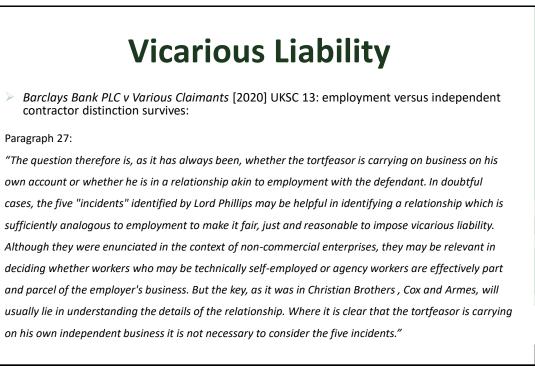


# AvMA 2020 Legal Update

#### **Richard Booth QC**

1 Crown Office Row





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NA OR

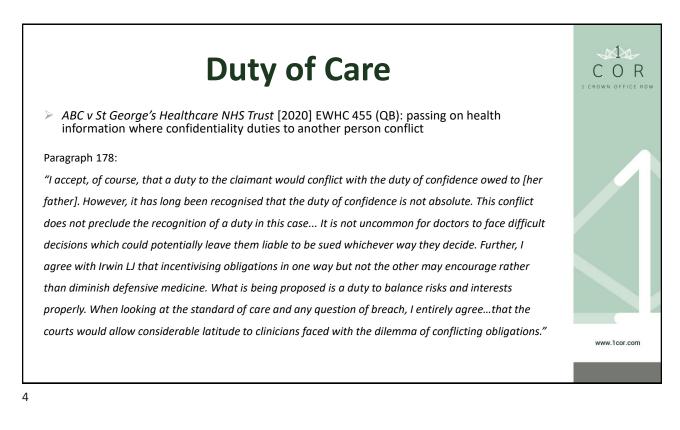


## **Vicarious Liability**

WM Morrison Supermarkets PLC v Various Claimants [2020] UKSC 12: sufficient connection versus frolic of one's own?

However misguidedly, furthering the employer's business will satisfy the vicarious liability test. (A positive spin!)







## **Standard of Care**

Brady v Southend University Hospital NHS Foundation Trust [2020] EWHC 158 (QB)

Treatment versus Diagnosis and the application of Bolam/ Bolitho

Ripe for appellate consideration?



Mordel v Royal Berkshire NHS Foundation Trust [2019] EWHC 1512 (QB):

Paragraph 86:

5

"Thus, what informed consent means is not sensibly in dispute: the issue here is the nature of the steps which should be taken to secure it. I have previously referred to the taking of reasonable steps because I think that in the context of a human system it is impossible wholly to avoid misapprehensions persisting and misunderstandings arising despite the implementation of entirely proper practice by a sonographer. The NHS could not operate if the law required guarantees and complete "fail-safes", the latter term being interpreted literally. However, what is reasonable in this context must absorb consideration of the issues at stake here. Not merely is the birth of a child with Down's syndrome a life-changing event for most parents, the steps required to guard against parental choice not being respected are not onerous. What is at issue here is the asking of a limited number of questions to ensure that what may be an unwarranted outcome does not result."



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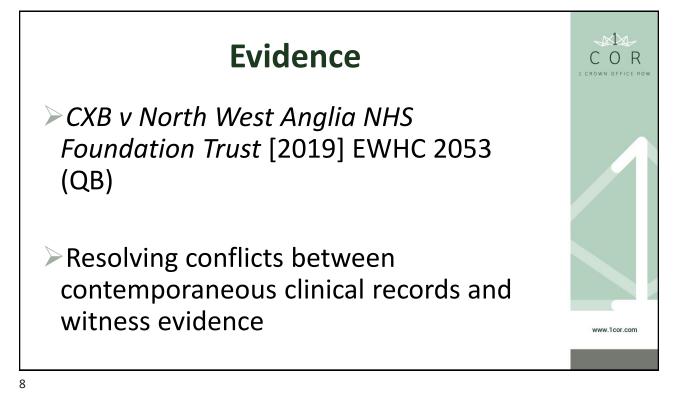
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# Causation > Schembri v Marshall [2020] EWCA Civ 358 > Role of statistical evidence > Collyer v Mid Essex Hospitals NHS Trust [2019] EWHC 3577 (QB) > C always has to prove causation, even in the case of an unusual injury





### Quantum

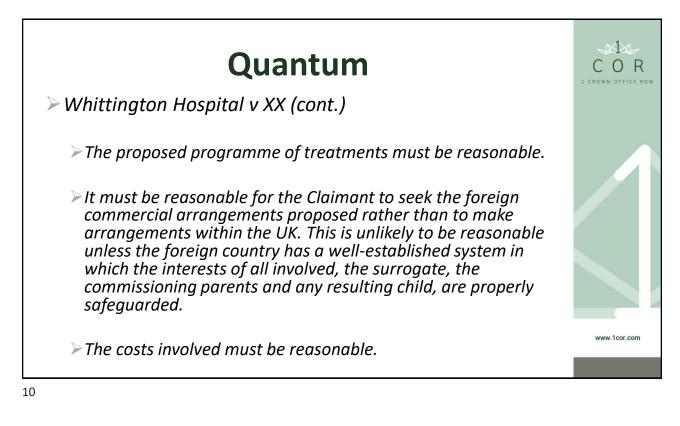
Whittington Hospital NHS Trust v XX [2020] UKSC 14

Recoverability of surrogacy costs

➢No illegality defence available

> Public policy moves with the times







### Quantum

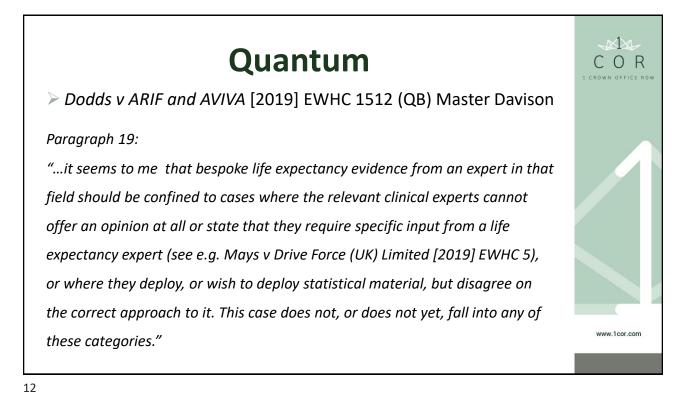
Irani v Duchon [2019] EWCA Civ 1846

Blamire lives on!

Paragraph 28

"...the judge has expressly referenced and therefore directed himself in accordance with the guidance given by Keene LJ in Bullock ... the Blamire approach should only be adopted if there is no real alternative."







### Costs

#### West v Stockport NHS Foundation Trust and Demouilpied v Stockport NHS Foundation Trust [2019] EWCA Civ 1220

#### Paragraphs 80-85:

"... when the judge comes to consider proportionality, there are some elements of costs which should be left out of account... The exceptions are those items of cost which are fixed and unavoidable, or which have an irreducible minimum, without which the litigation could not have been progressed... it is those elements of cost which are not inevitable or which are not subject to an irreducible minimum which will be vulnerable to reduction on proportionality grounds..."



#### Costs

RXK v Hampshire Hospitals NHS Foundation Trust [2019] EWHC 2751 (QB)

#### Paragraphs 12-13:

"... The discretion conferred by CPR 44.2(2) is a very wide one... the wording of CPR 44.2(8) provides that the court will make an interim payment on account of costs only where it has made a costs order which could be subject to detailed assessment. This is sometimes described as a "prospective" or "anticipatory" costs order, because it has been made before the conclusion of the proceedings... The application which should be made in these circumstances is for a costs order down to a specific date and an interim payment on account of those costs."



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Costs					C O R
Civil Justice Council, "Fixed Recoverable Costs in Lower					
Civil Justice Council, Tixed Necoverable Costs in Lower					
Value Clinic:	al Negligence	Claims" ((	October 20	19). costs	
value entried				157. 00303	
in clinical ne	gligence clair	ns un to f	25 000		
	Subcrice cian		23,000.		
	The final positions can be summa	rised as follows, all figure	s are exclusive of VAT and		
disburs	ements:				
Tak	ole 4 - Standard Track				
Stage		Claimant	Defendant	]	
1	All steps up to and including stocktake		£5,500 plus 20% of damages agreed		
2	From stocktake up to and		£500 in addition to stage		
-	including neutral evaluation	to stage 1	1		
	In F. Halle Trade				
Stage	ole 5 - Light Track Description	Claimant	Defendant	1	
1	All steps up to 21 days after	£2,500 plus 25% of	£1,000 plus 10% of		
	letter of response is due	damages agreed	damages agreed		
2a	From 21 days after letter of	£1,500 plus further 5%	£500 in addition to		N.
	response up to and including	of damages agreed, in	stage 1		
2b	stocktake From stocktake up to and	addition to stage 1 £500 in addition to	£500 in addition to		www.1cor.com
20	including neutral evaluation	stages 1 and 2a	stages 1 and 2a		
		0		1 1	

And Finally...
Surrogacy excepted, it has not been a great year for patients in the courts
The forceful brake applied in relation to the expansion of vicarious liability is deeply concerning for patients being treated in private hospitals
We all hope that 2021 will bring better news



#### **Contributors from 1 Crown Office Row**



Isabel McArdle



Rajkiran Barhey



Matthew Flinn



Michael Spencer



Charlotte Gilmartin

With additional thanks to 1COR pupils

> Alice Kuzmenko & Henry Tufnell



### **Richard Booth QC**

- Richard Booth QC was born and educated in South Wales. Before turning to law, he read French and Spanish at Fitzwilliam College, Cambridge, later obtaining a Master's in European Law in Brussels.
- Richard was called to the Bar by Middle Temple in 1993, becoming a QC in 2013. He specialises in clinical negligence, inquests, regulatory and disciplinary law, personal injury and sports law. He held the appointment of Junior Counsel to the Crown (Attorney-General's Regional Panel) between 2000 and 2012. He has sat as a Recorder on the Wales Circuit since 2008, presiding over criminal cases including serious sexual allegations. He has been Head of Chambers at 1 Crown Office Row since 2018. He is recognised as a Leading Silk in the field of clinical negligence.

