Butterworths Personal Injury Litigation Service

Bulletin Editor
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Filing instructions: This Bulletin includes material available up to 26 February 2015.

Please file immediately behind the Bulletins Guidecard, in Binder 6. **The Binder should now contain Bulletins 103 to 117**.

SAFEGUARDING MINORS AND PROTECTED PARTIES

It is less than a year since the Supreme Court ruled in *Dunhill v Burgin* [2014] UKSC 18, 137 BMLR on the importance of complying strictly with the CPR Pt 21 safeguards that require settlements of minors and protected parties' claims to be approved by the court. In *Dunhill*, a formally concluded settlement, one that was set out in a consent order and signed by both parties counsel, was rescinded even though the claimant's lack of capacity was so discreet that it was unknown to anyone at the relevant time. See the case commentary in BPILS Bulletin 144 from May 2014. The following case also features an infant settlement approval application.

JXMX (by her mother and litigation friend AXMX) v Dartford and Gravesend NHS Trust [2015] EWCA Civ 96, [2015] All ER (D) 180 (Feb)

New guidance on anonymity applications for minors and protected parties

(Moore-Bick VP, Black, Lewison LJJ)

The facts: The claimant, now six, sustained very severe injuries at her birth. Her expectation of life is limited and she will be a protected party when she becomes an adult. Her mother brought a claim against the hospital alleging clinical negligence and the trust offered to settle her claim by means of a large lump sum supplemented by periodical payments. When she applied for an infant approval order under CPR Pt 21 various orders were sought in order to ensure that her identity was protected from public disclosure, including an order preventing publication of the claimant's name and address.

This appeal follows on from Tugendhat J's (weighty and principled) refusal to grant the order. He had taken the view that the mother's fears and concerns

were not particularly well justified; neither was the potential harm sufficient to justify a departure from the open justice principle. He considered the anonymity order to be neither a necessary nor proportionate measure to address such concerns as she had. However, recognising the importance of the issue, he granted leave to appeal.

The issue: The appeal had to contend with the tension between two competing principles: first the constitutional importance of the public interest in maintaining open justice, and secondly the need to do justice to individuals, especially vulnerable parties such as this claimant.

The decision: The claimant's appeal was granted.

The reasoning: Although the Justices of the Supreme Court did not accept that approval hearings lay outside the scope of the open justice principle, it accepted the force in the argument that the courts should be more willing to recognise a need to protect the interests of claimants who are children and protected parties in the pursuit of justice. It accepted Mr Robert Weir QC's argument, advanced on behalf of the intervening party (The Personal Injury Bar Association), that the court's function when approving settlements is essentially a protective one and fundamentally different from its normal function of resolving disputes between the parties to proceedings. In this sense it is discharging a protective role, *parens patriae,* one which differs from the direct administration of justice. Mr Weir also introduced the novel proposal that the default position should be that the identity of a Part 21 claimant should not be disclosed.

The court acknowledged that whilst open justice has an important part to play in ensuring that justice is performed properly, the nature of its role in approving settlements under CPR Pt 21 is such that the public interest may usually be served, in what is essentially private business, without the need for disclosure of the claimant's identity. Accordingly, and in the interests of consistency, the court offered its guidance.

Adopting Mr Weir's suggestion, a court should normally make an anonymity order (in favour of the claimant) in an approval application without the need for any formal application, unless for some reason it is satisfied that it is unnecessary or inappropriate to do so.

It also directed:

(i) the hearing should be listed for hearing in public under the name in which the proceedings were issued, unless by the time of the hearing an anonymity order has already been made;

(ii) because the hearing will be held in open court the Press and members of the public will have a right to be present and to observe the proceedings;

(iii) the Press will be free to report the proceedings, subject only to any order made by the judge restricting publication of the name and address of the claimant, his or her litigation friend (and, if different, the names and addresses of his or her parents) and restricting access

by non-parties to documents in the court record other than those which have been anonymised (an "anonymity order");

(iv) the judge should invite submissions from the parties and the Press before making an anonymity order;

(iv) unless satisfied after hearing argument that it is not necessary to do so, the judge should make an anonymity order for the protection of the claimant and his or her family;

(vi if the judge concludes that it is unnecessary to make an anonymity order, he should give a short judgment setting out his reasons for coming to that conclusion;

(vii) the judge should normally give a brief judgment on the application (taking into account any anonymity order) explaining the circumstances giving rise to the claim and the reasons for his decision to grant or withhold approval and should make a copy available to the Press on request as soon as possible after the hearing.

Comment: This decision and its guidance will be welcomed by most practitioners; at the very least it should avoid much of the uncertainty and resultant expense occasioned by the former uncertainties that had attached to what had already become an increasingly common scenario.

QUANTUM AND MATERIAL CAUSATION IN CLINICAL NEGLIGENCE

Reaney v University Hospital of North Staffordshire NHS Trust [2014] EWHC 3016 (QB), 141 BMLR 63

When a pre-existing dependency can be disregarded in the quantification of future care

(Foskett J)

The facts: The claimant was admitted to hospital with severe back pain. She was diagnosed as having transverse myelitis, a grave condition that caused an inflammation in her spinal cord. Its effect was to render her permanently paraplegic at T7. This left her with no sensation below her mid thoracic spine nor any control over her bladder or bowels.

During her extended hospitalisation, and due to the treating hospital's admitted neglect, she suffered from a number of deep (grade 4) pressure sores. These eventually resulted in osteomyelitis and contractures of her legs which exacerbated her problems and reduced mobility significantly. The full effect of these symptoms was not apparent until approximately six months from discharge.

The claimant's case was that but for the hospital's negligence she would have been largely self dependent. Whilst her T7 paraplegia would have left her confined to a wheelchair for life, she would have only required about seven hours of care a week. This had been provided by her spouse and/or the local

authority. Although that dependency would have increased in later life, hitherto it had been provided for the most part by her husband; so this disability had no appreciable financial implications to this 67-year-old lady.

However, the effect of the additional supervening disability (that was permanent) was to leave her largely bed ridden: she could only sit out in a wheelchair for a maximum of four hours. More significantly, she now required 24-hour care from two carers. There were also extensive costs involved in providing her with suitable accommodation and equipment needs.

The key legal issue: The Trust argued that they were not liable to compensate her for her pre-existing (non tortious) disability as their liability was confined to compensating her for the additional disability they had caused over and above her pre-existing disability. They cited a non-personal injury authority, *Performance Cars Ltd v Abraham* [1962] 1 QB 33, [1961] 3 All ER 413, that was later followed in *Halsey v Milton Keynes General NHS Trust; Steel v Joy* [2004] EWCA Civ 576, [2004] 4 All ER 920.

The defence also relied on the Court of Appeal ruling in *Baker v Willoughby* [1970] AC 467, [1969] 3 All ER 1528 which created an exception to the 'but for' causation rule to mitigate the injustice that would have arisen if the normal causation rule applied. In that case the victim injured his leg in a car accident that left him permanently disabled with extensive future loss of earnings. Later on he was shot in the same leg and it had to be amputated. The insurers argued that the negligent driver had no liability after the amputation as the intervening event had obliterated the claimant's injury from the first event, and hence it ended the actionable loss from that first incident. The court held that the defendant remained liable for the full loss, notwithstanding the intervening event. This was not a case of concurrent tortfeasors; the second defendant did not cause or contribute to the first injury, so the first defendant was liable for the full future loss as though the second injury had not supervened.

Against this the claimant argued that, but for the hospital's negligence, she would have been able to cope largely for herself and that the supervening injury was directly responsible for her present extensive needs. She argued that *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 44 JP 392, 28 WR 357 applied so that the court should award 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'. In essence, the claimant's case was that the sequelae from the pressure sores had tipped her into needing extensive funded future care and that but for that occurrence, she would have been able to do without through the agency of gratuitous and local authority funded care. Reference was also made *to Paris v Stepney Borough Council* [1951] AC 367, [1951] 1 All ER 42 and the principle that the 'loss of an eye is significantly worse for a one-eyed man than a man with full eyesight' and how this was applicable to the 'but for scenario' in the present case.

The decision: The judge found the Trust liable for the full cost of the claimant's future care, equipment and accommodation needs.

He held that the case was distinguishable from *Performance Cars* and the other precedents. He preferred to follow *Sklair v Haycock* [2009] EWHC 3328 (QB), [2009] All ER (D) 159 (Dec) which featured a road accident claim that left the 46-year-old claimant badly incapacitated and dependent on 24/7 care. However, the defendant argued that the award should be reduced to take into account the fact that the claimant suffered from Asperger's Syndrome and Obsessive Compulsive Disorder, and that he had lived with his 80-year-old father for the past 20 years because he relied on him for his basic needs such as feeding and undertaking his laundry; a role that he would not be able to discharge indefinitely. However, apart from that he was able to lead a fairly independent life and he could travel on his own. His father was over 80 years of age and so, even if the accident had not occurred, it was common ground that he would not have been able to look after his son indefinitely. The judge, Edwards-Stuart J, ruled that he was entitled to his full loss without reduction. Whilst it was only fair and reasonable that a claimant give credit for relevant expenditure incurred prior to the accident when assessing his net loss as a result of the accident where he would have continued to enjoy gratuitous care and attention which he could no longer enjoy because of the accident, there was no reason in either logic or justice why he should be required to place a value on that care and attention and then be made to give credit for it against his claim.

Comment: So far so good since the decision is consistent with what common sense and fairness would seem to require to compensate this claimant for the way the hospital's negligence had triggered the need for financial resources to meet her needs that hitherto had been avoided by her family's resourcefulness. This decision is explicable by applying the normal 'but for' causation principle.

Guiding the lily: However, Foskett J then proceeded to bolster his decision by suggesting that even if *Sklair* did not answer to this particular case, causation could still be established for the full loss under the 'more conventional route' of material contribution.

This modification of the normal causation test is one that is confined to cases where medical science is unable to establish the probability that, 'but for' an act of negligence, the injury would not have occurred. It was to avoid such claims floundering on this 'rock of uncertainty' (as Lord Bingham put it in *Fairchild v Glenhaven Funeral Services Ltd; Fox v Spousal (Midlands) Ltd; Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] UKHL 22, [2003] 1 AC 32, [2002] 3 All ER 305 (a mesothelioma claim)), that this special rule was first propounded. In doing so the House of Lords approved a rule formulated in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, [1956] 1 All ER 615 (a pneumoconiosis claim), later applied in *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1 (a silicosis claim). Under this special rule where a claimant was able to establish first that the defendant's culpable exposure had made a material contribution to the disease that was more than negligible and, secondly, that the disease had materialised, then causation would be established. These were industrial disease claims where there were separate competing periods of exposure that

had acted cumulatively to increase the chance or likelihood of the disease occurring and where any one of those episodes may have actually operated as the triggering agent that caused the disease. The nature, effect and scope of this special causation rule has been the subject of much recent debate and has featured in a number of decisions at a very high level: *Barker v Corus (UK) plc (formerly Saint Gobain Pipelines plc); Murray v British Shipbuilders (Hydrodynamics) Ltd; Patterson v Smiths Dock Ltd and others* [2006] UKHL 20, 89 BMLR 1; *Sienkiewicz v Greif (UK) Ltd; Knowsley Metropolitan Borough Council v Willmore* [2011] UKSC 10, 119 BMLR 54; *Durham v BAI (Run Off) Ltd (in scheme of arrangement) and other cases* [2012] UKSC 14, [2012] 3 All ER 1161 and latterly *International Energy Group Ltd v Zurich Insurance Plc UK* [2013] EWCA Civ 39, [2013] 3 All ER 395 (in which the Supreme Court's decision is awaited from the hearing in late January 2015).

Foskett J may have muddied the waters somewhat in his zeal to leave no stone unturned in his extensive legal analysis. The use of the concept of 'material contribution' is perhaps best left to the discrete field of primary liability considerations in cases where medical science is unable to reveal whether, on the balance of probability, which of two potential cumulative causes actually materialised into an actionable injury.

Whilst it is undoubtedly correct that this exception to the conventional 'but for' causation test has its origins in industrial disease claims, such as *Bonnington* and *Fairchild*, it has since been comfortably accommodated in the context of clinical negligence claims for quite some time now. In *Bailey (by her father and litigation friend) v Ministry of Defence* [2008] EWCA Civ 883, [2009] 1 WLR 1052, the claimant suffered brain damage as a result of complications that were partly attributable to non-negligent causes and party to the treating hospital's lack of care. She underwent a gall stone operation that resulted in her suffering from complications, including pancreatitis. These required further procedures that so weakened her that she eventually aspirated and suffered a heart attack that caused her significant brain damage. The court found the treating hospital negligent in its lack of care not only for failing to effect a timely resuscitation but also, prior to that, in its treatment of Mrs Bailey leading up to that crisis. The other contributing factor to her generally weakened state had been the non-negligently caused development of pancreatitis.

In *Bailey*, Waller LJ looked for inspiration to the special causational rule developed in *Bonnington* and *Fairchild*. He opined that it in this context it was not possible to draw a distinction between medical negligence cases and others. The Court of Appeal found that it was her weakened state that had led to Mrs Bailey aspirating and that this condition had been caused, or materially contributed to, by the hospital's lack of care.

The origins of the 'material causation' principle as applied to clinical negligence can be traced back, before *Bailey* even, to the House of Lords case in *Hotson v East Berkshire Area Health Authority* [1987] AC 750, [1987] 2 All ER 909 approximately 28 years ago. In *Hotson*, a 13-year-old boy had fallen out of a tree and sustained an avascular necrosis type injury that

reduced the flow of blood to cartilage in his hip joint. The treating hospital failed to diagnose this for five days and this was held to have been negligent. He was left with a permanent disability of the hip joint. The issue was whether the five-day delay in diagnosis made any difference to the final outcome. The medical evidence was that the extensive nature of the damage to his blood vessels caused by the fall left him with only a 25% chance that an earlier diagnosis would have been effective: the die was cast when the injury was sustained. So on the balance of probability the present disability was inevitable. When the case came before the House of Lords it dismissed the claim on that basis, applying the conventional 'but for' test. However, Lord Bridge had noted that had the medical evidence indicated that the clinical negligence had contributed materially to the avascular necrosis he would be entitled to the full measure of damages.

Primary liability was not at issue in *Reaney*, only the quantification of the claimant's loss. The extent of the additional care needs was a known factor. In the writer's respectful opinion the court's decision is justified by simply applying the conventional causation test: namely that on the balance of probability, but for the supervening disability, the claimant would not have been obliged to purchase outsourced private care as well as the extensive equipment and accommodation costs. Reference to the material contribution exception was neither necessary nor relevant.

Practice points: *Reaney* shows that that when it comes to the tricky task of quantifying a previously injured claimant's future care, it is not always a simple topping up exercise. It may not be appropriate to deduct the notional cost of the victims pre-existing dependency from the post accident total as that may not do justice to the situation. Whilst the basic rule still pertains, namely that in tort law a defendant is not liable for a loss that predates the wrongful act, so does the time-honoured precept (that best answers this case), namely that you must take your victim as you find him.

Reaney is a sensible decision but it is perhaps one that is best confined to its facts.

The true significance of *Reaney* and *Sklair* seems to be this: where, prior to the onset of a supervening injury, a claimant has been making do with gratuitously provided help (whether derived from the family or the local authority), if that current level of care is subsumed by the consequences of a later injury then the claimant may be able to elect private care for the entirety of the care package and recover that in full from the defendant. This seems to be a natural implication of the Court of Appeal ruling in *Peters v East Midlands Strategic Health Authority* [2009] EWCA Civ 145, [2010] QB 48 which held that even where free of charge provision exists, a claimant can choose whether or not to opt for a full privately funded care regime as long as there is no double recovery of damages.

From a defendant's perspective, *Reaney* and *Sklair* produce a harsh outcome, extending their potential liability beyond what they would anticipate as being directly attributable to their wrongdoing. Consequently, claimants can expect

in these circumstances a very rigorous investigation of their arrangements both prior to and following the tortious event.

The following case serves as a recent example of a clinical negligence claim that justified the deployment of the material contribution test.

Leigh v London Ambulance Service NHS Trust [2014] EWHC 286 (QB), [2014] All ER (D) 201 (Feb)

Ambulance service liable for a 17-minute delay was materially causative of a claimant's PTSD

(Globe J)

The facts: The claimant, who was a passenger on a bus, was involved in an incident that inflicted an agonising injury to her leg involving the dislocation of her knee cap. It seems that the victim was of a nervous disposition. Unfortunately, her injury was compounded by her leg remaining trapped for 50 minutes before the ambulance eventually turned up. She developed Post Traumatic Stress Disorder (PTSD) of a particularly severe intensity (DSM-V), which is classified thus:

> The individual may experience dissociative states that last from a few seconds to several hours or even days, during which components of the event are relived and the individual behaves as if the event were occurring at that moment. Such events occur on a continuum from brief visual or other sensory intrusions about part of the traumatic event without loss of reality orientation, to complete loss of awareness of present surroundings. These episodes, often referred to as "flash-backs", are typically brief but can be associated with prolonged distress and heightened arousal.

The claimant alleged that her PTSD had been caused by the late arrival of the ambulance. The first emergency call was made at 19.02. The defendant admitted that an ambulance should have arrived at the scene by 19.33 (31 minutes later). It didn't arrive until 19.50, 17 minutes later still.

The defendant conceded that the late arrival had been negligent but it argued that the claimant would have suffered PTSD in any event as a consequence of the first half hour's ordeal, regardless of any subsequent delay.

After hearing extensive expert medical evidence on the issue as to whether and to what extent the delay was a causative factor, the judge concluded that it was unable to decide the issue as to whether the PTSD was caused before or after the delay. Neither could it indicate the degree to which the delay was responsible for contributing to the PTSD.

The decision: The defendant was liable in full for the claimant's debilitating PTSD.

The delay had acted as a cumulative cause of the PTSD. The medical evidence was unable to establish the probability of its having been caused prior to the delay nor the extent to which the delay itself contributed to this

condition. Nevertheless, he was satisfied that the delay had served as a material contribution to the development of her PTSD. All parties agreed that in the circumstances this was an appropriate case for the special causational rule, as applied in *Bailey (by her father and litigation friend) v Ministry of Defence* (see above under *Reaney v University Hospital of North Staffordshire NHS Trust*). The claim was quantified at £522,379, which reflected the fact that she had been forced to take early retirement from her employment at the National History Museum.

CAUSATION OF LUNG CANCER

Henegham v Manchester Dry Docks Ltd and others [2014] EWHC 4190 (QB), [2014] All ER (D) 150 (Dec)

Fairchild exception extends to lung cancer but apportionment of damages applies

(Jay J)

The facts: By the time the claim was heard the claimant had already died from lung cancer. He was a smoker who had also been exposed to asbestos dust by numerous employers with whom he had been retained on a sequential basic. Liability had been agreed by six defendants and it was accepted that between them they had been responsible for exposing him to 35.2% of the total culpable exposure. One of his other former employers (who was not a party to the action) was responsible for 56% of the total exposure. Taken as a whole, the extent of his lifetime exposure to asbestos was over five times the dose that the Helsinki criteria indicates as indicative of cancer being asbestos-related cancer.

The issue: The defendants contended that although lung cancer is an indivisible disease in the sense that it is not dose related, liability should be apportioned between the defendants to reflect the degree to which each of the defendants were responsible for their own aliquot share of the total culpable exposure.

The claimant argued that the special causation rule in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, [2002] 3 All ER 305 did not apply to this case; reserving his position on this point on any appeal to await the Supreme Court's decision in *International Energy Group Ltd v Zurich Insurance Plc UK* [2013] EWCA Civ 39, [2013] 3 All ER 395 from a decision of the Court of Appeal to the effect that indivisible disease claims established under the *Fairchild* rule were not subject to apportionment of damages under the House of Lords ruling in *Barker v Corus (UK) plc (formerly Saint Gobain Pipelines plc); Murray v British Shipbuilders (Hydrodynamics) Ltd; Patterson v Smiths Dock Ltd and others* [2006] UKHL 20, 89 BMLR 1. The claimant contended in effect that a modification of the *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, [1956] 1 All ER 615 principle applied to this claim so that provided he could establish that the

defendants' culpable exposure had materially contributed to the risk of lung cancer, then they were all jointly and severally liable for the full amount of the claim.

The decision on the correct test to apply: The judge held that there was no intermediate position that permitted a modification of the test causation formulated in *Fairchild*. There are two stark alternatives. First, there is the conventional 'but for' causation test that requires a claimant to establish that a defendant's wrongful act was on the balance of probably more likely to be the cause of the injury or disease than not (ie a probability of 51% or higher). Secondly, there is the *Fairchild* exception (see above under the *Reaney v University Hospital of North Staffordshire NHS Trust* case summary, sub-heading *Gilding the Lilly*). His view was that there was no appreciable difference between the various formulations propounded under, *Bonnington*, *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1 and *Fairchild* (see above under *Reaney*). What lay at the root of all these decisions was one single exception to the conventional causation test; albeit articulated differently.

Although the judge accepted that the claimant could establish, conventionally, on the balance of probability that his cancer was caused by being exposed to asbestos dust (especially given the multiplicative effect on the risk of the disease caused by his smoking), he considered that this would not enable him to prove that any one of the six defendants in the action were responsible for actually causing the disease. This is because, with the exception of the one employer who was not a party to the action, none of the employers could be said to be responsible for exposing him to an extent that could be shown to have doubled his risk of developing cancer.

However, although there was considerable discussion on the limited scope of the *Fairchild* exception at the highest judicial level, he considered that he was not prevented by precedent from extending its remit to lung cancer, which he then did.

The decision on the defendants' liability: The judge considered that although *Fairchild* applied he was bound by *Barker* to apportion liability between the defendants according to their respective share of his total exposure. The value of the full claim being agreed at £175,000, his estate was awarded only £61,000 against the six defendants.

Comment: This is a very significant decision. It is being appealed. The modified causation test and the special rules on the apportionment of loss in industrial disease claims are both a highly technical and polemical areas of the law. The outcomes of the appeal in this case and in *International Energy Group Ltd* are eagerly awaited and in the meantime uncertainty prevails.

VICARIOUS LIABILITY FOR ABUSE

NA v Nottinghamshire County Council [2014] EWHC 4005 (QB), [2015] Fam Law 133

Local authority not vicariously liable for foster parent's abuse

(Males J)

The facts: The claimant endured a very unhappy childhood and this was largely attributable to the abuse she received from a succession of individuals responsible for here well being and care. This included her mother and her violent partner, a series of residential children's homes and a variety of foster placements. It is the latter aspect of this litany of woe that is perhaps the most significant from a legal perspective. That is because the claimant sought to establish that the local authority was either directly responsible for the foster parent's abuse because they owed her a non-delegable duty of care or, alternatively, that they were vicariously liable.

The decision: The claims were dismissed.

Although, as Lord Phillips put it in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1, 'the law of vicarious liability is on the move' so that it was capable of extending to those who were not strictly speaking employees of the defendant but with whom the defendant had a relationship akin to employment, that principle did not encompass a local authority becoming vicariously liable for the wrongful acts of a foster parent. Foster parents were intended to have a very different role to that of a residential home. Their effectiveness depended to a large extent on their charges being brought up as part of the family and as free as possible from official interference and control. Once approved and assigned, a foster parent is not supposed to be under the control of the local authority.

As to the ground based on the authority being under a non-delegable duty of care, although the relationship satisfied all five defining features of a non-delegable duty of care, as stipulated by Lord Sumption in *Woodland v Essex County Council* [2013] UKSC 66, [2014] AC 537, the judge rightly held that it was still necessary to consider whether it is fair, just and reasonable to impose a non-delegable duty in all the circumstances. The judge concluded that the claim failed this last hurdle for the following reasons:

1. it would impose an unreasonable financial burden on local authorities providing a critical public service;
2. there was a real danger that the imposition of a non-delegable duty would promote, consciously or subconsciously, risk-adverse foster parenting;
3. there was a fundamental distinction between a placement with foster parents and a placement in a children's home; and
4. it would be difficult to draw a principled distinction between liability for abuse committed by foster parents and abuse committed by others with whom an authority decided to place a child, including its own parents.

Comment: Pragmatic as this decision may be, there will be many who find the outcome hard to reconcile with the thrust of *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, and with the evolving scope of liability in abuse cases. Arguably it fails to make a proper distinction between adopted children and foster parents who receive a maintenance allowance. The same

grounds of expediency could just as easily be argued in other scenarios where liability non-delegable duty has been established. It will be interesting to see if it is appealed. However, it is worth noting that there appears to have been a relative paucity of precisely articulated specific instances of abuse in this case and an understandable but problematic absence of corroborative evidence. These factors are likely to have influenced the outcome, despite the main thrust of the claimant's allegations being depressingly consistent.

NERVOUS SHOCK

Wild and another v Southend University Hospital NHS Foundation Trust [2014] EWHC 4053 (QB), [2014] All ER (D) 46 (Dec)

Grief-stricken father of still born-child excluded from claiming under secondary victim rule

(Michael Kent QC)

The facts: A hospital agreed to settle a negligence claim by the mother of an infant boy who had died in her womb. It was accepted that it had erred in the way it recorded the foetus's growth and that it should have intervened by inducing its delivery. The father was present at the ante-natal clinic when it was discovered that the baby had died in the womb. He was not present when it was still born the following day.

It was accepted that it was reasonably foreseeable in the circumstances that the father might suffer distress. However, the defendant refused to compensate the father on the ground that on the facts there was insufficient proximity in law to the father, who was a secondary victim. It relied in particular on the statement of principle in *Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 194, [2014] QB 150, contending that was that there was a lack of 'the requirements of immediacy, closeness of time and space, and direct visual or aural perception' of the shocking events as required by *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, [1991] 1 All ER 353. The Defence also averred that the Second Claimant was not present at the time of the alleged negligent events which led to the death of the baby, and that the events were not so exceptional or shocking as to be expected to cause a recognised psychiatric injury.

It will be recalled that the *Alcock* featured physical injuries sustained by the primary victims of the Hillsborough disaster over a relatively brief space of time. In that case Lord Oliver set out the criteria for nervous shock – secondary victim claims. They require:

- a marital or parental relationship between the Plaintiff and primary victim;
- the injury for which damages were claimed arose from the sudden and unexpected shock to the Plaintiff's nervous system;

- the claimant 'was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnessed the aftermath shortly afterwards';
- the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim;
- there was not only an element of physical proximity to the event but a close temporal connection between the event and the Plaintiff's perception of it combined with close relationship of affection between the Plaintiff and the primary victim.

The decision: The father's claim was dismissed.

The father's claim foundered on the third criterion. The tragic realisation that his son had died in the womb did not equate with the witnessing of horrific events leading to death or serious injury.

OTHER NOTABLE CASES

Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust [2015] EWCA Civ 18, 165 NLJ 7639

The Court of Appeal has ruled that a conditional fee agreement, entered into with a client who was known to have fluctuating capacity, was not frustrated by a supervening loss of such capacity.

Re Iraqi Civilian Litigation [2015] EWHC 116 (QB), [2015] All ER (D) 201 (Jan)

Mr Justice Leggett delivered an important limitation of action ruling that affects hundreds of claims brought under the Human Rights Act 1998 and tort law principles by Iraqi Civilians for mistreatment and unlawful detention at the hands of the British forces. He held that the limitation period that applied to the relevant period had been suspended indefinately by reason of the immunities enjoyed by British forces at material times under the Coalition Provisional Authority Order No 17, and that this immunity made it impossible for the claimants to sue in Iraq.

Dusek and others v Stormharbour Securities LLP [2015] EWHC 37 (QB), [2015] All ER (D) 138 (Jan)

Mr Justice Hamblen ruled that a financial consultancy firm was liable for the death of one of its employees who was killed in a helicopter crash in Peru. It had chartered the helicopter to transport the deceased to visit the site of a potential project. He held that the employer owed a non-delegable duty to care to take reasonable care for the safety of its employee and this extended to avoiding taking any unnecessary risks that it could reasonably foresee as endangering him. He found that the employer filed to do anything to investigate or risk assess the obvious dangers, and that this was causative as

had these measures been undertaken they would have revealed safety concerns that would have compelled them to advise him not to undertake the flight.

Broni and others v Ministry of Defence [2015] EWHC 66 (QB), [2015] All ER (D) 118 (Jan)

The High Court has ruled that the fixed success fee regime under CPR Pt 45 did not apply to claims against the MoD for injuries sustained in service.

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