he was able to move around without a stick*;* that there was no discussion over intercostal pain; that he was not informed of the risks of surgery or alternative treatments and he was unaware of the possibility of surgery making things worse. Had he been informed of the risks and viable alternatives, C contended that he would have declined surgery. By contrast, Mr. Minhas, recalled that C presented with terrible pain radiating from the left side of his back, with left-sided intercostalgia, and ongoing left-sided sciatic pain down to his leg and foot. Mr Minhas said that he believed it worthwhile to consider a further decompression at the thoracic level to alleviate the intercostal symptoms and a decompression at L3/L4 to resolve the left leg symptoms. He accepted that no non-surgical alternatives were offered as such alternatives would only offer temporary or minimal benefits. He said that he had informed C that the risk of the second surgery would be lower than he faced for his first operation, but that no spinal operation was without risk. He also accepted that if no intercostal pain had been reported, he would have waited to see if the Claimant's leg pain improved before advising further surgery.

- **Held:** Claim dismissed. The judge found Mr Minhas to be an impressive, cogent and convincing witness. By contrast, C evidence did not give confidence in his reliability or accuracy as a witness. The Court found as a matter of fact that C had reported debilitating intercostalgic pain during the July 2015 consultation, albeit for a period of less than a couple of months. The pain at this time was clearly acute and demanded some speedy intervention for its relief. The judge was satisfied that a responsible body of competent neurosurgeons would have concluded that a significant proportion of the Claimant's intercostal pain was radicular; caused by compression of the T10 nerve root and that this competent neurosurgical body would have offered revision surgery at the T10/T11 level of his thoracic vertebrae in July 2015. HHJ Blair QC found no failing in respect of offering alternative treatments. On the consent issue, HHJ Blair QC noted that the case of *Montgomery* identifies a duty for clinicians to take reasonable care to ensure a patient is aware of any reasonable alternative treatments. However, on the facts of this case, the

alternative treatments were inappropriate or ineffective and, therefore not reasonable, such that the surgeon did not have a duty to advise C of them. Finally, HHJ Blair QC noted that even if a breach had been established, the claim would have failed on the issue of causation. Even if presented with alternatives, C would have had the surgery – he was in significant pain and wanted rapid relief. Accordingly, the claim was dismissed.

- **Comment:** This decision reaches the same conclusion as *McCulloch* above. A responsible body of skilled spinal surgeons would have reasonably concluded that there were no reasonable alternative treatments available and accordingly, it was acceptable not to discuss them with C.

d) Causation

THORLEY V SANDWELL AND WEST BIRMINGHAM NHS TRUST

[2021] EWHC 2604 (QB)
QBD (Soole J) 1/10/21

- **Summary**: C brought a claim for clinical negligence arising out of its advice for him to stop taking warfarin whilst he underwent an outpatient coronary angiogram. He had been managed with daily warfarin since being diagnosed with atrial fibrillation in 2002. In March 2005, he was admitted to Sandwell Hospital complaining of two days of chest pain and breathlessness. He was diagnosed with troponin negative acute coronary syndrome and prescribed 75mg aspirin daily, being discharged the following day with arrangements for an outpatient coronary angiogram. To reduce the risk of uncontrolled bleeding from angiography, he was advised by the Trust to stop taking warfarin for four days prior to the procedure. Following the procedure, C was discharged home and was told to wait two days before recommencing warfarin at 3mg. He recommenced warfarin as advised, but suffered an ischaemic stroke the day after restarting it, resulting in permanent and severe physical and cognitive disability. C contended that the Trust was negligent in that the cessation of warfarin should have been limited to a shorter period and when resumed, should have been restarted at the usual dosage of 3.5mg, not 3mg. It was alleged these breaches caused or materially contributed to the occurrence of the stroke. Conversely, the Trust denied breach of duty, admitting only that warfarin should have been restarted no later than the day after the angiogram (28th April) at the dose of 3.5mg. With respect to causation, it was the D's case that C would have suffered the stroke in any event. The Trust later disclosed internal guidance from 2004 entitled 'Anticoagulation and Surgery'. The guidance – which, on its face applied to surgery rather than angiography – recommended ceasing warfarin for three days before surgery and recommencing as soon as the patient was able to take oral fluids. C's expert maintained that the guidance should have been applied to those undergoing an angiogram. D's expert disagreed, suggesting that the guidance did not apply and that the advice given to C had been in line with established medical practice. Notably,

D did not call any witnesses of fact to explain the background or to interpret the 2004 guidance.

- **Held**: Claim dismissed. (1) An adverse inference should not be drawn from the Trust's failure to call evidence from those who had drafted the 2004 guidance in line with the decision in *Wisniewski v Central Manchester HA [1998] P.I.Q.R. P324*. The 2004 guidelines had no application to angiography, no inference could be made from the absence of factual evidence called by the Trust on that issue and D had not been in breach of duty for failing to apply the 2004 guideline. (2) The expert evidence provided no basis for finding that a 3-day-delay in taking warfarin would have been better medical practice than 4 or 5 days. Further, a responsible body of competent practitioners would have deferred restarting warfarin until the day after the procedure. Accordingly, the Trust was not found to be in breach beyond the extent to which the Trust had already admitted. (3) Dealing first with causation on ordinary 'but for' principles, the Court found that even if the omission of warfarin for more than three days constituted a breach of duty, C would have suffered his stroke in any event. The Court then turned to examine the argument based on material contribution. It concluded that the material contribution test did not apply where there was a single tortfeasor and an indivisible injury.

- **Comment**: The most significant aspect of the judgment related to the analysis of material contribution and the conclusion that the test has no application where there is a single tortfeasor and an indivisible injury. There was no dispute that the stroke was an indivisible injury (ie, it either happens or it does not). Unsurprisingly, C sought to rely upon the Privy Council case of *Williams v The Bermuda Hospitals Board [2016] UKPC 4; [2016] AC 888*, contending that the divisibility or indivisibility of an injury was relevant only to the measure of damages against the contributing tortfeasor, not to the application of the principle itself. By contrast, D drew upon the Court of Appeal decisions in both *Ministry of Defence v AB [2010] EWCA Civ 1317* and *Heneghan v Manchester Dry Docks Ltd [2016] EWCA Civ 86* which point in the other direction. In the end, Soole J, found himself bound by *AB* and *Heneghan* on the basis of strict precedent, but noted that this was a legal issue "ripe for authoritative review".

- In relation to the application of the *Wisniewski,* Soole J drew upon the Supreme Court's comments on adverse inferences in the employment case of *Efobi v Royal Mail Group Ltd [2021] UKSC 33* where the Supreme Court had emphasised that whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.

e) Secondary victim claims

KING V ROYAL UNITED HOSPITALS BATH NHS FOUNDATION TRUST

[2021] EWHC 1576 (QB)
QBD (Philip Mott QC sitting as a Deputy) 16/6/21

- **Summary:** C brought a claim for psychiatric injury and consequential loss following the birth of his second son by emergency caesarean section on in May 2016. D accepted liability in a separate claim for the death of Benjamin. Following his birth, Benjamin was taken to a Neonatal Intensive Care Unit ('NICU') where C was informed that Benjamin was "*alive, but…very sick and we might still lose him*". It was agreed by C and D's psychologists that C suffered post-traumatic stress disorder ("PTSD"), with the accepted clinical cause being "[the] *psychological impact of seeing his critically ill son on his first visit to NICU after his son's birth*".

- **Held**: Claim dismissed. To recover, C must establish that he suffered a 'sudden and unexpected shock' which amounted to a 'horrifying event which violently agitates the mind'. 'Shock' required something more than what might be described as a shocking or horrifying in everyday speech. What C saw and heard on his visit to NICU was horrifying in ordinary language, and it caused him PTSD, but it was not an objectively shocking and horrifying event in the Alcock sense.

- **Comment**: This decision involves different considerations to those raised in *Paul* below. It highlights how difficult it remains for claimants to prove that they witnessed a 'sudden shocking event' in a hospital setting. It follows similar outcomes in *Wild v Southend University Hospital NHS Foundation Trust [2014] EWHC 4053; Liverpool Women's NHS Foundation Trust v Ronayne [2015] EWCA Civ 588; Wells v University Hospital Southampton NHS Foundation Trust [2015] EWHC 2376; Owers v Medway NHS Foundation Trust [2015] EWHC 2363;* and *Shorter v Surrey and Sussex Healthcare NHS Trust [2015] EWHC 614.*

PAUL (A CHILD) & ANR V ROYAL WOLVERHAMPTON NHS TRUST

[2022] EWCA Civ 12

CA (Sir Geoffrey Vos MR; Underhill LJ; Nicola Davies LJ)

- **Summary**: A very important decision concerning secondary victim claims in three conjoined claims (*Paul*, *Polmear* and *Purchase*). The essential feature of each case was that the horrific event, namely the death of the primary victim or its immediate aftermath which was witnessed by each claimant occurred appreciably after the omissions which constituted the defendants' negligence. In *Paul* and *Polmear*, the primary victims had died months after they had been clinically misdiagnosed. The courts at first instance found for the claimants,

holding that the deaths could constitute a relevant event such that the claimants could succeed in their damages claims. In *Purchase*, the primary victim also died months after a clinical misdiagnosis. The court found for the defendant, stating that it was bound by ***Taylor v A Novo (UK) Ltd*** *[2013] EWCA Civ 194*, which was authority for the proposition that no claim could be brought in respect of psychiatric injury caused by a separate horrific event removed in time from the original negligence, accident or a first horrific event.

- **Held**: Were it not for the decision in *Taylor v A Novo*, the Court would have found for the Claimants. The Master of the Rolls initially identified three distinct situations. The first are accident cases, such as *McLoughlin* and *Alcock*, where the negligence and the injury to the primary victim occur creating the horrific event occur in proximity. The second class contain cases such as these where the negligence occurs earlier than the horrific event caused by that negligence. The final type are cases like *Novo* where negligence causes two distinct potentially horrific events separated in time [77].

- The Court of Appeal stated that in the second class of cases, the problematic element concerned how to reconcile the third requirement for the claimant to be personally present at the scene of the accident, in the immediate vicinity, or to witness the aftermath shortly afterwards in the context of clinical negligence cases. The Master of the Rolls noted that if the negligence and horrific event were part of a continuum, as they were in *North Glamorgan NHS Trust v Walters [2002] EWCA Civ 1792*, sufficient proximity would be found. Nonetheless, the decision in *Walters* does not sit easily with *Somerset* and *Novo* and the latter was binding, precluding liability in the circumstances of these cases [93, 97]. Consequently, the five *Alcock* elements "could not be extended to allow a secondary victim to recover damages for psychiatric illness if the horrific event occurred months, and possibly years, after the accident" [92]. Lord Justice Underhill added that in his provisional view the "issues raised [by the claims] merit consideration by the Supreme Court" [106].

- **Comment:** Happily, the Court of Appeal has given permission to the Claimants in these three cases to appeal to the Supreme Court and fingers crossed the appeals will run their course. A restrictive approach that requires the horrifying event to be proximate to the breach of duty has long resulted in injustice to secondary victims in clinical negligence cases where there is often a long period of time between the original breach of duty and injury manifesting itself. It is heartening that the Court of Appeal would have favoured a less restrictive approach than that imposed by Lord Dyson in *Taylor v A Novo* had they not felt bound to follow that decision as a matter of precedent. The current case law creates an unsatisfactory distinction between secondary victims who succeed because they happen to be present when the breach of duty immediately triggers a horrifying event and those where it weeks, months or years before it occurs but the horrifying event is no less traumatic. No doubt any case which raises similar issues will now be stayed pending the outcome of the Supreme Court's decision.

f) Non-delegable duty of care

HUGHES V RATTAN

[2022] EWCA Civ 107
CA (Bean LJ; Nicola Davies LJ; Simler LJ) 4/2/22

- **Summary:** C brought a dental negligence claim against D who owned his own dental practice that was contracted to provide NHS dental care under a General Dental Services Contract ('GDS Contract') with the local Primary Care Trust ('PCT'). The claim itself arose from NHS dental treatment provided to C by four dentists engaged at the practice, three of whom were self-employed associates. D accepted vicarious liability for the fourth dentist, who was engaged under a contract of employment. As to the other three, each held professional indemnity cover, was responsible for their own work and clinical audits, had clinical control over the dental treatment they provided, paid their own tax and NIC and received no sick pay or pension. C maintained that she was a patient of the practice rather than a particular dentist. She made her appointments at reception and saw whichever dentist she was allocated. She made payment at reception and never to an individual dentist. At first instance, the judge held D was vicariously liable for the acts and omissions of the treating dentists and owed a non-delegable duty of care in respect of the treatment received. D appealed.

- **Held:** Appeal dismissed on the primary issue. The judge had held correctly that D was under a non-delegable duty of care. She was a patient of his practice. The Personal Dental Treatment Plan that she had signed named only D as the treatment provider. It said nothing about whether the whole course of treatment would be provided by one individual or whether the provider would be an employee of the practice or an independent contractor. The judge had also correctly found that the patient had satisfied all of the criteria for a non-delegable duty of care in *Woodland v Swimming Teachers Association [2013] UKSC 66*. First, a 'patient' included anyone receiving treatment from a dentist; they did not need to be especially vulnerable to qualify. Second, an antecedent relationship between C and D was established on each occasion that the patient signed the Treatment Plan. That relationship placed C in D's actual care, not because he was a dentist himself but because he was the practice owner. The fact that each treating dentist had completed clinical control when performing treatment did not mean that her interactions with the practice were entirely administrative. Third, the patient had no control over whether D chose to perform the obligations personally or through employees of third parties. At most, she could only express a preference for which treating dentist she would like to see. It was not strictly necessary to decide the vicarious liability point, but the court would do so as it was in the nature of a test case. Following *Barclays Bank v Various Claimants [2020] UKSC* 13, the critical question had reverted to being whether the alleged torfeasor's relationship with D could properly be describe as being akin to employment, with the focus being on the

contractual arrangements between torteasor and defendant. Here, the *Barclays* test was not met for a number of reasons, the most important being that the treating dentists were free to work at the practice for as many or as few hours as they wished and were free to work for other practices and business owners. Had the court been required to decide that ground, it would have held that D was not vicariously liable for the acts and omissions of the treating dentists.

- **Comment:** An important decision considering when a non-delegable duty of care applies which is of particular relevance to those who may be looking to sue a practice rather than individual practitioners. In *Woodland*, Lord Sumption had emphasised: "Where a non-delegable duty arises, the defendant is liable not because he has control but in spite of the fact that he may have none. The essential element in my view is not control of the environment in which the claimant is injured, but control over the claimant for the purpose of performing a function for which the defendant had assumed responsibility" [24]. The 5 factors necessary to make out a non-delegable duty are: (1) the claimant is a patient or a child or for some other reason especially vulnerable or dependent on the protection of the defendant against the risk of injury; (2) there is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself (i) which places the claimant in the actual custody, charge or care of the defendant and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm; (3) the claimant has no control over how the defendant chooses to perform those obligations; (4) the defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; (5) the third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him. It was only (1) to (3) which were in issue in this case. Central to the finding in C's favour was the fact that the practice was originally providing treatment to her under the terms of an NHS contract which was important in establishing the nature of the relationship.

g) Drawing inferences and weighing up witness recollections

FREEMAN V PENNINE ACUTE HOSPITALS NHS TRUST

[2021] EWHC 3378 (QB)
QBD (HHJ Tindal sitting as a Judge of the High Court) 3/12/21

- **Summary:** C claimed damages as administratrix of the estate of her deceased son. When C was 36 weeks pregnant, she had experienced sudden intense abdominal pain and claimed that she asked her partner to call the maternity unit who then directed she be taken home and given pain relief. The pain became worse and C attended A&E 2.5 hrs later. An emergency C-Section was performed. As a result of placental abruption he had been deprived of oxygen. He suffered severe brain injury and died aged 12. D denied liability, contending that there was no record of the call, albeit it had not at the time been its practice

to record phone calls. However, it admitted that if the call had been made and the partner had mentioned that the mother was in severe pain, it would have advised them to attend hospital immediately and the child would have been born within an hour and would not have suffered his brain injury. Whilst accepting the burden of proof lies on the claimant, C argued an inference should be drawn as C had been deprived of evidence due to D's poor record-keeping practice of not recording telephone calls.

- **Held:** Judgment for C. With regard to adverse factual findings, the judge adopted the approach in *Shawe-Lincoln v Neelakandan [2012] EWHC 1150* as endorsed in *McKenzie v Alcoa [2020] PIQR P6*: namely, "whether it is appropriate to draw an inference, and if it is appropriate… the nature and extent of the inference, will depend on the facts of the case… Secondly, silence or a failure to adduce relevant documents may convert evidence on the other side into proof, but that may depend on the explanation given for the absence". The judge was not critical of the D's practice at the time of not logging telephone calls from patients and partners and accordingly, the absence of a record of the call was neutral as to whether it had happened. On balance, it was likely that the partner had called and spoken to a midwife, told her the mother was in pain and had been told to take her home for rest and pain relief. If he had been asked how bad the pain was, he would have said it was intense and he would have been told to take the mother straight to the maternity unit. They would have gone to the hospital relatively quickly, the child would have been born within an hour and brain damage would have been avoided. C was awarded the agreed sum of £500,000.

- **Comment**. Another helpful decision looking at the line of authorities on adverse inferences through missing documentation which has evolved through *Keefe v Isle of Man Steamship [2010] EWCA; Raggett v Kings College Hospital [2016] EWHC 1604 (QB); JAH v Burne [2018] EWHC 3461 (QB); Shawe-Lincoln v Neelakandan [2012] EWHC 1150 and McKenzie v Alcoa [2020] PIQR P6*. Whether it is appropriate to draw an inference and the extent of it will depend upon the facts of the particular case; and silence or a failure to adduce relevant documents may convert evidence on the other side into proof, but that may depend on the explanation given for the absence of the witness or document.

- The judge also reviewed the competing authorities concerning the weight to be given to oral evidence as compared to contemporaneous clinical notes and preferred to follow the approach in *Synclair v E.Lancs NHS [2015] EWCA Civ 1283* and *Manzi v King's College NHS Trust [2018] EWCA Civ 1882*. This approach notes that although a contemporaneous clinical record is inherently likely to be accurate, this does not generate a presumption in law that has to be rebutted. It is not, therefore, necessary to analyse what might be sufficient to displace a presumption of inherent reliability as this "is to make process of fact finding to owners and mechanistic". See too the recent decisions in *Sheard v Tri Do [2021] EWHC 2166* and *HTR v Nottingham University Hospitals NHS Trust [2021] EWHC 3228* where similar issues arose as to the proper approach to take in respect of personal recollections of witnesses as against the medical records.

h) Wrongful conception

TOOMBES V MITCHELL

[2021] EWHC 323 (QB)
QBD (HHJ Coe QC sitting as a Judge of the High Court) 1/12/21

- **Summary:** This was Part 2 of an action brought by C against her mother's former GP. Under Part 1, Lambert J (*Toombes v Mitchell* [2020] EWCA 3506) had determined that C was entitled to bring a claim under s.1 of the Congenital Disability (Civil Liability) Act 1976 on the assumption that a set of agreed facts proved correct. Having succeeded at that hearing, Judge Coe QC in Part 2 was required to determine whether those factual assertions were or were not correct. C was a 20 year old woman born with a neural tube defect causing a form of spina bifida which was not identified before her birth. There was no negligence in that failure. However, C's mother had attended D for pre-conception advice and she had raised the question of folic acid. D advised her that if she had a good diet there was no need to take folic acid supplement. D agreed that if the Court accepted that was the advice given, it was substandard and there was no need to obtain expert evidence on the point. D contended that he had given advice in accordance with his 'standard practice', namely to advise taking folic acid prior to conception and for the first 12 weeks of pregnancy.

- **Held:** Judgment for C. The GP's note of the consultation was "completely inadequate". She rejected the GP's assumption that the recorded entry "folate if desired" meant that he gave C's mother his usual standard advice about folic acid and then had an additional discussion about diet versus supplements. Rather, that the more likely meaning of the note was that the GP told C's mother that if her diet was good enough, folic acid was not necessary. The judge further concluded that C's mother was not pregnant at the consultation but instead followed the advice given and C was conceived almost immediately after this. Had she been given the correct advice, she would have delayed conception whilst she took a course of folic acid. It was agreed by D and therefore did not need to be decided by HHJ Coe QC, that on the balance of probabilities, later conception would have resulted in birth of a child without the defect that C suffered from.

- **Comment**: The issues to be determined in the second hearing of this matter are of less general importance than the very significant issues of principle which fell for consideration under Part 1. In contradistinction to claims for wrongful birth brought by the parents, the ability of C to bring a claim in her own name for losses throughout her life will have a very large impact on quantum. However, it has to be remembered that it will be a potentially narrow cohort of claimants who will be able to take advantage of the decision. Section 1 of the Congenital Disabilities (Civil Liability) Act 1976 precludes a claim for 'wrongful life' in post-conception cases where D's negligence did not cause the disability; further, it does not apply to a child who dies *in utero*. The door is open to certain pre-conception cases even if D's negligence did not cause the disability, and happily for C, this case fell into that

category. However, there must still be a causal connection between the 'occurrence and the disability' and again, on the facts of this case, having sexual intercourse without the protective benefit of folic acid supplementation was an occurrence within the Act.

Damages

a) Avoiding double recovery

MARTIN V SALFORD ROYAL NHS FOUNDATION TRUST

[2021] EWHC 3058 (QB); [2022] PIQR Q2
QBD (HHJ Bird sitting as a Deputy) (12/11/21)

- **Summary:** C was a patient detained under s.37 of the Mental Health Act 1983 ('MHA') who had an extensive psychiatric history due to her Emotionally Unstable Personality Disorder and paranoid schizophrenia. She had previously succeeded in her trial on liability against D ([2018] EWHC 1824) arising from mismanagement of her atypical femoral fracture, resulting in her suffering from septic shock, multiple organ failure and a brain injury. The Court was required to assess damages. Her current care was provided by a care package under s.117 of MHA.

- **Held**: as set out further below:

    - Care: There was no reason why C's care package should not be split between physical and mental health providers. C's needs fell into two categories: (i) needs arising as a result of her mental health, which were not caused by the defendant's negligence; (ii) physical needs arising as a result of the defendant's negligence. The court therefore had to hive off the first category. However, C's current care and support package, funded through s.117, covered both categories and she would continue to have a right to access s.117-funded physical care whatever damages were awarded. If damages were awarded for care that the claimant received from the state at no cost, that would over-compensate her. However, C's current care regime was insufficient to put her in the position she would have been in had she not been injured as a result of the defendant's negligence. An award for future care should therefore be made; the possibility that C might continue to take advantage of the s.117 provision for her physical care was not sufficient for the court to adjust the award. C should have two day-time carers, a personal assistant and one night-time sleeping carer. That would give her the flexibility to leave her home when she wished and to shower and go to the toilet as and when needed. In addition, the appointment of a case manager.

- Accommodation: C's present accommodation was unsuitable and a new home should be acquired. A therapy room was not required. A three-bedroomed property with a notional value of £283,333 was sufficient (reduced by the calculation in *Swift v Carpenter [2020] EWCA Civ 1295*), plus adaptation costs, the cost of a car port, relocation costs and increased running costs.

- Capacity: The experts agreed that the claimant's brain injury had not caused significant cognitive deficit, but had potentially caused some. C therefore had an impairment of the mind or brain, but the evidence fell short of that needed to displace the presumption of capacity under the Mental Capacity Act 2005. Accordingly, she was not entitled to damages for the costs of a Court of Protection deputy. However, the court allowed her to amend her claim to include the cost of setting up a personal injury trust. The requirement for C to take control of a large fund of money, and so be exposed to the risk of pressure from others to spend it, would not have arisen if the defendant had not been negligent. D would suffer no real prejudice from the amendment, but if the amendment were refused the claimant would be deprived of the opportunity to seek full compensation in respect of the loss she had suffered and would be under-compensated because she would use compensation intended for other purposes to pay for a personal injury trust.

- **Comment**: This case engaged the thorny and commonly encountered issue of how to avoid double recovery where a claimant has the benefit of statutory funding for her is or her care needs. Whilst it is easy to identify the problem, it has proved far from easy for the Courts to find an appropriate mechanism to manage it. Whilst in *Crofton v NHSLA [2007 EWCA Civ* 71, the CofA suggested one solution was to adjust the multiplier, such approach has not been favoured at first instance owing to the real uncertainty of changes to public funding, both in terms of amount and duration. Again, whilst *Peters* undertakings are commonly sought, they are rarely agreed to and in any event, there are real issues over enforcement whether a deputy is or is not in place. In a case where there is less than a 100% recovery, a claimant will inevitably have to look to state funding to bridge the shortfall in any event. In this case, D was not responsible for C's care needs arising from her mental health disability, but was for her physical injuries and her funding under s.117 of the MHA covered both. There was no dispute that her current care regime was inadequate and she sought a privately funded care regime. There was no order that the Court could make which prevent her from continuing to claim support under s.117 both in respect of her mental health needs but also her physical needs. Judge Bird awarded the full cost of private care to meet her physical needs despite the chance of double recovery on the basis that, "any possibility that [C] might continue to take advantage of section 117 provision for her physical care, whilst it cannot be entirely discounted, is not sufficient for me to make any adjustment to the award". This conclusion was akin to the practical approach adopted in *Freeman v Lockett* [2006] EWHC 102 where the Court accepted the claimant's indication that she would not seek public funding of her care needs if she received the full cost of care and awarded the same in full.

b) Lost Years and loss of earning capacity

HEAD V CULVER HEATING CO LTD

[2021] EWHC 1235 (QB); [2021] PIQR P17
QBD (Johnson J**)** 11/5/21

- **Summary:** The case had been remitted back to the High Court by the Court of Appeal to assess the financial dependency arising from a successful company business in which the Deceased, his wife and their two sons were directors. The Deceased was the driving force behind the business which he had built up from scratch. Before his death from mesothelioma in November 2019, he commenced proceedings which came before HHJ Melissa Clarke at first instance in May 2019. It was found that but for his mesothelioma, he would have worked full time until 65, reducing to 80% from age 65-70. After 70, he would have reduced his presence to about 50%, no longer taking a salary but continuing to receive dividends on his shares. From age 75 to 80, it would have been 25% and he would then have retired. However, HHJ Melissa Clarke had held that it was more likely that the profitability of the business would not diminish after his death and his estate would continue to have the benefit of income and capital in the from capital in the form of dividends payable on his shareholding; accordingly, there was no loss. The Court of Appeal ([2021] EWCA Civ 34) overturned that finding and found that dividend income paid from the business was a result of the Deceased's hard work and flair, not of passive investment and should be reflected in damages. It was to be treated as earnings rather than investment income and thus recoverable in the lost years. It was remitted back to the High Court for assessment of damages.

- **Held:** The effect of the Court of Appeal's judgment was that artificial distinctions should not be drawn between salary, dividends and undistributed profit. What was important was the element of the funds generated by the business that reflected the Deceased's earning capacity as opposed to any element that reflected investment income. The Deceased's earning capacity was best reflected by a combination of his salary and 90% of the company's profits, less a deduction in respect of work done by his wife and his living expense. Once he no longer worked full time, his earning capacity could be reduced pro rata. In respect of the deduction to reflect the Deceased's living expenses, it was appropriate to use the figure of £3,584 found by the original judge, rather than a percentage deduction. The sum awarded in respect of the lost years was £2,444,310 plus interest. Interest was to run at the conventional half rate to the current decision, rather than judgment rate of 8% from the date of the original judgment. Although C had bettered its own Part 36 offer, it was unjust to make consequential orders under CPR 4.36.17(4) as C had been allowed to rely upon new evidenced served very late without good reason which had resulted in a finding which increased the value of the claim.

- **Comment**: The reasoning in this case (following on from the Court of Appeal decision) is entirely in line with the Court of Appeal's decision in *Rix* below in the context of a FAA

claim. It highlights that the Court will not draw artificial distinctions between salary, dividends and undistributed profits, but will instead look to the practical realities lying behind arrangements made for reasons of tax efficiency. As an aside, the admission of new evidence meant that the defendant could discharge the high burden of demonstrating that it would be unjust to impose Part 36 penalties when C beat her own offer.

c) LRMPA/Fatal Accidents Act 1976

CHOUZA V MARTINS

[2021] EWHC 1669 (QB)
QBD (Martin Spencer J**)** 22/6/21

- **Summary:** In 2015 the Deceased, a Spanish national, was killed in an RTA in England. He ran a company which had entered into a contract with another under which he was paid €250/day and received a disability pension of €4,647 pursuant to Spanish Social Security General Law. Following his death, his two younger sons gave up their work and studies to take over the running of the business.

- **Held:** A figure of £500 for PSLA was appropriate to reflect 5 seconds of mental anguish and fear followed by almost instantaneous death in the accident. In terms of income from the companies, he would have wound up his business in 2018 in any event, but he would have continued to work 270 days per year receiving annual net earnings of €67,500 to retirement age 67. He would have received a disability pension until he was in receipt of the state pension. Income tax was to be deducted from the disability pension at a rate of 19%. In terms of the dependency ratio, it was not necessary in order to depart from the conventional percentages to descend into the nitty-gritty of the family finances and work out precisely how much was spent on the various individual items of expenditure. Instead, whilst still abiding by a general percentage approach, the court was entitled to depart from the conventional percentages and adjust them in accordance with the accepted evidence *(Harris v Empress Motors [1984] 1WLR 212* and *Owen v Martin [1992] PIQR Q151* followed). On that approach, the appropriate percentages were 85% pre-retirement and 75% post-retirement by when the family finances would have been replenished and there would no longer have been dependent children. In terms of the children's dependency claims, the eldest was not dependent at all. As to the two sons who took over the running of the business, they were providing replacement of the deceased's income and their claims were double recovery for the loss of the deceased's income which could not be characterised otherwise. Their dependency claim was essentially a claim for lost earnings which could not be accommodated within the statutory provision (*Rupasinghe v W. Hertfordshire Hospitals NHS Trust [2016] EWHC 2848 (QB)* applied). Loss of intangible benefits of £5,000 for the wife and minor children was appropriate (daughter), but not the adult sons. There could be no award in respect of increased liabilities flowing from his death nor in respect

of the costs of obtaining a court resolution in Spain to ensure the award was not the subject to taxation, as they were losses arising from the death, not the loss of future financial benefit.

- **Comment**: There are a number of interesting features of this decision. First and most significantly, was Martin Spencer J's willingness to go behind conventional percentage dependency calculations without going into the nitty gritty of looking at every family bill. Second that the Court was not prepared to award loss of intangible benefits to adult children. Third, that a very modest award for PSLA was appropriate even though the death was almost instantaneous.

STEVE HILL LTD V WITHAM

[2021] EWCA Civ 1312
CA (Nicola Davies LJ; Stuart-Smith LJ; Sir Patrick Elias) 22/6/21

- **Summary:** D appealed against the assessment of damages arising from the death of C's husband, the Deceased, from mesothelioma in 2019. C and the Deceased had fostered two children on permanent placements. They had decided that C would return to full-time work as a specialist nurse and the Deceased would be the parent at home. They received a fostering allowance from the local authority which continued after his death when C stopped work to care for the children. At first instance, the judge found that the relevant dependency was C's, not the children's, as she had dependent on him to act as the children's principal carer which had allowed her to pursue her career. Accordingly, the judge found that the measure of loss was instead replacement care at commercial rates. D appealed and sought to rely on fresh evidence arising after the trial which showed that the children were no longer in C's care, although she hoped they would be returned to her.

- **Held:** Allowing the appeal, although dependency was valued at the date of death, the new evidence was directly relevant to the continuance of the dependency. As the children were no longer in the respondent's care, the dependency could not be said to be continuing as the premise upon which it was based no longer existed (*Welsh Ambulance Services NHS Trust v Williams [2008] EWCA Civ 81* followed). The new evidence was of such a nature as to undermine the original findings and the resultant valuation. To refuse to admit the evidence would affront common sense or a sense of justice *(Mulholland v Mitchell (No 1) [1971] AC 666* followed. The matter would be remitted for reassessment of the dependency on childcare after May 2021 when the children were removed from C's care.

- As to the dependency, C had lost the benefit of the service her husband had provided in caring for the children and accordingly, she could claim the cost of securing those services to enable her to place herself in the position she had been in before his death. The fact that C had continue to be paid for foster care by the Local Authority did not affect her loss of dependency on her husband's services as before his death, she had the benefit of

the foster care payment plus the benefit of his services. The judge's decision to value care on the basis of the cost of employing labour to replace the lost services rather than on the basis of gratuitous replacement by a friend or relative was one that had been open to him. Where earnings had been lost, the commercial rate of care could be applied, *Housecroft v Burnett [1986] 1 All ER 332* applied. Whether it was appropriate was fact-specific.

- **Comment**: Having won her case at first instance, this claimant was incredibly unfortunate to be subject to a totally unexpected turn of events which resulted in removal of the foster children from her care. As a result and wholly exceptionally, the Court of Appeal was prepared not only to admit fresh evidence, but also to take into account subsequent events even though the dependency is ordinarily valued at the date of death, as 'post death events which are relevant are those which affect the continuance of the dependency', per *Williams*. The decision is of interest not only for that unforeseen turn of events, but also because the Court of Appeal was prepared to assess the loss by reference to the commercial cost of employing replacement services rather than gratuitous care rates discounted by 25%, as it is 'it is the value of the services lost which requires assessment and compensation, not the value of how the dependent manages following the death'.

PARAMOUNT SHOPFITTING CO. LTD V RIX

[2021] EWCA Civ 1172; [2022] PIQR P1
CA (Underhill LJ; Baker LJ; Nicola Davies LJ) 28/7/21

- **Summary:** The Deceased had died of mesothelioma as a result of working for D. He had left D's business to set up his own successful business in the 1970s and died aged 60. At the date of his death, he owned 40% of the shares of the company and was the main breadwinner. His wife, C, also held 40% of the shares and their two sons 10% each. After his death, C's son took over the business and it remained profitable. At first instance, C's primary contention was that her financial dependency should be calculated by reference to her share of the annual income which she and the deceased would have received from the business had he lived (Basis 1). An alternative contention was that the widow's financial dependency should be quantified by reference to the annual value of the deceased's services to the business as a managing director, calculated by reference to the cost of employing a replacement (Basis 2). The judge adopted Basis 1 and D appealed, contending that the judge had erred in treating all the profits generated by the family company as providing the basis for the financial dependency claim without having regard to whether those profits had survived the deceased's death and continued to accrue to the widow; and also for treating C's shareholding as if it had belonged to the Deceased.

- **Held:** Appealed dismissed. Assessments were fact dependent. The question was the extent of the dependants' loss based on a reasonable expectation of pecuniary benefit from the continuance of the deceased's life. Capital assets which the dependants had the benefit of during the deceased's lifetime and which they continued to enjoy after their death were not

taken into account. Accordingly, the court had to determine the amount of loss that had arisen because the deceased was no longer alive and able to work; and how much of the deceased's income that was derived solely from capital which the dependants had inherited. The dependency was fixed at the time of death and post-death events were only relevant to the extent that they affected the continuance of the dependency and the change in earnings to reflect the effects of inflation.

- Applying the principles to the facts of the case, it was undisputed that much of the success of the business was attributable to the deceased's skill and acumen. C did not work in the business and her shareholding and salary merely reflected accounting advice. The courts should look at the practical reality in relation to financial dependence, not at the corporate, financial or tax structures used in family arrangements and here widow's salary and dividends should be included in the loss of dependency because they resulted from the Deceased's work and did not represent C's own earnings (*Maylon v Plummer [1964] QB 330* followed). It was logical to treat the whole of the profit available to the deceased and the claimant as earned income and therefore part of the financial dependency; the decision to retain profits within the company as opposed to take it out by way of dividends was a personal decision by the Deceased and C; the fact that the business had thrived since the deceased's death was irrelevant for the purpose of the calculation of C's dependency. Given the findings of the judge, namely that the income of the Deceased and C in the form of salary, dividends and profits was wholly attributable to the Deceased's endeavours, no portion or percentage of C's post-death income could be independent of the deceased and unaffected by his death and accordingly, there could be no deduction of monies received from the company by the claimant post-death. In any event, such deduction would contravene the principle that the dependency was fixed at the date of the death and nothing done by a dependent post death could affect the level of dependency from that source save in limited circumstances which did not apply (*Wood v Bentall Simplex Ltd [1992] PIQR P332; Williams v Welsh Ambulance Services NHS Trust [2008] EWCA Civ 81* and *Arnup v MW White Ltd [2008] EWCA Civ 447* followed.

- **Comment**: This is an important re-appraisal of financial dependency in a family business situation. It re-affirms the principle that the Court will go behind the fiction of a families' tax arrangements and will look at the practical reality of who is generating the income in the business. Accordingly, the Court of Appeal upheld the judge's willingness to treat the widow's earnings as director and shareholder as actually being her husband's earnings. Similar principles apply when looking at the reality of partnership arrangements, as has long been established in *Ward v Newalls Insulation [1998] 1 WLR 1722*. Again, it was reiterated that the dependency is fixed at the moment of death (pity the exceptional circumstances which resulted in the Court of Appeal deviating from that in *Witham* above). Accordingly, under the FAA, the Court can award damages which are greater than the actual financial loss sustained. When assessing whether or not the dependency was based on income (which can form part of the dependency) or capital (which cannot), the Court should identify if it is received with or without the deceased's labour and services. Here, the dependency was truly on the Deceased's endeavours; further, the fact that the company had continued to thrive after his death was irrelevant.

Limitation

WILKINS V UNIVERSITY HOSPITAL NORTH MIDLANDS NHS TRUST

[2021] EWHC 2164 (QB)
QBD (Richard Hermer QC sitting as a Deputy) (30/7/21)

- **Summary**. The Court was required to determine as a preliminary issue whether C's clinical negligence claim was time-barred. C had undergone bilateral knee replacements in November 2008 and March 2009. He suffered pain and swelling in the left knee requiring regular review. In June 2010 he had further revision surgery. In November 2010 he was referred to a second orthopaedic surgeon who carried out an arthroscopy in July 2011 in January 2012 he carried out further revision surgery. In June 2012, C instructed solicitors to investigate a potential clinical negligence claim against the Trust. In March 2013 Mr. Wilkins was provided with a report from an orthopaedic expert on breach of duty and causation. This concluded that the standard of care he had received fell within that which would be regarded as acceptable by a reasonable body of medical opinion. Mr. Wilkins accepted his solicitors' advice that there were insufficient merits to proceed with a claim. However, his left knee continued to deteriorate and in June 2016, he underwent an above-knee amputation of the leg. In September 2016 he entered into a CFA with a second firm of solicitors. In May 2019, a report was received from another orthopaedic expert. This concluded, contrary to the first report, that there had been breaches of duty of care in failing appropriately to significant infection in 2009 and 2010 and that the amputation could have been avoided but for these. C issued proceedings in June 2019. The Trust denied liability and also contended that the claim was time-barred.

- **Held**: The court determined that the claim had not been brought within 3 years of the date of knowledge, but that it would be equitable in all the circumstances to disapply that time limit pursuant to section 33 Limitation Act 1980 and permit the claim to proceed.

- As to the date of knowledge, the court considered that this was 'straightforward' on the facts. To have the requisite knowledge for the purposes of s.11(4) and s.14 of the Limitation Act 1980, C did not need to appreciate all the details of the claim, let alone that there had been an actionable breach of duty. It was sufficient that they understood in general terms the essence of the factual case upon which a later claim might be based. C did not need to appreciate the precise mechanism by which he had sustained an injury, but the broad terms that the medical care might be a possible cause of his injury. In the present case, it was clear that by June 2012 (7 years before issue) C was, in broad terms, ascribing his ongoing pain in the knee to the treatment he had received from the Trust. He was sufficiently troubled by his plight that he consulted solicitors. The fact that he obtained legal advice in 2012 did not automatically establish knowledge. But, by this date, he knew

the essence of the case. The fact that the orthopaedic expert evidence at that date was negative could not "cancel out" pre-existing knowledge.

- As to the s.33 extension of time, a fair trial remained possible. There was "little concrete prejudice" to the Trust and the trial was "indeed pretty much unimpacted by the passage of time". Second, the underlying claim was serious. Third, C himself could not be deemed culpable for the majority of the delay. This was largely attributable to his ill-health, his acceptance of the negative advice given to him in 2013 and delay on the part of solicitors. He was not blamed for any of these. Accordingly, his claim was allowed to proceed.

- **Comment:** The decision reiterates the relatively low threshold for knowledge and that all is needed is an understanding in general terms of the essence of the factual case upon which the claim is based. Once acquired, knowledge cannot be unacquired, even if the claim undergoes a false start in the sense that a claimant receives legal or medical expert advice that injury was probably not caused by negligent medical care. It also re-emphasises the importance, from a defendant's perspective, of identifying *specific* prejudice, or impediment to a fair trial, caused by delay on a s.33 application. The most important factor remains whether or not a fair trial is possible when working the way through the s.33 checklist, such as the death of a witness or the loss of key documents. Whilst D was able to say in *Wilkins* that the passage of time can always be expected to cause general prejudice, the court commented that in the "absence [of] any evidence at all of how such general prejudice transmutes into actual prejudice to the operation of a fair trial in this particular claim, the forensic value of the submission is very limited indeed" [83].

ADEROUNMU V COLVIN

[2021] EWHC 2293 (QB)
QBD (Master Cook) (20/8/21)

- **Summary**: C was required to determine as a preliminary issue whether C's claim for clinical negligence against the Defendant GP was time-barred. On 19.11.09, C had consulted with D who noted that he was having difficulty talking and needed further tests. Four days later, C suffered a stroke. In November 2011, C applied for leave to remain in the UK which was refused. He appealed and immigration proceedings were not concluded until 2017. In Jan 2017, C contacted solicitors and issued proceedings on 10.10.17 alleging that D negligently failed to exclude a stroke and failed to refer C for urgent investigation. C asserted he was a protected party; in the alternative, that he did not knowledge more than 3 years before 10.10.17; and in the further alternative, he sought to rely upon s.33. D disputed the alleged lack of capacity and contended that any cause of action accrued on or around 23.11.09 when he suffered his stroke.

- **Held**: As to the question of capacity, it was issue specific, *Masterman-Lister v Jewell [2002] EWCA Civ 1889* applied. When considering capacity, the court was not bound by the expert evidence alone; it could take into account all the available evidence, *Saulle v Nouvet*

[2007] EWHC 2902 considered. C had been able to obtain documents from his treating clinicians to assist his immigration case and no concerns had been raised over his capacity when dealing with the immigration litigation and medical treatment which were no less complex. C could deal with the issues and make decisions in the claim with appropriate assistance. He had capacity.

- As to his date of knowledge, C's medical notes in 2010 recorded that he felt D had "destroyed [my] life". He had actual or constructive knowledge for the purpose of s14 of the Limitation Act by no later than 20.12.20.

- As to s.33, the delay in contracting solicitors until January 2017 was explainable by a combination of C's Christian principles and immigration litigation finding there to be a difference between making a complaint to the GP and taking legal advice to bringing a civil claim. The cogency of the evidence at trial would not be significantly affected by delay; the medical records remained readily available and D had prepared a statement detailing her recollection of contact with C. Although taking no steps for approximately seven years must count against C and that there was a degree of over-exaggeration in C's cognitive impairments, such exaggeration did not go to the merits of the claim and is easy to discern. It was possible to have a fair trial and it was equitable to allow the action to proceed.

- **Comment**: This was clearly a difficult case involving borderline capacity. In the end, Master Cook preferred the evidence of D's neuropsychiatrist because that expert had considered the available factual evidence more thoroughly in forming his view, in particular C's immigration case and all of his medical records. Proof again on how important an expert's scrutiny of all the material can be when it comes to the weight to be attached to his or her evidence. He found little assistance from the neuropsychological evidence, in large part because C did not engage with neuropsychological testing. In the end, the evidence which most assisted him was the factual (mostly documentary) evidence relating to what C had been doing and coping with since the stroke. This demonstrated a relatively high level of capacity to manage his affairs and, indeed, to instigate complicated immigration appeals. When it came to s.33, as with *Wilkins* above, the most important factor is the extent to which it is still possible for a fair, rather than taking a punitive approach because of the delay.

Practice and procedure

a) Part 36

SEABROOK V ADAM

[2021] EWCA Civ 382
CA (Lewison LJ, Asplin LJ; Males LJ) (18/3/21)

- **Summary:** D had admitted 'liability' following an RTA, but not causation. C had made an offer to settle for 90% of the claim for damages and interest to be assessed. The offer letter referred only to 'liability' and not to 'causation'. D did not accept the offer and C's claim was successful at trial limited to one head of loss only. The District Judge concluded that it was not a genuine offer to settle and awarded costs without taking it into account and the judge upheld the DJ's decision on appeal, finding that the defendant had bettered what was offered within the Part 36 offer since the liability found by the court was limited to damages for only one of the two alleged injuries.

- **Held**: Appeal dismissed. It was important in a Part 36 offer to make express reference as to whether the offer related to the whole of the claim or part of it and/or the precise issue to which it related in accordance with CPR r.36.5(1). If the issue to be settled was 'liability', it would be sensible to make clear whether D was being invited only to admit a breach of duty or if the admission as intended to go further, what damage the defendant was being invited to accept was caused by the breach of duty. The judge was right to find that the defendant had bettered the Part 36 offer, as the reasonable reader would have understood the offer to be addressing the entire claim.

- **Comment**: Re-affirmation that Part 36 offers need to define precisely the issues they relate to. Asplin LJ concluded at [22] that if the issue to be settled is 'liability', it would be sensible to make clear whether the defendant is being invited only to admit a breach of duty, or if the admission is intended to go further, what damage the defendant is being invited to accept was caused by the breach of duty.

WORMALD V AHMED

[2021] EWHC 973 (QB
QBD (Mrs Clare Ambrose sitting as a Deputy) (21/4/21)

- **Summary:** C was a protected party and had brought a claim against D for serious post-traumatic brain injury following an RTA. D made a Part 36 offer of £2m. Several years later, C served a notice of acceptance after he had suffered a cardiac episode which left him in a critical condition. Later that day, C died. D sought to withdraw the offer and C's executor applied for a declaration that D's offer had been accepted pursuant to CPR r.36.11 and could not be withdrawn.

- **Held:** The Court made no order, reserving its position to allow C's estate to provide certain information required under the rules. As C was a protected party, the offer and its acceptance were not binding until approved by the court pursuant to CPR r.21.10. Accordingly, until approved, the offeror could resile from its offer by giving notice of withdrawal, but r.36.9 meant that the offer could only be withdrawn if the offeree had not previously served notice of acceptance. Therefore, under r.21.10, the court would decide

whether the withdrawal of the offer was to be given effect or the settlement approved. Although the primary considerations of an application under CPR 21.10 were the protection of the protected party and their dependents, followed by ensuring D was properly discharged, the overriding objective which included ensuring that parties were on an equal footing was also relevant. In all the circumstances, in assessing whether approval of the settlement would be unjust, the court had to take into account how matters stood at the time of the hearing and the estate's interests did not require the same protection as those of a protected party.

- **Comment:** As the judge noted in her decision, ordinarily it would be undesirable for the Court to conduct investigations as to whether the settlement was too generous to the protected party or gave rise to a windfall, as that was an inherent contingency of litigation. However, in circumstances where C died and it would result in the estate doing financially significantly better than they would have done at trial, that could go into the balance. Accordingly, it was considered unjust for the defendant to be bound by the accepted offer. Final determination was held over.

b) Interim Payments

PAL (A CHILD) V DAVISON & OTHERS

[2021] EWHC 1108 (QB)

QBD (Yip J) (29/4/21)

- **Summary:** In order to purchase a particular property that had been identified, C sought a top up interim payment of £2m on top of interims of £1.025m previously made. C invited the judge not only to order the interim payment, but also to exercise the jurisdiction of the Court of Protection to make an order that would enable the Deputy to purchase the proposed property. An issue arose as to whether the calculation at the first stage of *Eeles* involves assessing the likely special damages to trial or only to the date of the interim payment application.

- **Held**:. In allowing the interim payment sought, the Court found that the starting point under *Eeles* is an assessment of special damages to the date of the hearing, rather than trial. However, there will be many instances where it is entirely appropriate in making the conservative assessment at the first stage to bring in special damages which have not yet accrued but will do so before trial. It depends upon the context, but what is essential is to keep in mind the clear principle that the court's task is to estimate the likely amount of the lump sum element to the final judgment. The risk of possible over-payment must be managed, particularly where any uncertainty exists, but C should not be kept out of money nor be required to make frequent applications for interim payments. In this case, the Court must guard against allocating large elements of other pre-trial expenditure (eg care/rehab

costs) when the application is expressly sought for C's accommodation needs. Accordingly, the Court must leave out of account the special damages which are likely to accrue in relation to C's other needs to avoid prejudicing future interim payment applications to meet C's ongoing care and rehab. The monies already received are to be applied in that direction. The heads of loss that could be brought into account on this application were PSLA and the capitalised accommodation claim. On that basis, £2m was not a reasonable proportion of the relevant heads of loss at Stage 1. However, £2m was reasonably required under Stage 2 on the particular facts of this case. The issue of authorisation of the purchase should be left to the nominated judge of the Court of Protection, but in the hope that the application be expedited.

- **Comment**: This decision is interesting for a number of reasons. First, for the Court's view that the starting point under *Eeles* is an assessment of special damages at the date of the hearing, rather than trial, albeit it depends upon the context. Second, it highlights the importance of evidence in support of the application: in this case, C was able to demonstrate with some degree of certainty that there was a lack of other viable property options for C in her locality. Third, despite the fact that the judge could have assumed the jurisdiction of the Court of Protection and vary the terms of the Deputy's appointment to allow the purchase, Yip J was not prepared to do so, preferring that the separation of responsibility was maintained.

AL v A

[2021] EWHC 1761 (QB)

QBD (Robin Knowles J) (28/6/21)

- **Summary:** C applied for a further interim payment of £500,000 (in addition to £400,000 already made) to a 7 year old girl who had suffered a severe brain injury in an RTA. Of the further interim, C sought a further £150,000 to provide for her costs of care and rehab for the next 12 months and £350,000 to enable her current rental home to be purchased and additional security measures to be taken. D opposed the application contending that there was no jurisdiction to make the order and the Court should limit itself to awarding an interim for the next 12 months only as it was too early to come to any conclusions as to C's prognosis and needs, emphasising her lack of physical disability.

- **Held**: Application granted. There was a real need for accommodation now and the amount requested was reasonable and there were serious potential adverse consequences involved in the alternative of requiring C to leave her home. Although the Court was encroaching upon the trial judge's freedom to allocate between an immediate capital sum and a PPO, it was prepared to predict that the trial judge would take the same course and the IP sought was modest. In terms of jurisdiction, the limit was set by 4.25.7(4) ("a reasonable proportion of the likely amount of the final judgment"). That did not say that future losses

could not in any circumstance be considered, but went to the exercise of discretion. If future losses were to be placed outside the jurisdictional limit in vital early years after an accident but at a time during which litigation was not being taken to a conclusion, less might be available to achieve important rehab end than was desirable.

c) Experts including joint statements

ADEROUNMU V COLVIN

[2021] EWHC 2293 (QB)
QBD (Master Cook) (20/8/21)

- **Summary:** See separately under 'Limitation' for considerations of the primary issues on the preliminary issue. However, Master Cook also expressed his opinion on the joint expert statements.
- **Held:** The joint expert statements were both overly lawyered documents which asked many questions that were nothing more than cross examination or improper attempts by the parties to advance their respective position. Of the 41 questions posed to the neuropsychology experts, he found that only about two were of assistance to him in understanding the issues on which they were agreed, upon which they disagreed, and the reasons for their disagreement.
- **Comment**: Master Cook's criticisms echoed those of Yip J. in *Saunders v Central Manchester University Hospitals NHS Foundation Trust [2018] EWHC 343* who considered that a 60-page joint statement did little to narrow the issues. Master Cook reiterated that joint statements are meant to be for the benefit of the court rather than a proving ground for parties' respective cases.

FERNANDEZ V ICELAND FOODS LTD

[2021] 12 WLUK 201
QBD (Cotter J) (14/12/21)

- **Summary:** C appealed a case management decision refusing him permission to instruct a new medical expert in his personal injury claim against his employer where the expert had changed his view of how the injury occurred.
- **Held**: Appeal refused. The factors to be taken into account when considering the appointment of a further expert under CPR 35.1 included: the nature, importance and

number of issues in the case, the reason for appointing a new expert, the claim's value, delay, and the overall justice to the parties, *Cosgrove v Pattison [2001] CP Rep 68* considered. Expert shopping had to be discouraged, *Beck v Ministry of Defence [2003] EWCA Civ 1043* followed. The fact that an expert changed their opinion could not by itself provide a reason to allow a disappointed party to instruct a new expert. The court had to have regard to the overriding objective and what was reasonably required to resolve proceedings, *Guntrip v Cheney Coaches Ltd [2012] EWCA Civ 392* followed and *Stallwood v David [2006] EWHC 2600 (QB),* considered. An appellate court was unlikely to interfere with a case management decision where there was no error of law and where the decision-maker had not exceeded the ambit of their discretion. There were sound reasons for the expert's altered view and C could not realistically challenge his new opinion on the basis that it was not properly or fairly held. Further, expert shopping had to be discouraged.

- **Comment**: It is always an uphill struggle to persuade a Court to allow the instruction of a new expert, albeit on occasions the Court will make such an Order. It will be doubly hard to persuade an appeal Court to go behind a case management decision once it has been made, particularly where, as here, the judge found that the reasons for the expert changing his view was well supported and for good reason. However, in *Stallwood*, |C did manage to overcome those hurdles where she had compelling reasons behind her total loss of confidence in her expert and the judge had made gratuitous comments at the case management conference that heighted her sense of grievance.

RADIA V MARKS

[2022] EWHC 145 (QB)
QBD (Lambert J) (26/1/22)

- **Summary:** C considered the scope of the duty of care owed by a medical expert where a tribunal had made adverse credibility findings about the claimant. C had brought a claim against his employer before an employment tribunal alleging disability discrimination after he had been diagnosed with acute myeloid leukaemia. D had been instructed as a single joint expert to report on his condition. The tribunal dismissed the claim, finding that C had not told the truth and had intentionally misled the tribunal. The EAT upheld the ruling and adverse costs order and permission to the Court of Appeal was refused. C's case was that D was in breach of duty in tort and contract, had misreported C's account of his weight at their consultation concerning his chemotherapy-related weight loss; that he then failed to notice the discrepancy between that weight and the weight recorded in the hospital medical records; and that discrepancy had led the tribunal to conclude that the claimant had been untruthful, resulting in the adverse liability findings and the adverse costs order. The defendant accepted that he had made a mistake by not picking up the references to the claimant's weight when reviewing the hospital medical records.

- **Held**: Claim dismissed. It fell outside established categories of negligence. It was therefore a novel claim to which the six-point plan applied for analysing the place of the scope of duty principle in *Khan v Meadows [2021] UKSC 21* was followed. D had owed C and the

employer a duty of care as a single joint expert in his assessment of C's medical condition and in his reporting on his condition to the tribunal, *Jones v Kaney [2011] UKSC 13, [2011] 2 A.C. 398, [2011] 3 WLUK 949* followed. The harm identified in the instant claim was the tribunal's findings of dishonesty. However, D's duty of care did not extend to protecting C from the risk of an adverse credibility finding, or a finding of dishonesty. A medico-legal expert could not give evidence about credibility since his opinion was admissible only to the extent that it addressed issues within his expertise. To extend the scope of the expert's duty to the protection of a party from the risk of an adverse credibility finding would create a real conflict between his overriding duty to the court and his duty to the party. Therefore the harm asserted did not fall within the scope of the defendant's duty of care. The court rejected the claimant's wider case on causation. The tribunal's finding that the claimant was dishonest had been based upon several different factors. Most critically, the tribunal had found that he had known from the outset that his discrimination complaints lacked merit, and he had only raised the allegations during negotiations with the employer for a severance package. That finding had been critical to the tribunal's decision on costs, not its earlier finding of dishonesty (paras 78-79, 82).

- **Comment**: This is an early and useful application of the principles expressed in the Supreme Court in *Khan v Meadows*: whilst it is not new law to ask whether the harm complained of fell within the scope of the alleged duty of care, the decision has re-emphasised the need to analyse exactly what harm is alleged. The decision will also present some cause for relief in expert witnesses, as the court was keen to emphasise that it appreciated the practical difficulties under which the expert evidence was given in this case. It does, however, highlight the obligation on instructing parties to ensure factual accuracy in reports when cross-referenced to contemporaneous documents.

d) Re-litigation

ASTLEY V MID CHESHIRE HOSPITALS NHS FOUNDATION TRUST

[2022] WL 00243967
QBD (Eyre J) (26/1/22)

- **Summary:** C sought an order to bring a new cerebral palsy claim against a Trust under CPR r.38.7, having previously discontinued the original claim over 14 years earlier. The original claim had been due to come to trial in June 2006, but had been discontinued after joint expert discussions. C had applied to adjourn the original trial to seek permission to obtain fresh evidence but the application had been refused and a notice of discontinuance filed. C contended that since then, the decision in *Bailey v MOD [2008] EWCA Civ 883* meant that the law had changed. D contended that *Bailey* merely clarified the law on material contribution which was a well-established doctrine.

- **Held**: Application refused. The test was as set out in *Hague Plant Ltd v Hague [2014] EWCA Civ 1609*: namely, whether there was a sufficient explanation for the claim's reintroduction to overcome the court's natural disinclination to permit a party to re-introduce a claim which it had decided to abandon. At most, *Bailey* clarified the law as derived from existing authorities. It had potentially been expressed in a new way, but it was not a change in the law as envisaged in the White Book. The Court had to conduct a balancing act. In C's favour was the fact that he had suffered a catastrophic injury and there had been no determination of the merits of his claim, with a prospect of success at trial. There was no other form of redress. Against granting permission was the fact that C had not appealed the decision refusing him permission to adjourn the original trial to get new information; the question of court resources; the passage of time (14.5 yrs). The matters advanced by C were not sufficient to grant permission.

e) Requesting the Claimant to undergo genetic testing

PALING (A CHILD) V SHERWOOD FOREST HOSPITALS NHS FOUNDATION TRUST

[2021] EWHC 3266 (QB)
QBD (Master Sullivan) (7/12/21)

- **Summary:** In a claim for brain injury said to have been caused due to hypoglycaemia following C's birth, D applied for an order prior to serving its Defence that C and both parents provide a blood sample for the purpose of genetic testing and in default, that the claim be stayed. D believed there is possibly a genetic cause for C's condition and that testing and expert evidence is required to determine the issue of causation. In support of its application, D served evidence from a neuroradiologist contending that the MRI imaging did not show the sequelae of neonatal hypoglycaemia, supported as well by a letter from its neonatologist, a geneticist (who stated there would be a 1 in 4 or 5 chance of positively proving a genetic cause) and its paediatric neurologist, the latter stating that C's presentation as more in keeping with an autistic spectrum disorder. C opposed; neither of C's parent wished that they or C should undergo testing.

- **Held**: Application dismissed. The relevant test to apply is that set out in *Laycock v Lagoe [1997] PIQR 518,* namely a 2-stage test: first, whether the interests of justice require the test which D proposed and second, if the answer is yes, whether C has advanced a substantial reason as to why the test should not be undertaken. In answer to the first question, the Court accepted that the test had a significant chance of progressing the claim and it would be in the interests of justice to carry it out in a claim such as this where the value of the claim is likely to be high. However, in answering the second question, sequencing does have more significant invasion into a person's private life than a simple blood test or even a genetic test which is looking for a specific syndrome or mutation. Such wide sequencing may bring to light mutations which indicate severe health

consequences which might be irrelevant to the issue of causation (eg, predisposition to cancer or other disorders) and it is not just for C but also for each of his parents. The impact on them is not just a simple blood test, but the impact of the information the genetic sequencing would give and the choice they would have to make in consequence. If the application is refused, D still has the ability to run the causation arguments already identified.

- **Comment**: A very interesting decision concerning the circumstances under which the Court may or may not require testing to be undertaken. Applying the two-part test in *Laycock*, the Court accepted that the outcome of genetic testing might have a significant role to play in determining causation. However, in answering the second question, the Court sensitively weighed the potentially detrimental knock-on effects that the genetic testing might have on the family, particularly when disallowing the application would not affect D's ability to mount its causation defence.

f) Joinder of Defendants

PAWLEY V WHITECROSS DENTAL CARE LTD

[2021] EWCA Civ 1827; [2022] PNLR 8
CA (Underhill LJ; King LJ; Stuart-Smith LJ) (2/12/21)

- **Summary:** C brought a claim for dental negligence against the dental practice alleging that it was liable for any negligence on the part of the individual dentist who worked there and treated her between 2012 and 2018. D applied under CPR 4.19 to join the individual dentists to the claim arguing it was necessary and desirable because the dentists should be given a chance of defending themselves against the allegations; that D was hampered in fighting the allegations in the absence of the dentists as parties; and because it was disadvantageous to C for them not to be joined. The dentists were neutral on the application. The DJ ordered their joinder and the judge upheld the appeal. C appealed again.

- **Held**: Whilst the Court had power under CPR r.19 to order joinder of a person as defendant even where C did not agree, it was generally wrong in principle for C to be forced to sue someone they had chosen not to pursue, particularly so since such joinder might expose C to potential liability for costs. Accordingly, C's decision should in all normal circumstances be respected, particularly when it served to limit the number of parties and thereby tended to save expense. Since the dentists personally had a very arguable defence of limitation, it would put C in an intolerable position were she to be effectively forced to bring proceedings against them. If D wanted them to be a party, the proper course was to join them as Part 20 defendants. In cases where group litigation was

involved or in other exceptional circumstances, it might be permissible to join a party as defendant against C's objections, but not in this case.

- **Comment**: A rare example of a Defendant seeking to apply to join additional defendants. See also the case the important decision in *Hughes v Rattan* above dealing with non-delegable duties of care in another dental negligence case brought against the dental practice rather than individual dentists. At the time of this appeal, the appeal in *Hughes* (involving the same Claimant Counsel) had yet to come before the Court of Appeal, but the Court noted that Defendants had not applied to strike out the claim in that case or apply for summary judgment; further, that there were obvious and sound reasons why C might choose to adopt the route she had taken, even if it meant that she was exposed to a greater risk of failure overall. They emphasised that there was nothing abnormal about the circumstances of her claim that required her decision to be overruled or justified compelling her to pursue the dentists personally.

g) Withdrawing admissions

DULSON V POPOVYCH

[2021] EWHC 1515 (QB)
QBD (HHJ Nigel Lickley QC sitting as a Judge of the High Court) (8/6/21)

- **Summary:** D (a registered nurse) applied for permission to resile from an admission of breach of duty made in her Defence and to amend the defence. In support of the application, D's solicitor stated that expert evidence had been obtained from a nursing expert advising D that it was in breach of duty in failing to refer C urgently in accordance with NICE Guidance (2 week referral for suspected oral cancer). However, local Guidance provided otherwise.

- **Held**: Permission to resile refused. The local guidance was available at the time the case commenced but had not been sought by D. D had delayed in making the application. The trial would have to be vacated with more delay and uncertainty for C having thought that liability was not in issue for over a year. The case he would have to prepare now would be markedly different to the one he has anticipated.

- **Comment**: A good example of a delayed application to resile from an amendment being refused. The Court carefully went through each of the criteria in Paragraph 7.2(a)-(g) of the Practice Direction to CPR 14 and the balance of prejudice clearly weighed against allowing D's application. Further, D could not completely escape liability on the amendment sought.

h) Embargoed judgments

R ON THE APPLICATION OF THE COUNSEL GENERAL FOR WALES V THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

[2022] EWCA Civ 181
CA (Sir Geoffrey Voss MR; Nicola Davies LJ; Dingemans LJ) (16/2/22)

- **Summary:** The Court provided guidance following the breach of an embargo on publication of a draft judgment which had been provided in confidence to the parties and their legal representatives.
- **Held:** The provisions of CPR PD40E are mandatory and it is the personal responsibility of counsel and solicitors instructed in a case in which an embargoed draft judgment was provided to ensure that those provisions are complied with. It is not appropriate for persons in the clerks' rooms or offices of Chambers to be given a summary of its contents. Drafting press releases by barristers and solicitors for publicity is not a legitimate activity to undertake within the embargo. It would be different if a corporate party wished to issue a press release immediately on hand down to explain to the public what had occurred in the judgment. It should be sufficient for one named clerk to provide the link between the court and the barrister(s). In future, those who break embargoes can expect to find themselves the subject of contempt proceedings as envisaged in CPR PD 40E para 2.8.
- **Comment**: A salutary lesson to all of us eager to get that press release out!

Costs

a) QOCS

HO V ADELEKUN

[2021] UKSC 43; [2021] 1 WLR 5132; [2021] Costs LR 927
UKSC (Lord Briggs; Lady Arden; Lord Kitchin; Lord Burrows; Lady Rose) (5/10/21)

- **Summary:** This case concerned the mechanics of qualified one-way costs shifting ('QOCS'). D made an offer to settle C's claim for damages for personal injury, as well as to pay her costs of the claim to be assessed if not agreed. The offer was accepted and a Tomlin order was made by consent. There was subsequently a dispute over the basis on

which C's costs were to be assessed. D argued that C's costs were limited to fixed costs and D that she was entitled to recover the costs on a standard basis. After a series of appeals, the Court of Appeal held that only fixed recoverable costs were payable. D was awarded the costs of the various appeals and D asked the Court of Appeal to direct under that D was entitled to set off her obligation to pay C's fixed recoverable costs for the claim against the much larger costs liability arising out of the various appeals. The Court of Appeal ordered accordingly. Accordingly, C appealed to the Supreme Court.

- **Held**: Allowing the appeal, that the qualified one-way costs shifting regime was intended to be a complete code about the use which a defendant in a personal injury claim could make of costs orders obtained against the claimant; that where the regime applied, the jurisdiction in CPR r 44.12(1) to direct the set-off of a defendants costs liability against the amount that the defendant was entitled to be paid under a costs order was not wholly excluded by CPR r 44.14(1); that, however, such setting off of costs against costs constituted "enforcement" of the defendants costs order for the purposes of rule 44.14(1) and so was subject to the monetary cap in that provision; that, therefore, set-off under rule 44.12(1) could only occur to the extent that the aggregate amount in money terms of the costs orders enforced by the defendant against the claimant did not exceed the aggregate amount in money terms of any orders for damages and interest in the claimants favour; that the amount in money terms of a costs order in a defendants favour was the gross amount of that order, not the net amount arrived at following a set-off of costs against costs under rule 44.12(1); that, therefore, in the present case the costs order in the claimants favour could not be set off against the costs order in the defendants favour since such set-off would be contrary to rule 44.14(1), the aggregate amount in money terms of any orders for damages and interest in the claimants favour being zero; and that, accordingly, the defendant would have to pay the claimants costs of the claim and the agreed damages and could not enforce the costs order in her favour.

- **Comment**: As the Supreme Court noted, this case is of relevance to a particular series of circumstances. In cases where orders for costs in D's favour are less than the aggregate of the orders for damages and interests in C's favour, there is no constraint on the ability of D to enforce its costs, whether by set-off or other forms of enforcement. However, as set off in a QOCS context is a form of enforcement, it is precluded where it exceeds the value of any orders for damages and interest made in favour of the claimant. Importantly, it affirmed the decision in *Cartwright v Venduct Engineering Ltd [2018] 1 WLR 6137* and held that where the claimant succeeds, but by way of settlement rather than trial, the damages for and interest payable under the settlement do not count for the purposes of CPR 44.14(1); accordingly, a defendant cannot recover any of its costs absent one of the exceptions applying, such as fundamental dishonesty. The effect of the Supreme Court's decision is to insulate C's costs from set off. Wherever possible, claimants should therefore ensure that any settlements are either by way of a Tomlin Order or by way of Part 36 acceptance. The former can be particular relevance if accepting an offer from one Defendant but pursuing a claim against another.

b) Detailed assessment

ABA v University Hospitals Coventry and Warwickshire NHS Trust

[2022] 1 WLUK 249
SSCO (Costs Judge Leonard) (22/1/22)

- **Summary:** A direction for a preliminary issue on breach of duty and causation had been made in a clinical negligence claim. In January 2021, judgment was given for C with damages to be assessed. An order specified that D would pay C's costs of and incidental to the issue of liability on the standard basis, with such costs to be the subject of detailed assessment if not agreed. C served a bill of costs of the liability issue. D applied for notice of commencement to be set aside on the grounds that it was premature in the absence of an order for immediate detailed assessment.

- **Held**: Notice of commencement set aside. Where liability and causation had been tried as preliminary issues in a clinical negligence claim but other issues, including quantification of damages, remained yet to be determined, it was appropriate to set aside a notice of commencement of detailed assessment proceedings in respect of the costs of the liability issue. In accordance with CPR r.47.1, costs of part of the proceedings were not to be assessed until the conclusion of the proceedings as a whole.

- **Comment**: Any party that wants to seek an immediate assessment of costs will need to make specific provision for assessment within the terms of the Order. Absent such an order that there will be no authority for costs allowing a party to seek assessment immediately. As Patten J addressed in *Crystal Decisions (UK) Ltd v Vedatech Corporation [2007] EWHC 1062 (Ch)* "the purpose of CPR 47.1 is to lay down a general rule that the costs of part of the proceedings are not to be assessed until the conclusion of the proceedings as a whole unless the Court orders them to be assessed immediately". Costs Judge Leonard did observe that the default position was that interest would accrue upon the Claimant's unpaid liability costs at 8% per annum. Accordingly, it should always be in D's interest to agree a significant payment on account of costs pursuant to CPR r44.2(8) and the Court will make an order for an interim payment unless there is good reason not to do so.

c) Varying costs budgets

Persimmon Homes Ltd, Taylor Wimpey UK Ltd v Osborne Clark LLP, Osborne Clark (A Firm)

[2021] EWHC 831 (Ch)

Ch (Master Kaye) (11.4.21)

- **Summary:** The Claimants applied to vary their costs budget under CPR r.3.15A during professional negligence proceedings against the defendant solicitors.

- **Held**: Application refused. The effect of r.3.15A was to elevate the procedure to be followed when seeking to vary an agreed or approved costs budget from a practice direction to a rule. The mandatory nature of the requirements were emphasised by the inclusion of "must". An application to vary involved a two-stage process. The applicant first had to satisfy the court that it had met the mandatory requirements of r.3.15A(2) to (4) by establishing (a) that there had been a significant development in the litigation since the last approved or agreed budget which warranted a revision, and (b) that the particulars of the variation had been submitted promptly to the other parties and the court. If the applicant could meet those mandatory requirements, the court went on to the second stage of considering the exercise of its discretion. Costs management was not a granular exercise akin to a detailed assessment; it was a high-level exercise. **Significant developments** - Not every significant development in the litigation would warrant a revision, and not every development would be significant even if it had costs consequences. Some significant developments would be easier to identify than others. Where the proposed variation was to add in a new phase such as expert evidence, the court might require very little supporting information. However, where the development was a change to an existing phase, the court would need to look more closely at whether it amounted to a significant development since the last approved costs budget. The court would need to be confident that the proposed variation was not an attempt to carry out a root and branch revision to the phases of the last approved costs budget. It was for the applicant to provide sufficient evidence that the variation was not simply an attempt to address a miscalculation or overspend [97, 116-118]. **Promptness** - What was prompt would depend on the context. Under r.3.15A(2) and (4), there were two linked elements which required the revising party to promptly submit their particulars of variation both to the other party and to the court. In most cases, those two aspects of the mandatory requirement would be closely aligned, but that would depend on the facts of each case. If, for example, the parties were co-operating in narrowing the areas of disagreement in relation to the proposed variations, what might be considered prompt submission might differ from a situation where there was no such co-operation [100,120-121]. **Approach to exercising discretion** - In exercising its discretion at the second stage, the court would have regard to the overriding objective and all the circumstances. That included considering the prejudice to the applicant and to the respondent respectively if the budget was varied or not varied. The question of promptness and the nature of the significant development might come back into consideration more broadly as part of all the circumstances of the case (para.102).

- **Comment**: This is a significant decision outlining the key factors governing applications to vary costs budget and should be read in conjunction with the earlier decision in *Thompson*

v NSL Ltd [2021] EWHC 679. In that case, Master McCloud also gave guidance on the meaning of significant development under CPR 3.15A where the development took place in the period between the last date for submitting the proposed budget and the date of the budgeting hearing. As to what should constitute a significant development, Master McCloud considered that the bar should not be set too high, otherwise it would encourage inflated, precautionary budgets. Where the significant development occurs after the budget is filed and served and before the CCMC, Master McCloud stated that best practice is to completely draft a revised budget and provide it in proposed form to the other side first. If not agreed, an application should be made to revise the budget promptly.

d) Failing to apply for remission of court fees

GIBBS V KING'S COLLEGE NHS FOUNDATION TRUST

[2021] 11 WLUK 486
SCCO (Judge Rowley) (22.11.21)

- **Summary:** The parties came before Judge Rowley for a detailed assessment of C's bill of costs in a clinical negligence claim. The costs claimed included the issue fee of £10,000, together with associated costs incurred by the paralegal considering the file in relation to the issue fee. D's point of dispute to C's bill of costs raised the point that C was self-employed and receiving benefits (ESA, PIPL and PIPM) and thereby eligible for an issue fee remission. Further, if C had made an application but elected to pay the court fee anyway, then this was not a reasonably incurred cost (para 5). C contended that there is no requirement for a Claimant to mitigate their loss by reliance on the public purse (para 4). Both parties drew upon the decision of HHJ Lethem in *Ivanov v Lubbe* (17.1.20, Central London County Court) to advance their respective contentions.

- **Held**: The issue fee of £10,000 was disallowed under CPR 44.3. Judge Rowley began his judgment by reiterating under CPR 44.3(2), the burden of proof falls upon the Claimant to demonstrate that costs, including the court fee, were reasonably incurred and proportionate and that any doubt must be resolved in the Defendant's favour. On the facts, Judge Rowley was satisfied that the Claimant had not provided evidence to demonstrate that this item of costs had been reasonably incurred [17], with no evidence regarding the "incurring of a court fee of £10,000 in circumstances where the claimant was [very ill] and might have been eligible for fee remission" [17]. Finding doubt as to whether the fee had been reasonably and proportionately incurred, Judge Rowley proceeded on the basis that a fee remission was available [18] finding that "if, as appears to be the case here, (fee remission) was simply overlooked should the court allow the fee as being reasonably incurred in any event? In my judgment the answer is no" [20]. As the Claimant was unable

to provide justification as to why the court fees were incurred, the fee was disallowed under CPR 44.3, with permission to appeal provided. The judge went on to consider the difference between mitigation of loss and the reasonable incurring of fees and expenses.

- **Comment**: Although there have been conflicting decisions in the County Court (see too *Stoney v Allianz Insurance PLC, Liverpool CC, DDJ Jenkinson 7.11.19)*, this is the first reported SCCO case which has considered the test to be applied in determining whether or not an issue fee has been reasonably incurred when the receiving party could have claimed remission. In circumstances where the issue fee can now be as much as £10,000, it is clearly a matter of practical significance and Judge Rowley's decision may not be the final word, as he indicated that he would be inclined to grant permission to appeal if sought. Understandably, the Claimant relied by analogy with the decision in *Peters* to argue that there is no duty on a party to look to the public purse to meet the issue fee and accordingly if the Claimant elects to look to the tortfeasor to meet that cost, then it has not acted unreasonably. This argument had found favour with HHJ Lethem in *Ivanov*. Whilst acknowledging that CPR 44.3 places the burden on the Claimant to establish that the cost it has incurred was reasonable and proportionate, HHJ Lethem considered that there were strong public policy grounds for saying it is not unreasonable for a Claimant to preserve the public purse and direct the cost of wrongdoing on the tortfeasor, and that the same were relevant considerations to an assessment of reasonableness under CPR 44.3 and 44.4 (para 38). Judge Rowley took the contrary view. He considered that by bringing in a fee remission scheme, Parliament would expect all those who qualify for that remission to use it; and that it would equally have been open for Parliament to require paying parties to reimburse the State for fees forgone where the Claimant had been entitled to a fee remission in the first place (similar to CRU). Further, that the principle in *Peters* refers to recovery of a loss that has been incurred, not to the incurring of an expense after the damages have been settled. In short, he did not consider that the receiving party is in a position to elect whether or not to require the opponent to pay court fees where that party is entitled to a fee remission [32]. Happily, the number of cases where this point arises in relation to the issue fee will be comparatively narrow, as any opportunity to avoid paying the issue fee and ease cash flow will ordinarily happily be taken. For my part, HHJ Lethem's reasoning in *Ivanov* was forceful and insofar as it was contended that a party who may be eligible for a fee remission can never look to the tortfeasor rather than the state to pay the issue fee may be importing mandatory words into the rules which do not exist. However, Paragraphs 20 and 38 of the decision suggests that Judge Rowley was not going that far, but instead was focusing on the absence of evidence demonstrating that a conscious and reasonable decision was taken. As he stated [38] "…a party who does not consider whether they are entitled to a fee remission …, risks being unable to recover that fee from their opponent …[and] the onus will be on the receiving party to justify why the court fees were incurred. If as here, there is no such justification put forward, the fee should be disallowed". Whilst the door is not shut, it will be a brave litigant who runs the risk of not applying for remission where there is any doubt as to eligibility.