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Clinical Negligence Briefing

In this edition of our Clinical Negligence Briefing, Katie Ayres examines the possible implications for medical practitioners, particularly those practising in paediatrics, of the pending decision of the Supreme Court in CN v Poole Borough Council, while Ella Davis and Dominique Smith take a look at the important Supreme Court decision in Darnley, which may significantly expand the range of individuals involved in healthcare who owe duties of care in relation to administrative functions.

CN v Poole Borough Council: Implications for Medical Professionals

The judgment of the Supreme Court in *CN v Poole Borough Council* is eagerly awaited by social care lawyers. The decision, whichever way it is decided, will have an impact on the provision of social care to children (and potentially, vulnerable adults), in a way that cannot be understated. This article suggests that it is not only those within the social care sphere that will need to take a close look at this important decision.

CN v Poole BC – The Issues

The facts of CN were recognised by those representing the Defendant to be 'grim'. A mother and her two sons (the Claimants), one of whom is profoundly disabled, were moved to a housing estate by the Defendant. Over the years that the Claimants and their mother were resident on the estate they were the victims of a campaign of harassment and bullying by a family that lived next door. Despite the family being evicted by the Defendant, the abuse continued due to them being re-housed nearby. The Claimants' mother sought assistance from the authorities. The police did little to help. The landlord facilitated the installation of protective equipment around the house but refused to help the family move. The local authority social services department also, it is claimed, failed to act.

It is important to look at exactly what action the Claimants plead that the Defendant social services department ought to have taken. The Claimants alleged that, if their plight had been properly investigated by the Defendant, this would have led to the commencement of Care Proceedings and the children's accommodation away from home (and hence, away from the abuse). The corollary of this, however, was also that the Claimants would have been accommodated away from their mother who, although she had not been able to protect them from the abuse, was a loving mother doing her best to meet their needs. The Supreme Court expressed some surprise at this argument.

The Claimants and their mother brought an action against the Defendant, alleging common law negligence, based on the failure to investigate and act under the duties imposed by the Children Act 1989. The Defendant applied to strike out the claims on the basis that there was no such duty of care in negligence. The action was initially struck out by the Master. The High Court (Slade J.) restored a part of the action relating to the Claimant's claim against the local authority as a social services authority (*CN v Poole Borough Council* [2016] EWHC 569 (QB)). The Court of Appeal (Davis, King and Irwin LL.J.), restored the order of the Master ([2017] EWCA Civ 2185).

The Defendant argued that there is no duty of care on a local authority (either directly, or vicariously via its social workers) when carrying out its

duties under statute. This was established as a matter of public policy by the House of Lords Decision in *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633 and, the Defendant says, was subsequently affirmed by the Supreme Court (albeit in the context of the police) in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] A.C. 1732. The House of Lords authority of *Mitchell v Glasgow CC* [2009] UKHL 11, [2009] 1 A.C. 874 additionally makes plain that there can be no claim against the landlord or the local authority in its guise as housing authority.

The Claimants relied instead on the Court of Appeal's decision in *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] Q.B. 558, in which a social services authority was held to be in principle liable in negligence for wrongly removing children from their parents. This decision was handed down after the coming into force of the Human Rights Act 1998, and, as a result of its enactment the previous line of authority under *X v Bedfordshire* could '*not survive*' (paragraph 83).

The arguments in the Supreme Court in *CN* were wide ranging from basic rules of precedent to much wider submissions about the correctness of *X v Bedfordshire*. The latter involved exploration of the 'basics' of negligence, most recently set out by Lord Reed in *Robinson v Chief Constable West Yorkshire Police* [2018] UKSC 4. It is possible that the Supreme Court will once again go 'back to basics' in deciding *CN* and it is likely that this exercise will have a wider impact than simply on the liability of social workers.

Wider Application

One area in which *CN* may have a significant impact is on the liability of paediatricians. Such liability will become particularly relevant in situations where a paediatrician is engaged by social services to specifically examine a child for signs of abuse.

Argument in *CN* addressed the fact that ordinarily there is no duty for 'omissions' (i.e. failures to act). An exception to this general rule is where there is a recognised pre-existing relationship that determines that such a duty should arise (e.g. doctor-patient, or more generally where there has been 'an assumption of responsibility'). As a rule of thumb, the person to whom you owe a duty in negligence is the person for whom you act under a retainer. This is because, in broad terms, the person to whom you have assumed responsibility is the person employing you to do the task.

In *X,* five children brought claims, which included claims for damages in negligence, against the council for failing to take action to prevent them from suffering parental abuse and neglect. In the 'Newham' case (one of the five) a child and her mother brought claims, which included claims for damages in negligence against the local authority, the area health authority and a consultant psychiatrist employed by the latter. On the issue of vicarious liability Lord Browne-Wilkinson concluded:

"The social workers and the psychiatrists were retained by the local authority to advise the local authority, not the plaintiffs. The subject matter of the advice and activities of the professionals is the child. Moreover the tendering of any advice will in many cases involve interviewing and, in the case of doctors, examining the child. But the fact that the carrying out of the retainer involves contact with and relationship with the child cannot alter the extent of the duty owed by the professionals under the retainer from the local authority. The Court of Appeal drew a correct analogy with the doctor instructed by an insurance company to examine an applicant for life insurance. The doctor does not, by examining the applicant, come under any general duty of medical care to the applicant. He is under a duty not to damage the applicant in the course of the examination: but beyond that his duties are owed to the insurance company and not to the applicant.
[…]
In my judgment in the present cases, the social workers and the psychiatrist did not, by accepting the instructions of the local authority, assume any general professional duty of care to the plaintiff children. The professionals were employed or retained to advise the local authority in relation

to the well being of the plaintiffs but not to advise or treat the plaintiffs."

The impact of this is twofold:

(1) A paediatrician does not owe a direct duty to a child whom she was examining at the behest of a local authority and therefore there can be no claim against the local authority based on vicarious liability principles (which, by definition, requires a duty first to be owed by the individual which can be extended to the employer); and

(2) Because there is also no direct duty of care on local authorities generally in respect of carrying out their children's services functions (for public policy reasons), neither the local authority (directly or vicariously) nor the paediatrician could be sued for a failure to correctly identify the signs of abuse.

Unfortunately, the matter is not quite so clear cut. A decision that is rather out of kilter with this aspect of the ratio of *X* is *Phelps* v *Hillingdon London Borough Council* [2001] 2 AC 619. In *Phelps* four appeals were heard together by a Committee of seven members of the House of Lords. In each, the complainant contended that the local education authority had negligently failed to make proper provision for his or her special educational needs. The cases were advanced both on the basis that the education authority was vicariously liable for breaches of a duty of care owed by the individual teachers or other professionals and on the basis that the education authority was in breach of a duty of care owed directly by the authority.

On the issue of vicarious liability, Lord Clyde found that there were strong grounds for arguing that the individual professionals involved owed the children a duty of care, breach of which would result in the education authorities becoming vicariously liable. At 654 Lord Slynn similarly concluded that:

"…where an educational psychologist is specifically called in to advise in relation to the assessment and future provision for a specific child, and it is clear that the parents acting for the child and the teachers will follow that advice, prima facie a duty of care arises."

Clearly, the effect of *Phelps* is that a paediatrician could well be found to have a duty of care to a child who she is examining at the behest of a local authority.

These rather conflicting House of Lords authorities make it very hard to answer the following question: Where a paediatrician has been engaged by social services to advise them on the likelihood that a particular child has been abused, does the paediatrician owe a duty to the child in question as well as to the body engaging her?

If an educational psychologist owes a duty to a child when engaged by an education authority to assess his or her needs then why, on the same principles, shouldn't a social worker or a paediatrician owe a similar duty to the child when engaged by a local authority? It remains to be seen how the Supreme Court will answer this question.

The question of a claim against a local authority founded on vicarious liability for the acts of a paediatrician in these circumstances may also be affected by the Court of Appeal decision in *Barclays Bank plc v Various Claimants* [2018] EWCA Civ 1670. In circumstances where the paediatrician is engaged by a local authority she may previously have been thought of as an 'independent contractor' whose acts could not establish a vicarious liability claim. It seems unlikely that this will be the position going forwards.

The practical effect of the decision in *CN* on medical professionals practising in this area is likely to be twofold:

(1) The judgment may provide clarification on whether a direct duty is owed to a child by a paediatrician engaged by a local authority to examine him or her for signs of abuse. Such a duty would, it seems, be likely to provide the foundation for a claim against the local authority on vicarious liability principles.

(2) If local authorities are found to be capable of owing a direct duty of care to children (i.e. the Supreme Court does away with the policy reasons that militated away from such a duty in *X*) then this will likely lead to contribution claims being made by local authorities against the NHS Trust employing the paediatrician who 'missed' the signs.

By Katie Ayres

In *Darnley v Croydon Health Services NHS Trust [2018] UKSC 50*, the Supreme Court were asked to decide whether an Accident and Emergency department ("A&E") receptionist giving misleading information about waiting times, constituted a breach of duty on the part of the Defendant Trust.

Background

The Claimant attended A&E at the Mayday Hospital ("the Hospital") following an assault, during which he was stuck on the head. He spoke to a receptionist upon his arrival and explained that he was feeling very unwell and thought he had a head injury. The receptionist told him he would have to wait up to four or five hours to be seen, but neglected to tell him that a triage nurse would see him within just 30 minutes. After 19 minutes, the Claimant decided he did not want to wait and went home. Approximately one hour after he left Accident and Emergency, the Claimant became distressed. An ambulance was called and he was taken back to the Hospital. A CT scan identified a large extra-dural haematoma overlying the left temporal lobe and inferior parietal lobe with a marked midline shift. The Claimant was transferred into the care of the neurosurgeons at St George's Hospital, Tooting, and taken to the operating theatre at 01:00, around four and a half hours after he first presented at A&E. The Claimant suffered a severely disabling left hemiplegia.

The Decision at First Instance

The Claimant brought a claim alleging a breach of duty by the non-clinical reception staff concerning the information he was given about the time he would have to wait before being seen by a clinician. The claim was dismissed at first instance on the grounds that it would not be fair, just and reasonable to impose a duty on civilian receptionists. The judge did, however, find as a fact that had the Claimant been told he would have been seen within 30 minutes, he would have waited and would have been seen before he left. Had he been seen, he would have been admitted or told to wait. He would therefore have collapsed while at the Hospital, been subsequently transferred to the operating theatre sooner and would have made a very near full recovery.

The Court of Appeal

The Court of Appeal dismissed the Claimant's appeal. Jackson LJ was satisfied that there was no general duty to provide information about waiting times. He considered that the receptionist had not, by giving such information, assumed responsibility for the tragic consequences which followed, and that it would not be fair just or reasonable to impose a duty not to provide inaccurate information about waiting times. Moreover, even if the receptionist was in breach of duty by giving incorrect information to the Claimant, the scope of that duty could not extend to liability for the consequences of a patient walking out without telling staff that he was about to leave. There was no causal link between any breach of duty and the injury.

However, in his dissenting judgment, McCombe LJ considered that the Hospital owed a duty not to misinform patients. That duty could not be avoided by relying on civilian staff. On the facts, he found that in failing to give accurate information about the triage system, the hospital was in breach of duty.

The Supreme Court

Duty

Novel situation or established duty

The Supreme Court unanimously allowed the

Claimant's further appeal with Lord Lloyd-Jones giving the only judgment. He held that this was not a case concerning the imposition of a duty of care in a novel situation, thus a re-evaluation of the ingredients of foreseeability of damage, proximity and fairness was not required. Where the existence of a duty has previously been established, a consideration of justice and reasonableness has already been taken into account (see *Robinson v Chief Constable of West Yorkshire Police [2018] 2 WLR 595*). Only in cases where the court is asked to go beyond the established categories of duty of care, will it be necessary to consider whether it would be fair just and reasonable to impose such a duty (as in *James-Bowen v Comr of Police of the Metropolis [2018] 1 WLR 402*) . It does not matter that there is no authority already dealing with the same precise factual scenario, but it is sufficient for a case to fall within an established category in which the law imposes a duty.

Lord Lloyd-Jones considered that it was well established that those who provide and run a casualty department owe a duty not to cause physical injury to persons who present complaining of injury, before such persons are treated or admitted onto a ward. As soon as Mr Darnley attended and was booked in, he was accepted into the Hospital's system and had entered into a patient and healthcare provider relationship with the Defendant Trust. The scope of the duty extended to a duty to take reasonable care not to provide misleading information which may foreseeably cause physical injury. Further, *Kent v Griffiths [2001] QB 36* provides some precedent for the existence of the duty contended for. That too was a case in which the provision of misinformation by non-medically trained staff led to a delay causing physical injury.

Who owes the duty?

The duty is owed by the Defendant Trust and it is inappropriate to distinguish between medical and non-medical staff in determining the question of the existence of a duty. That distinction may, however, be relevant to the standard of care and the question of breach.

Policy concerns

The Supreme Court held that concerns about the difficult environment in which A&E staff work and the challenges involved in providing precise and accurate information went to the issue of breach of duty and a failure to meet the standard reasonably expected, not to the existence of a duty to take reasonable care when providing information. This is not a new head of liability for NHS Trusts and the burden of proving a negligent provision of misinformation, and causation, will remain effective control factors.

Breach of Duty

The role being carried out by a person is important to the question of breach and they will be expected to exercise a degree of skill appropriate to the task they are undertaking. A receptionist cannot be expected to give medical advice. Further, the court noted that it would be impossible for receptionists to provide accurate information to each patient as to precisely when they would be seen. However, it was held not to be unreasonable to require receptionists to take reasonable care not to provide misleading information as to the likely availability of medical assistance. The standard required is that of an averagely competent and well-informed person performing the function of a receptionist at a department providing emergency medical care. Responding to requests for information as to the usual system of operation of the A&E department is well within the area of responsibility of a receptionist.

The information given by the receptionist at the Hospital that the Claimant would have to wait up to four to five hours to see a doctor was incomplete and misleading. It was held at trial that it was reasonably foreseeable that a person so misled might leave and so the provision of that misleading information was negligent.

Causation

Finally, the majority of the Court of Appeal's conclusion on causation (that the Claimant was

responsible for his own actions) ignored three key findings of fact by the trial judge. First, if the Claimant had been told that he would be seen within 30 minutes he would have stayed, been seen and admitted, or told to wait. Second, his decision to leave was made, at least in part, on the basis of the misleading information given to him. Third, it was reasonably foreseeable that a person who believed they would have to wait four or five hours would leave. The Claimant's actions were not, therefore, a break in the chain of causation, but rather the foreseeable consequence of the Defendant's breach of duty. His departure was all the more likely given the vulnerable state he was in, due to what transpired to be a very serious head injury.

Comment

It is evident that the Supreme Court did not regard its decision in this case as particularly advancing the law and believed that concerns of a flood of similar cases had been over stated by both the Defendant and the Court of Appeal. However, given that the trial judge and two Court of Appeal judges dismissed the claim, it seems likely that many practitioners might also have previously thought such a case was likely to fail. It may be that allegations relating to the provision of misleading or inaccurate information by non-medical staff (whether in an emergency or any other situation), will now more readily be made.

By Ella Davis and Dominique Smith