

AvMA 2020 Legal Update

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Vicarious Liability

- *Barclays Bank PLC v Various Claimants* [2020] UKSC 13: employment versus independent contractor distinction survives:

Paragraph 27:

*“The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five “incidents” identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer’s business. But the key, as it was in *Christian Brothers*, *Cox and Armes*, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents.”*

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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!)

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Duty of Care

- *ABC v St George's Healthcare NHS Trust* [2020] EWHC 455 (QB): passing on health information where confidentiality duties to another person conflict

Paragraph 178:

"I accept, of course, that a duty to the claimant would conflict with the duty of confidence owed to [her father]. However, it has long been recognised that the duty of confidence is not absolute. This conflict does not preclude the recognition of a duty in this case... It is not uncommon for doctors to face difficult decisions which could potentially leave them liable to be sued whichever way they decide. Further, I agree with Irwin LJ that incentivising obligations in one way but not the other may encourage rather than diminish defensive medicine. What is being proposed is a duty to balance risks and interests properly. When looking at the standard of care and any question of breach, I entirely agree...that the courts would allow considerable latitude to clinicians faced with the dilemma of conflicting obligations."

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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?

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Standard of Care: Consent

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

Paragraph 86:

“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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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

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Evidence

- *CXB v North West Anglia NHS Foundation Trust* [2019] EWHC 2053 (QB)
- Resolving conflicts between contemporaneous clinical records and witness evidence

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Quantum

- *Whittington Hospital NHS Trust v XX* [2020] UKSC 14
- Recoverability of surrogacy costs
- No illegality defence available
- Public policy moves with the times

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Quantum

- *Whittington Hospital v XX (cont.)*
 - *The proposed programme of treatments must be reasonable.*
 - *It must be reasonable for the Claimant to seek the foreign commercial arrangements proposed rather than to make arrangements within the UK. This is unlikely to be reasonable unless the foreign country has a well-established system in which the interests of all involved, the surrogate, the commissioning parents and any resulting child, are properly safeguarded.*
 - *The costs involved must be reasonable.*

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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.”

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Quantum

➤ *Dodds v ARIF and AVIVA* [2019] EWHC 1512 (QB) Master Davison

Paragraph 19:

*“...it seems to me that bespoke life expectancy evidence from an expert in that field should be confined to cases where the relevant clinical experts cannot offer an opinion at all or state that they require specific input from a life expectancy expert (see e.g. *Mays v Drive Force (UK) Limited* [2019] EWHC 5), or where they deploy, or wish to deploy statistical material, but disagree on the correct approach to it. This case does not, or does not yet, fall into any of these categories.”*

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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...”

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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

- Civil Justice Council, “Fixed Recoverable Costs in Lower Value Clinical Negligence Claims” (October 2019): costs in clinical negligence claims up to £25,000.

5.16 The final positions can be summarised as follows, all figures are exclusive of VAT and disbursements:

Table 4 - Standard Track

Stage	Description	Claimant	Defendant
1	All steps up to and including stocktake	£6,000 plus 40% of damages agreed	£5,500 plus 20% of damages agreed
2	From stocktake up to and including neutral evaluation	£2,000 in addition to stage 1	£500 in addition to stage 1

Table 5 - Light Track

Stage	Description	Claimant	Defendant
1	All steps up to 21 days after letter of response is due	£2,500 plus 25% of damages agreed	£1,000 plus 10% of damages agreed
2a	From 21 days after letter of response up to and including stocktake	£1,500 plus further 5% of damages agreed, in addition to stage 1	£500 in addition to stage 1
2b	From stocktake up to and including neutral evaluation	£500 in addition to stages 1 and 2a	£500 in addition to stages 1 and 2a

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

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- 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.

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