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Annual Case-Law Update

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14th December 2023

Travel Case Round-Up

Spanish penalty interest
Nicholls v Mapfre

Ice, airlines and accidents
Arthern v Ryanair

Covid refunds
KT v FTI Touristik

Package travel regulations
Sherman

And finally…
Griffiths

Spanish penalty interest

- Debate in previous cases as to whether Spanish penalty interest is procedural or substantive (see *Troke, Sedgwick).*
- And whether, if procedural, it should be awarded as a matter of discretion under S 35A SCA.
- *Nicholls and Woodward v Mapfre* [2023] EWHC 1031 (QB): Spencer J considers this on appeal.

Spanish penalty interest – *Nicholls and Woodward*

- Held:
- Recovery of Spanish penalty interest is substantive, not procedural.
- But if it were procedural, it would not be appropriate to award it as a matter of discretion as England and Wales has a “different procedural environment” to Spain, with its own rules and sanctions (eg Part 36).
- Awards upheld but for different reasons.

Ice, airlines and accidents
Arthern v Ryanair (2023) EWHC 46 (KB)

- Here, the cabin floor was wet, passengers having walked in de-icing fluid from outside.
- Held: judge was entitled to find this was neither unusual nor unexpected, and therefore not an «accident».

KT v FTI Touristik GmbH

- C bought a package holiday to Gran Canaria in March 2020. C departed as planned.
- Two days after arriving, Spain closed beaches and brought in a curfew. Guests were «locked down» in their rooms, only leaving their rooms to eat. C was sent home a week early.
- C sought a 70% refund of the holiday cost on the basis of a lack of conformity with the contract.
- D relied on «unavoidable and extraordinary circumstances».
- CJEU hold that, where there is a lack of confirmity, a traveller is entitled to a price reduction save where this is attributable to the traveller.
- The «unavoidable and extraordinary circumtances» defence applies only to the separate entitlement to compensation.

Sherman v Reader Offers Ltd [2023] EWHC 524 (KB)

- Case concerns the 1992 Package Travel Regulations.
- C booked a North West Passage cruise over the phone without seeing a brochure or advert.
- C was provided a basic itinerary when he booked, and then, later, a more detailed itinerary with stops in Greenland and the North West Passage.
- That year, ice break-up was later than usual. The itinerary could not be followed and much had to be abandoned.

Sherman v Reader Offers Ltd [2023] EWHC 524 (KB)

At first instance:

- Judge holds that the relevant itinerary was the basic one provided at the time of booking, not the detailed one.
- The change in itinerary was a post-departure alternation under Reg 14, meaning compensation was payable if appropriate.
- Compensation was not appropriate: the Reg 15(2)(c)(i) defence was made out (unusual and unforeseeable circumstances beyond the control of D, which could not have been avoided with all due care).

Sherman v Reader Offers Ltd [2023] EWHC 524 (KB)

On appeal:

- Basic itinerary did not comply with PTR requirements. The later itinerary was the relevant one. Judge holds that the relevant itinerary was the basic one provided at the time of booking, not the detailed one. C may not have been bound by contact until detailed itinerary provided.
- The detailed itinerary was an essential term of the contract. C had not been notified of a «major change» in good time, and this was abreach for which compensation was payable.
- The unforseable/unavoidable defence was not made out; late ice was foreseeable in the North West Passage. Liability under Reg 15 was made out.

And finally…
Griffiths v TUI

- Expert evidence (like other evidence) needs to be properly challenged if it is to be criticised in closing submissions.
- This is a question of fairness: the (expert) witness needs to have the criticisms put to him / her.
- Experts do not need to be called in all cases – «focused Part 35 questions» may be sufficient.

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Personal Injury Update

Robert Horner

14 December 2023

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Personal Update

James v Shaw (t/a Shaw Leisure) [2023] EWHC 2683

James v Shaw [2023] EWHC 2683

- The facts:
  - C worker on fairground, stood on railing of a ride trying to undo a bolt
  - Slipped and injured
  - C argued unsafe system of work
  - D argued all reasonable steps taken
  - Conflict of account

James v Shaw [2023] EWHC 2683

- Held:
  - C account accepted:
    - C Wst consistent with ambulance record
    - C account inherently credible
    - D account inherently implausible
    - D's post-accident actions not consistent with a conscientious employer
    - D failed to produce easily available evidence to support assertions made

James v Shaw [2023] EWHC 2683

- Held:
  - C not contributory negligent:
    - C under a duty to take reasonable care for himself
    - C had learned on the job in the presence of his employer
    - C had responded to a positive request from his employer
    - Employer was actively carrying out the task in breach of Working at Height Regulations

Apres Lounge Limited v Wade [2023] EWHC 190

Apres Lounge Ltd v Wade [2023] EWHC 190

- The facts:
  - C attended D bar.
  - Slipped on a spilt drink close to the bar
  - D case:
    - Staff checked floor every at least every 10-15 minutes when collecting glasses
    - No specific intervals for inspection
    - No formal recording of inspections
    - On finding a spillage staff trained how to clear it up

Apres Lounge Ltd v Wade [2023] EWHC 190

- Co1st:
  - Evidence of system of inspection accepted
  - System of inspection not sufficient
  - Spillages likely close to the bar
  - Dark and busy area
  - Wooden floor – likely slippery when wet
  - No documentation of actual inspections

Apres Lounge Ltd v Wade [2023] EWHC 190

- On appeal:
  - Direct and detailed evidence of system of inspection
  - Inspection at least every 10-15 minutes
  - Having regard to the realities of running a late night bar system sufficient – proactive not reactive
  - Spilt drinks not ‘an unknown phenomenon’ - Most customers aware of the risk
  - Cannot reasonably prevent risk arising
  - Reasonable care taken. Claim failed

Other liability decisions

- **FLR v Chandran [2023] EHWC 1671**: 60/40 in respect of D driver travelling too fast and C child stepping into road and 'freezing' on seeing D.
- **Macdonald v MS Amlin [2023] EWHC 526**: 60/40 where D lorry driver stopped his vehicle in a slip lane in a tunnel to investigate a noise. C scooter rider collided with the lorry, having moved across a slip lane without ensuring it was safe.
- **Ashton v City of Liverpool YMCA [2023] EWHC 707**: 65/35 where C an intoxicated resident fell from a window of supported housing, leaning to retrieve washing, because the window restrictor was broken.
- **Czernuszka v King [2023] EHWC 380**: Rugby player liable for tackle during a game. The relevant test was whether the defendant player had failed to exercise such degree of care as was appropriate in all the circumstances.
- **Jenkinson v Hertfordshire CC [2023] EWHC 872**: C injured in tripping accident. Poor hospital treatment. No special rule that medical treatment of an injury could not break the chain of causation unless it was grossly negligent so as to be a completely inappropriate response to the injury.

DJ v Barnsley MBC [2023] 1815

DJ v Barnsley MBC [2023] EWHC 1815

- The facts:
  - DJ fostered by aunt and uncle
  - DJ abused by uncle
  - DJ alleged LA was vicariously liable

DJ v Barnsley MBC [2023] EWHC 1815

- Co1st:
  - Claim failed
  - Stage 1: Not satisfied - Relationship between uncle and LA not akin to one of employment

DJ v Barnsley MBC [2023] EWHC 1815

- On appeal:
  - Was there a sufficiently sharp line between the activity of the foster carers and that of the LA such that VL not justified?
  - In *Armes v Notts CC [2017] UKSC 60* LA vicariously liable for the actions of foster parents not related to C
  - In present case foster parents were related to C

DJ v Barnsley MBC [2023] EWHC 1815

- On appeal:
  - In this case, the issue not resolved simply by relationship between C and Aunt/Uncle
  - The distinction would lie in understanding the details of the relationship between Aunt/Uncle and LA to see whether, when whittled down, the relationship was akin to employment

DJ v Barnsley MBC [2023] EWHC 1815

- On appeal:
  - In favour of VL:
    - LA under a statutory duty to provide care for DJ
    - Duty discharged by placing with Aunt & Uncle
    - Aunt & Uncle required to apply for role
    - Some form of risk assessment and interview by LA
    - LA monitored Aunt & Uncle and reviewed DJ welfare etc.
    - Some form of agreement between LA and Aunt & Uncle

DJ v Barnsley MBC [2023] EWHC 1815

- On appeal:
  - Against VL:
    - Aunt & Uncle not recruited by LA as foster carers
    - Aunt & Uncle not trained by LA as foster carers
    - Aunt & Uncle cared for DJ because no other family member would and he was their nephew

DJ v Barnsley MBC [2023] EWHC 1815

- On appeal:
  - Against VL:
    - Aunt & Uncle not recruited by LA as foster carers
    - Aunt & Uncle not trained by LA as foster carers
    - Aunt & Uncle cared for DJ because no other family member would and he was their nephew – **Most revealing factor** – strongly suggesting Aunt & Uncle raised DJ because he was part of their family

DJ v Barnsley MBC [2023] EWHC 1815

- On appeal:
  - Held:
    - Stage 1: Akin to employment: Not satisfied - Activities of Aunt & Uncle more aligned to that of parents raising their own child than akin to that of employment with LA
    - Claim failed

Trustees of Barry Congregation of Jehovah's Witnesses v BXB [2023] UKSC 15

- The facts:
  - C raped by an Elder, having befriended him with her husband through church
  - The rape occurred at the home of the Elder where C and her husband were visiting after a morning of door-to-door evangelism
  - C alleged the church was vicariously liable for the actions of the Elder

Trustees of Barry Congregation of Jehovah's Witnesses v BXB [2023] UKSC 15

- Held Co1st & CA:
  - Claim succeeded
  - Stage 1: Akin to employment: Satisfied – Elder carrying out work on behalf of, and assigned to him, by D, performing duties to further D's aims & objectives.

Trustees of Barry Congregation of Jehovah's Witnesses v BXB [2023] UKSC 15

- Held Co1st & CA:
  - Claim succeeded
  - Stage 2: Close connection: Satisfied – Various reasons put forward – including: i) But for the fact that the perpetrator was an Elder C would not have started or continued to associate with him, ii) the rape took place following door-to-door evangelism, iii) As an Elder D have conferred authority on the perpetrator in respect of C, iv) Concerns have been raised previously about the Elder's behaviour with other Elders,

Trustees of Barry Congregation of Jehovah's Witnesses v BXB [2023] UKSC 15

- Held SC:
  - Claim failed
  - Stage 1: Akin to employment: Satisfied – Elder carrying out work on behalf of, and assigned to him, by D, performing duties to further D's aims & objectives.
  - Stage 2: Close connection: Not Satisfied – The rape had been committed while C was in the Elder's home, when C was offering the perpetrator emotional support in the context of friendship, and not while the Elder was carrying out his authorised activities as an Elder.

MXX v A Secondary School [2023] EWCA 996

- The facts:
  - TF, then 18, undertook a work experience placement at D school
  - TF met C, then aged 13, whilst on placement
  - Subsequently, TF and C became friends on Facebook
  - Some months later, sexual activity between TF and C
  - C asserted D school vicariously liable for the actions of TF

MXX v A Secondary School [2023] EWCA 996

- Co1st:
  - Stage 1: Akin to employment: Not Satisfied – 1 week work experience placement for an unqualified 18 year old, where TF was supervised, performed minor ancillary tasks and had no responsibility for pupils teaching or care
  - Stage 2: Close connection: Not Satisfied – The activity complained of occurred many weeks after TF had ceased his work placement

MXX v A Secondary School [2023] EWCA 996

- CoA:
  - Stage 1: Akin to employment: Satisfied – In reality D identified the terms upon which TF could be present, required TF to accept the procedures that applied to staff, supervised, directed and controlled his activities
  - Stage 2: Close connection: Not Satisfied – The placement was 1 week when TF had limited contact with C. The activity complained of occurred many weeks after TF had ceased his work placement. Not fair and just to hold D vicariously liable

Iceland Foods v Birch [2023] 1WLUK 202

Iceland Foods v Birch [2023] 1 WLUK 202

- The facts:
  - C's sols sent claim notification form to Iceland, alleging injury from tripping incident at Iceland's store
  - Iceland reviewed CCTV – appeared fake claim
  - Iceland notified C's sols
  - C's sols ceased to act
  - Iceland applied for permission to bring proceedings for contempt against C

Iceland Foods v Birch [2023] 1 WLUK 202

- Held:
  - When considering to grant permission to bring committal proceedings under CPR81:
    - Court had to be wary of allegations of making a deliberate false statement
    - Threshold test required a **strong prime facie case**, although the court had to avoid delving into the merits of the case
    - Court had to be satisfied a committal application was **in the public interest**
    - When considering public interest, the strength of the evidence of falsity relevant, makers knowledge of falsity, circumstances in which it was made, the evidence of the maker's understanding of the likely effect of the statement and the use to which it was put in proceedings
    - Whether the proceedings would **justify the use of resources** and **the overriding objective**

Iceland Foods v Birch [2023] 1 WLUK 202

- Held:
  - Strong prime facie case - The CCTV suggested that C had deliberately lowered herself to the floor
  - Legitimate public interest in deterring others from making dishonest claims designed to elicit payments, jeopardizing the administration of justice and wasting court resources on illegitimate claims

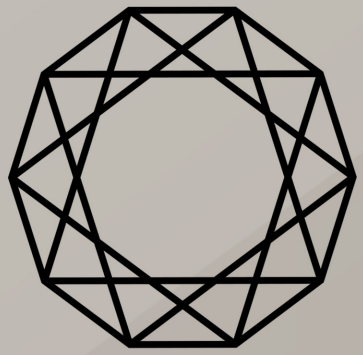
ZSY (by EZY, Lit Friend) v AAA [2023] EWHC 2977

ZSY (by EZY, Lit Friend) v AAA [2023] EWHC 2977

- The facts:
  - Approval of settlement of a PI claim
  - Settlement involved PPO of £16k p/a
  - C Latvian who would live in Latvia
  - Proposed indexation to Latvian Monthly Wage index accepted to insulate against fluctuations and volatility in the currency markets and the growth of the Latvian economy

Other quantum decisions

- **Dee v Welsh Ambulance Service [2023] EWHC 2765**: Interim payment application. Breach admitted. Causation denied. Court must be satisfied on the burden of proof to a high degree that C will obtain a substantial sum from D. D served no cogent evidence to answer C's evidence. IP granted.
- **Holmes v Poeton Holdings Limited [2023] EWCA Civ 1377**: Rejected D argument that material contribution had no application to cases of indivisible injury.
- **Barry v MoD [2023] EWHC 459**: C clearly 'disabled' but earning capacity not significantly affected. Court adjusted educational level from 2 to 3 to reflect this.
- **Hassam v Rabot [2023] EWCA Civ 19**: Approach to assessing tariff & non-tariff injuries. Permission to appeal granted.



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Clinical Negligence Update

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December 2023

CLINICAL NEGLIGENCE UPDATE

- Big Issues of 2023
  - Consent
  - Novus Actus Interveniens

- Hot topics for 2024

CONSENT – The Post Montgomery Fall Out

Montgomery

- A change in approach to the law relating to information disclosure was justified by reference to changing societal values and a shift towards Dr/ Pt relationship based on partnership rather than paternalism.

- The standard of information disclosure was to be set by the Court rather than treated as a matter of clinical judgement to be determined by reference to the Bolam test

- The paternalistic approach of not informing Mrs Montgomery of the risk of shoulder dystocia on the basis that this might lead her to request a CS which was not in her maternal interests could not be justified

Montgomery paragraph 87

“The doctor is…under a duty to take reasonable care to ensure that the patient is aware of any **material risks** involved in any recommended treatment, and of **any reasonable alternative or variant treatments**. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.”

Montgomery – the fall out

- what did the obligation to disclose reasonable alternative or variant treatments mean in practical terms?

- who decided which of the theoretically possible treatment options were reasonable treatment options?

McCulloch v Forth Valley Health Board [2023] UKSC 26

- Pt died following a diagnosis of suspected pericarditis. The treating doctor, supported by her peers, formed the view that NSAIDs were inappropriate. C argued that he should have been given the treatment option.

- NSAIDS were clearly a possible treatment option.

BUT:-

- Were they a *reasonable* treatment option?

- Was the issue to be determined by reference to Bolam?

McCulloch - Summary

- A distinction was drawn between *possible* treatment options and *reasonable* treatment options.
- The narrowing down of possible treatment options to reasonable treatment options was found to be an exercise of professional judgment to which the professional practice test should apply.
- i.e. Bolam/ Bolitho

Note:

- Once it had been decided what the reasonable alternative treatments were, by applying the professional practice test, the doctor was then under a court imposed duty of care to inform the patient of those reasonable alternative treatments and of their material risks.
- The doctor cannot limit his discussion to the treatment option which he prefers. Instead he had to inform the patient of all reasonable treatment options using the professional practice test.
- The Doctor cannot reject an option by taking on himself a decision more properly left to the patient.

CNZ v Royal Bath Hospital NHS Foundation Trust [2023] EWHC 19 (KB) – Ritchie J

Antenatal Consent

- In 1996 it was not usual practice for women to be given the option of CS antenatally in an uncomplicated twin birth. If they requested a CS, they would be counselled against it, but if they persisted in that request a CS would be performed.
- D argued ECS was not a reasonable option.
- As a matter of fact it was found that C had been counselled against a CS and agreed to a vaginal birth.
- BUT: Ritchie J also considered D's approach to be illogical - ECS must have been a reasonable option (if the maternal request persisted they would have agreed and performed CS in 42% of twin births) and the practice (of not discussing the option unless raised) was contrary to Montgomery.

CNZ v Royal Bath Hospital NHS Foundation Trust [2023] EWHC 19 (KB) – Ritchie J

Intrapartum Consent

- There was then late decent of the second twin. The options were CS or ARM. This was not communicated to M despite M and F requesting a CS. There was a 6.5 minute delay in delivery much of which was generated by the Registrar not ascertaining the patient's wishes before discussion with the Consultant and preparing transfer to theatre 'slowly'.
- It is noteworthy that Montgomery was applied in the context of an imminent delivery (rather than antenatally).
- This is different to the approach in previous cases:

  > *ML (A Child) v Guy's and St. Thomas' National Healthcare Foundation Trust* [2018] EWHC 2010 (QB) Martin Spencer J - "a world of difference between a woman who requests a [CS] in the ante-natal period and a woman who requests a [CS] in the throes of labour pain" (para 90)

- In CNZ, Montgomery was applied but with recognition of the different circumstances of the labour ward versus antenatal counselling
- It was relevant that F was there and able to speak for M. It was relevant M made clear that she wanted a CS 9 minutes after the conversation should have taken place.

Also

- Did *Montgomery* (events in 1999) apply to those in *CNZ (events in 1996)*? *'Probably'!*

Novus Actus Interveniens

Jenkinson v Hertfordshire CC [2023] EWHC 872 (KB) – Andrew Baker J

Negligent medical care in aftermath of tortious accident does not have to be grossly negligence to break the chain of causation

- C badly fractured ankle in tripping accident
- D's expert evidence criticised hospital
- D applied to amend to allege that the negligent treatment broke the chain of causation
- On appeal: there is no special rule that medical treatment of an injury caused by a defendant's tort could not break the chain of causation unless it was grossly negligent treatment so as to be a completely inappropriate response to the injury
- Amendment permitted. *Webb v Barclays Bank* considered and *Rahman v Arearose* doubted

Query whether this is right or helpful

The rationale behind *Webb v Barclays Bank* [2021] EWCA Civ 1141

- Tortfeasor should anticipate possibility of dodgy medical treatment
- Good for claimants
- Been working well

Hot topics for 2024

- **Secondary victim claims** - *Paul v Royal Wolverhampton NHS Trust* [2022] EWCA Civ 12 – Can the horrific event witnessed be removed in time from the negligence? SC decision awaited
- **Ex turpi** – *Lewis-Ranwell v G4S Health Services (UK) Ltd* [2022] EWHC 1213 (QB) – claim for poor psychiatric care leading to a killing spree for which C was found to be 'not guilty owing to insanity' – does the illegality defence apply? - CA decision awaited
- **Material contribution** – *CNZ and CDE v Surrey and Sussex* – injury caused by negligent and non negligent hypoxia - is the functional effect of PHI capable of being apportioned?
- **Lost years -** *CCC v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1905 (KB) certificate for leapfrog appeal –young children - is a dependent relationship required? *Croke v Wiseman* cf *Pickett* and *Gammel*
- **Discount rate** – call for evidence not yet initiated and the 180 day review period not yet commenced – unlikely to any change prior to autumn 2024

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Thank you for your attention.

Questions?

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