Duty of Care – clinical negligence

Khan v Meadows [2021] UKSC 21

Facts:

The Appellant consulted her GP, before getting pregnant, in order to find out whether she carried the haemophilia gene. The Respondent negligently led her to believe that she was not a carrier; in reality, the blood tests only showed that the Appellant did not herself have haemophilia, rather than the broader question of whether she was carrying the gene, which subsequent tests showed that she was. As a result, when she was pregnant she did not undergo foetal testing, which would have revealed that her foetus was affected, and the Claimant asserted that if she had known, she would have terminated the pregnancy.

Issues:

The Appellant's son was born with haemophilia and there was no dispute that the Respondent was liable for the costs of bringing him up, which were attributable to that haemophilia. The issue for the Court related to the fact that the Appellant's son was subsequently diagnosed with autism, which was unrelated to his haemophilia, and whether the Respondent should be liable for **all** costs arising from the pregnancy or merely those relating to the haemophilia.

The Court considered whether a Defendant is only liable for losses which fall within the scope of their duty of care to the Claimant, which is set out in the *SAAMCO* principle, from *South Australia Asset Management Corporation v York Montague Ltd.* [1997] AC 191. *SAAMCO* asks (and it is sometimes referred to as the *"SAAMCO Counterfactual*"), *"what would the Claimant's loss have been if the information which the Defendant in fact gave had been correct?"* in order to work out the extent or scope of the Defendant's liability.

The Supreme Court rejected the Appellant's argument that clinical negligence should fall outside the *SAAMCO* principle. Lord Burrows focused upon the purpose of the advice or information provided in order to determine if it is fair, just and reasonable to allocate liability to the Respondent here. Lord Leggatt on the other hand, looked closely at the causal connection between the subject matter of the advice and the Claimant's loss to determine if it was fair and reasonable to impose liability.

Ultimately, the Court dismissed the appeal, limiting the Respondent's liability to losses falling within the scope of her duty of care to advise the Appellant on whether or not she was a carrier of the haemophilia gene; this meant that the losses relating to the Appellant's son's autism fell outside the scope of that duty.

This case is linked to *Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20* which was heard at the same time.

Duty of Care - professional advisers

Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20;

Facts:

The Respondents audited the accounts of the Appellant building society. Annually between 2006 and 2013 the Respondents negligently advised the Appellants that they could use a method known as "hedge accounting" to prepare their accounts, which would be considered to give a true and fair representation of the financial position of the society. Relying upon the Respondents' advice, the Appellants employed a strategy of swapping long term interest rates as a "hedge" against the costs of borrowing money in order to fund aspects of its mortgage business. This strategy effectively hid the true capital position of the Appellant society. When the Respondents realised their error in 2013, the Appellants had to restate their accounts which caused them difficulties with reduced assets and insufficient capital to meet their regulatory requirements; this resulted in the Appellants closing out early the contracts relating to interest rate swaps at a cost of £32million.

Issues:

This case is linked to the Supreme Court decision in *Khan v Meadows [2021] UKSC 21* which considered the application of the *SAAMCO* principle in relation to clinical negligence. Here the Supreme Court were considering the scope of the duty of care in the context of professional accountancy advice.

Lord Burrows focused upon whether the factually caused loss is within the scope of the duty of care (avoiding discussions about "duty nexus" which appear in the judgments of Lord Hodge and Lord Sales). Lord Leggatt emphasised the role of causation when considering the scope of duty principle; whether there is a sufficient causal relationship between, *"what made the information or advice wrong and the loss"* (paragraph 96, per Lord Leggatt).

The Supreme Court allowed the appeal, holding that the £32m loss fell within the scope of the duty of care assumed by the Respondents in light of the purpose of the Respondents' advice on the use of "hedge accounting". In reality, the damages were reduced by 50% due to a finding of contributory negligence.

The practical implications of this decision for professional advisers, are that it would be wise for those advisers to specify the ***purpose*** for which they are advising, and what risks the duty of care is being mitigated against by this advice and ensure that these are reflected in any written agreement when they are engaged.

Nuisance / Defences - Limitation

Harrison Jalla & Others v Shell International Trading & Shipping Co. & Another [2021] EWCA Civ 63

Facts:

The Appellants were individuals and communities living and working along a stretch of the Nigerian coast. The Bonga oil field lies 120kms off the Nigerian coast, in 2011, a flexible flowline and mooring buoy ruptured there; the Respondents who were responsible for the pipeline, turned it off within 6 hours. The oil spilled led to oil damage along the shoreline; for most Claimants this happened shortly after the spill, but for those living in one of the delta channels further away from the source of the spill, the timing was much later. The damage continued while the oil remained on the land. This oil damage affected, amongst other things, the fishing and farming on that land, as well as drinking water and mangrove woods that were used for energy.

Issues:

What is a continuing nuisance? This question was one of principle for the Court of Appeal. They considered whether the claim in nuisance accrued when actionable damage was suffered along the shoreline or whether there was a continuing cause of action in nuisance while the oil remained on the Appellants' land. This was relevant to the claim because it linked to whether claims were statute-barred due to limitation (which is 6 years for nuisance).

Coulson LJ surveyed the leading authorities on the issue and concluded that this was **not** a case of continuing nuisance but a single cause of action which, as a matter of law, was completed when the damage occurred to the land rather than when the spill occurred. The Claimants only acquired a cause of action when the oil spill arrived on their land, which would vary depending on where they were located.

To help with understanding continuing nuisance, Coulson LJ referred to the classic example of a tree roots case (at paragraph 54), where the tree roots spread under neighbouring land and undermine the neighbour's house foundations. The landowner remains liable until they abate the nuisance by cutting down or severely pruning the tree. The nuisance is continuing as a state of affairs either deliberately or by omission. This contrasts with a one-off act or omission causing an oil spill; using the language of the older authorities, it could be classed as an "isolated escape" (paragraph 55, per Coulson LJ).

This is an important environmental nuisance decision. The Court of Appeal were keen to distinguish the colloquial, non-legal use of the word nuisance from the legal cause of action, and to make clear that nuisance is not equated with physical damage or harm; similarly continuing damage is not synonymous with a continuing cause of action in nuisance (paragraph 68). One rationale for this is that it could lead to unending liability and difficulties for firms in identifying future liabilities with any certainty from a one-off spill, which would render the Limitation Act ineffective.

Vicarious Liability

The Trustees of the Barry Congregation of Jehovah's Witnesses v BXB [2021] EWCA Civ 356

Facts:

The Claimant was a member of the Jehovah's Witnesses' Barry Congregation in 1990 when she was raped by a man called Mark Sewell. Sewell was a ministerial servant and subsequently became an elder of the congregation; this resulted in a criminal conviction and sentence of imprisonment. The Claimant brought a claim for damages due to her injuries and episodes of depression and post-traumatic stress disorder. She brought her claim against the Appellant trustees amongst others claiming that they were vicariously liable for Sewell's torts.

Issues:

This case is a useful consideration of the extent of vicarious liability where there is a claim in relation to historical sexual abuse of an adult.

The Court of Appeal carries out a useful survey of relevant authorities in this area of law and concluded that Sewell's position as an elder was crucial to the question of vicarious liability. *"Elders were integral to the organisation, the nature of their role was directly controlled by it and by its structure. The judge was entitled to conclude that the relationship between elders and the Jehovah's Witnesses was one that could be capable of giving rise to vicarious liability."* (paragraph 81, per Nicola Davies LJ). This effectively resolved the question posed by the "close relationship" test of Lord Phillips in the *Christian Brothers* case and confirmed the question of vicarious liability.

The dicta of Males LJ is also helpful, as he considered the role and power relationship between Sewell and the Claimant and its importance in the circumstances surrounding the rape.

The Court of Appeal did not find compelling the arguments that it should make a difference that the Claimant was an adult at the time of the rape, rather than being a child victim of sexual abuse as in many of the other authorities. They noted that adults may also be susceptible to the risk of abuse in relationships of responsibility, power and moral authority and were worthy of the protection of the Courts. The Court observed that this was particularly so where the faith promoted, *"a culture of unquestioned obedience to religious leaders"* (paragraph 107, per Bean LJ).

Vicarious Liability/Breach of Statutory Duty

SKX v Manchester City Council [2021] EWHC 782 (QB)

Facts:

The Claimant had been placed by the Defendant local authority in a private children's home in the 1980s and brought a claim for damages for personal injuries alleging that they were the victim of historical sexual abuse by one of the children's home employees.

The claim was twofold, that either the local authority was vicariously liable for the acts of the employee of the private care home and in the alternative that the Claimant was owed a non-delegable statutory duty of care to the Claimant under s.2 Child Care Act 1980 (now repealed but in force at the time of the alleged abuse and replaced by similar statutory duties within the Children Act 1989).

Issues:

Vicarious Liability

This was an interesting case, following a number of authorities in which the doctrine of vicarious liability has been incrementally extended beyond the simple employer/employee relationship to relationships which are "akin to employment" (per Lady Hale in *Various Claimants v Barclays Bank* [2020] UKSC 13). Cavanagh J considered the facts and concluded that there was no relationship "akin to employment" as the wrongdoing employee was carrying out an independent business on behalf of a third party (the children's home operator); that business was vicariously liable for his actions, but the local authority was not.

In particular, the Court distinguished the case of *Armes v Nottinghamshire County Council* [2017] UKSC 60, where a foster parent wrongdoer was in a relationship akin to employment with the local authority as they did not carry out an independent business; unlike the facts of this case, there was no company in between. Therefore, the Defendant local authority was not vicariously liable for the children's home employee's actions.

Non-Delegable Duty

Cavanagh J then considered the non-delegable duty question and again looked for guidance from the Supreme Court decision in *Armes*. His view was that the local authority's duty extended so far as to arrange, supervise and pay for the child's day to day care, but there was no further duty to ensure that care was taken for the Claimant once he was placed with the third-party private children's home.

The Defendant local authority had therefore discharged its duty by placing the Claimant appropriately and did not owe a non-delegable duty to provide daily care for and protect the Claimant once he was placed in the care of the private children's home and was therefore not liable to the Claimant.

This decision is interesting as it shows that the widening of duties in these historical sexual abuse cases is not without limits, and that *Armes* (which related to local authority foster

parents) is not an opportunity to open the floodgates to hold local authorities liable for all abuse of children that they supported.

Negligence - Causation

Leach v North East Ambulance Service NHS Foundation Trust [2020] EWHC 2914 (QB)

Facts:

The Claimant was alone at home when she suffered a subarachnoid haemorrhage (SAH) as a result of a ruptured aneurysm. Her first call to 999 was made at 14.22. At 15.10 ambulance records noted that an ambulance was required within 30 minutes. Multiple further calls were made by a neighbour and subsequently the Claimant's mother, and the ambulance eventually arrived at 16.11. The Defendant admitted it was negligent for the ambulance not to have arrived by 15.40 - so there was a 31 minute period of culpable delay.

The Claimant's SAH was treated successfully, but she developed significant Post-Traumatic Stress Disorder (PTSD) manifesting itself, in particular, as severe anxiety.

Issues:

The issue for the High Court to decide was whether the negligent period of delay caused or contributed to the onset of PTSD. The Defendant's case was based on evidence that she would have developed PTSD in any event, whereas the Claimant's case was based on evidence that it was not possible to specify the point the PTSD was triggered, but the 31 minute delay had made a material contribution to its onset.

HHJ Freedman (sitting as a Deputy High Court Judge) expressed the view that material contribution is particularly helpful as a concept when considering causation where an indivisible injury has occurred; in this case indivisible due to the difficulty in deciding the relevance of negligent and non-negligent delay. He concluded that it was not possible on the balance of probabilities to determine a fixed point in time during the wait for the ambulance that the PTSD was likely to develop, but the 31 minutes of negligent delay was important (being approximately one third of the overall delay) and made a material contribution to the Claimant's PTSD. Apportionment would not be appropriate for an indivisible injury.

Where medical evidence could not establish clearly that "but for" the negligent act, the Claimant would not have suffered the injury, the modified material contribution "but for" test was appropriate.

Defamation - Defences

Lachaux v Independent Print Limited & Others [2021] EWHC 1797 (QB)

Facts:

The facts of this case should be familiar, as the Supreme Court decided a preliminary issue about the meaning of serious harm in s.1(1) Defamation Act 2013 in *Lachaux v Independent Print Ltd & another* [2019] UKSC 27.

The Claimant, Bruno Lachaux brought libel actions in relation to the Defendants' newspaper reports alleging that amongst other behaviour towards his ex-wife he had been violent and abusive towards her during their marriage, removed their son from her possession and falsely accused her of abducting him.

Nicklin J dismissed the newspapers' public interest defence ordering them to pay £120,000 in libel damages and to publish a summary of his judgment.

Issues:

Public Interest Defence – s.4 Defamation Act 2013

Nicklin J was highly critical of the publishers' failure to uphold basic journalistic standards and considered the best way to approach a public interest defence under s.4 DA 2013. The burden of establishing a public interest defence lies with the publisher. He confirmed that there are 3 issues for the Court to determine under s.4(1) (at paragraph 129 of the judgment):

- *Was the statement complained of, or did if form part of, a statement on a matter of public interest? If so,*
- *Did the Defendant believe that publishing the statement complained of was in the public interest? If so,*
- *Was that belief reasonable?*

Nicklin J described publication in this case as "utterly irresponsible" (paragraph 92). He emphasised that to rely upon the public interest defence in s.4 DA 2013 the Defendant newspapers needed to verify the allegations made against the Claimant, given how serious they were, and to put those allegations to him for comment. It was also noted that the Defendants had breached their own code of conduct in addition to the Press Complaints Commission's Editorial Code of Practice (PCC Code). Without those key actions on the part of the Defendants, the judge felt that it was impossible to *reasonably* believe that publication was in the public interest and dismissed the defence.

To put it simply, the more serious the allegation, the more important it is for a Defendant to provide the Claimant the opportunity to give a response if they wish in order to rely upon a s.4 public interest defence.

Damages

The Whiplash Injury Regulations 2021

These reforms to the law relating to the recovery of damages where whiplash injuries occur came into force on 31st May 2021. Whiplash injuries are soft tissue injuries, typically to the neck and back, caused in a road traffic accident. These regulations only apply to claims where the accident occurred after that date.

Some of the key points introduced by these regulations include:

- The replacement of the Judicial College Guidelines with a new tariff for awarding damages of pain, suffering and loss of amenity (PSLA) in relation to whiplash injuries with consequences continuing for less than 2 years. This removes the element of judicial discretion which existed for assessing the quantum of damages for PSLA.
- This tariff (see regulation 2) will see significant reductions in damages for whiplash cases, for example:

Duration of Injury	**Whiplash Injury Regulations 2021**	**Judicial College Guidelines**
Up to 3 months	£240-£260	Up to £2,300
9-12 months' duration	£1,320-£1,390	£3,000-£4,080
18-24 months' duration	£4,215-£4,345	£5,000-£7410

- There is a process whereby the Court can increase the tariff damages by up to 20% in exceptional circumstances under regulation 3.
- Several procedural changes have been brought in, including the introduction of a Road Traffic Accident Small Claims Protocol and Practice Direction 27B which covers cases where the value of damages for injuries falls below the threshold of £5,000. This brings all these claims for up to 2 years of symptoms within the ambit of the Small Claims track of the County Court, meaning that costs cannot be recovered. This is likely to result in fewer lawyers being involved in these cases and a corresponding rise in the number of litigants in person.
- Certain cases fall outside the new "Official Injury Claim Portal", which is the mechanism by which Claimants can commence their claim. These exceptions include where the Claimant is a child or vulnerable road user (which could be summarised generally as the Claimant not being in a car/larger vehicle, but on a motorbike, bicycle, horse, in a wheelchair or is a pedestrian).