BREAKINGBURY V CROAD – CARDIFF COUNTY COURT 2021
RAMDHEAN V (1) AGEDO AND (2) THE FORUM DENTAL PRACTICE LTD LEEDS COUNTY COURT 2020 (JANUARY AND APRIL)

CIVIL WATCH – CASE ANALYSIS

As part of *Goldsmith Chambers' Civil Watch series, Heather Beckett, a practitioner within the Clinical Negligence and Healthcare group of the Civil Team provides an overview of two County Court dental negligence cases which extended the concepts of non-delegable duty of care and vicarious liability for the acts and omissions of self-employed dental associates providing NHS dental care.*

In addition, both cases each also have a "sub-plot", providing useful practice points in their own right. One provides a salutary lesson reminding of the costs perils for a party in failing adequately to engage with mediation. The other provides a practical illustration of the exercise undertaken by the court when considering a limitation defence raised in a dental negligence claim.

INTRODUCTION

1. Until now, dentists in NHS general dental practice have, with a few exceptions, been regarded as responsible for their own individual acts and omissions for the treatment they provide, with the practice or practice principal having no liability. This contrasts with the perception of many, if not most dental patients, who regard themselves as being a patient of a particular practice, simply accepting the dentist or dentists to whom they have been "assigned", possibly over a number of years. Two recent County Court cases have contradicted that traditional view, potentially opening up a way for claimants to recover damages from some principals, owners or limited companies operating dental practices where the actual treating dentist cannot be located or is uninsured. For principals and owners of dental practices, this has underlined a need to have appropriate indemnity arrangements in place for this eventuality, to ensure that they are rigorous in checking the personal indemnity arrangements of associates and to keep records of the whereabouts of former associates.

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2. The Claimant had been a dental patient at the Defendant's practice for a number of years. The Defendant retired in 2000, but he continued to own the practice until he sold it in 2012. Importantly, he had continued during this time to enter into a contractual relationship with the local Health Board to provide NHS Dental Services. He was therefore the "Provider". As is quite common, he discharged his contractual responsibilities via a series of dental associates working at the practice. They were the "Performers". The associates were all categorised as being "self-employed" for tax purposes, and the Defendant had general arrangements with the associates along the lines of a standard British Dental Association (BDA) associate contract. The associates were all expected to have their own indemnity arrangements under the contract.

3. The Claimant did not have a choice as to which of the various dentists she saw at the practice over the years. She simply saw the dentist to whom she was allocated. The NHS paid the practice for treatment provided. A proportion of that payment would then be paid to the relevant associate, with the practice retaining the remainder.

4. The Claimant had bridgework carried out at the practice in around 2011. Some years later, she learned that this had failed and that she faced the possibility of significant and costly remedial work. The claim related to the standard of the original work and the cost of the remedial work.

5. The Claimant alleged that as the practice owner and the individual holding the Provider NHS contract, Dr Croad had a non-delegable duty of care to her, or in the alternative he was vicariously liable for the actions and omissions of his associates. It would be open to Dr Croad to seek an indemnity from the relevant associate, but the Claimant did not have to do so.

Non-delegable duty of care

6. The court considered the list of "*five defining features"* which assist in defining a case where a non-delegable duty of care arises, as set out by Lord Sumption in *Woodland v Swimming Teachers Association* (2014) AC 537:

    - The Claimant is a patient or a child or for some other reason is especially vulnerable or dependent on the protection of the Defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.
    - There is an antecedent relationship between the Claimant and the Defendant, independent of the negligent act or omission itself, (i) which places the Claimant in the actual custody, charge or care of the Defendant and (ii) from which it is possible to impute to the Defendant the assumption of a positive duty to protect the Claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the Claimant. It is characteristic of such relationships that they involve an element of control over the Claimant.
    - The Claimant has no control over how the Defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.
    - The Defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the Claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the Defendant's custody or care of the Claimant and the element of control that goes with it;
    - The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the Defendant and delegated by the Defendant to him.

7. The court considered all five defining features to be present in relation to this case. In particular:

    - In relation to the required "antecedent relationship" (feature (ii)), the Claimant regarded herself as a patient of the practice and the practice regarded her as

"belonging" as a patient of the practice. She paid the practice when paying for treatment. Associates were not, by their contractual relationship, permitted to "poach" patients from the practice if they moved on. When an associate moved on, the Claimant had simply been allocated by the practice to a new associate.

- In relation to the "lack of control" element (feature (iii)), whilst the court accepted that the Claimant could move to another dental practice altogether if she wished, this was not the point. Having registered for NHS treatment with the practice, it had not been open to the Claimant to insist on how the service was provided.

Features (i), (iv) and (v) were also made out.

8. Thereafter, the court "stood back", as it is required to do, and asked whether it was right to impose a non-delegable duty in all the circumstances on the Defendant. The question was whether a dental practice (or in this case the defendant, since he owned the practice at the material time) should owe a duty to a patient for whose care they are paid by the local health board. The answer in the court's judgment was that it should. Any perceived unfairness might be addressed at least in some way if the Defendant was entitled to claim an indemnity from the individual associate dentists concerned, but that was a separate matter.

Vicarious liability

9. The court considered that the facts, particularly the level of control exerted over the associates, pointed to an arrangement which was "akin to employment", notwithstanding the self-employed tax status. The associates were set "targets" for dental activity to be accomplished during the year. Thus they were told what they were required to do, even though they were not specifically told how to do it. The work was undertaken on behalf of the practice and for the benefit of the practice which received a direct financial benefit. The practice brought the patients in and arranged for their treatment, thus facilitating the risk that arises from clinical treatment.

10. Hence, it was held that the requirement for a finding of vicarious liability was made out.

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11. The Defendant took a point on limitation. The judgment examined both the issue of determination of "Date of Knowledge" arising pursuant to the operation of section 14 of the Limitation Act 1980, and also, briefly, principles which would be considered if there was a question of the court exercising its discretion under S.33 to disapply limitation. It is helpful in general when a limitation defence is raised, but perhaps particularly so in dental negligence matters, where it is not altogether unusual for a dental patient only to discover the existence of a dental problem some time after the cause of action has actually arisen.

12. It is the Claimant's burden to establish when they should have acquired the requisite knowledge that they have sustained significant injury, that such injury was attributable to the treatment (or lack of it) and the identity of the tortfeasor. Thereafter, the Claimant will be considered to have the requisite "*reasonable belief",* in the context of S.14 of the Limitation Act 1980 when they have:

"*a belief held with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal or other advice and collecting evidence"*[1].

13. It was the Claimant's evidence that she had always had "*bad teeth"* and had always spent a considerable amount of time visiting the dentist. She gave evidence that she recalled being told by a dentist once that "*some people just have trouble"* and that she believed that this applied to her. Symptoms which she suffered following the alleged negligent treatment therefore needed to be seen against this background – since she was used to having problems with her teeth, she did not at the time suspect that any symptoms were anything different from the normal situation for her. The court accepted her evidence and referred to the case of *Khairule v North West Strategic Health Authority* 92008) EWHC 1537 in deciding that this sort of evidence can be relevant to consideration of constructive knowledge or duty of curiosity in relation to S.14 of the Limitation Act[2]. The limitation defence failed.

14. The judge then went on, for completeness, to say that this was a case where the Court would have, in any event, exercised its discretion under Section 33 of the Limitation Act to allow the claim to continue. The analysis in this respect explored the hypothetical scenario that if it had been found that the Claimant should have begun investigating a possible claim in 2012, she should have had "until perhaps late 2013 to have investigated enough to obtain knowledge". Limitation would then have run from late 2013 until late 2016. In other words, the Court recognised that it does take some time for a Claimant to investigate the possibility of a claim following an initial "suspicion". Thereafter, the period of additional delay fell to be considered in relation to prejudice caused to the Defendant because the Claimant did not start the claim for another 3 years. In this particular case the prejudicial effect of the passage of time would have been limited because the requirement was for expert analysis of the treatment provided and recorded rather than the Claimant's recollection.

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15. This case also required a preliminary hearing in relation to liability of a Defendant, in this case a dental company, Forum Dental Practice Limited, (FDPL), on the basis of non-delegable duty of care and/or vicarious liability. It similarly involved the acts and omissions of a dental associate, in this case, Dr Agedo. Dr Agedo's whereabouts were not known and he played no part in proceedings. He did have professional indemnity cover, but did not notify his indemnifiers of the potential claim, and cover was thereafter declined[3].

[1] Per Lord Wilson in *AB and others v Ministry of Defence* 92013 1AC 78

[2] Whilst the test is an objective one, the "reasonable person" to be considered when examining when a Claimant should be fixed with the requisite constructive knowledge or duty of curiosity is a "reasonable person in the objective circumstances of the actual claimant".

[3] Unlike the situation where a motor insurer cannot avoid liability to meet a claim for an insured risk on the grounds of failure to notify under S 148 of the Road Traffic Act 1988, although they can in certain contractual circumstances then look to the insured to reimburse the costs, there is no "parallel" system obliging an indemnity insurer of a dentist to meet a claim if they are contractually permitted to avoid it.

16. In *Ramdhean*, the Claimant was referred to FDPL for removal of a wisdom tooth. FDPL had an NHS Intermediate Minor Oral Surgery contract with Doncaster Primary Care trust to provide oral surgery services in primary care. Dr Agedo had been engaged by FDPL to carry out the oral surgery work in fulfilment of FDPL's obligations under the contract, although he was self-employed and it was his decision whether he undertook the work.

17. The Claimant alleged that Dr Agedo's extraction of her wisdom tooth was performed negligently, that he left roots of the tooth in situ, on two occasions, whilst telling her that all the roots had been removed. She eventually had the roots removed at hospital, but was left with some loss of sensation around the left side of the lip, chin and tongue.

18. As in the case of *Breakingbury* (which referred to *Ramdhean v Agedo* in the course of the judgment), the Court approached the analysis of non-delegable duty of care against Lord Sumption's "five defining features" indicative list[4], found these satisfied and then considered the issue of whether it was fair just and reasonable that FDPL, a commercial concern operating to make a profit out of an NHS contract with the PCT, should be fixed with a non-delegable duty. The Court found that it was.

19. In relation to vicarious liability, the Court did not in this case find it useful to consider whether the relationship between FDPL and Dr Agedo was an arrangement "*akin to employment".* It applied the principles set out in the Supreme Court authorities of *Cox v Ministry of Justice* [2016] UKSC 10 and *Mohamud v WM Morrison Supermarkets PLC* [2016] UKSC 11. It found applying these principles that FDPL was vicariously liable for any negligence which the Claimant may prove in her claim against Dr Agedo.

20. For those readers who may prefer an oral explanation of this case – see https://www.youtube.com/watch?v=YcRgGe9c1C8

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21. The "fall-out" from the judgment in the preliminary hearing in *Ramdhean* concerns the subsequent costs hearing three months later. The Claimant, given her success on the contested preliminary issue, asserted that she should be able to recover costs from the Second Defendant for that part of the claim.

22. An argument based on the Second Defendant's failure adequately to engage in ADR, despite several invitations from the Claimant for mediation or round table settlement found favour with the court. The Second Defendant had steadfastly maintained, in effect, that there would be no offers forthcoming because it was nonsense to suggest that the Second Defendant would be found liable for any negligence on the part of the First Defendant. The judge remarked that whilst it was entirely up to the Second Defendant to adopt such an approach, to do so runs the risk of adverse costs consequences. She derived assistance from the authority of *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288, in particular the judgment of Lord Justice Briggs and the "checklist" from the ADR Handbook set out therein, which can be summarised as:

[4] *Woodland v Swimming Teachers Association* (2014) AC 537, although it should be noted that this is an indicative list only

"…*calling for constructive engagement in ADR rather than flat rejection or silence*."

When considering what the court may consider is meant by "*constructive engagement*", HHJ Belcher in *Ramdhean* observed that:

"…*there are mediations that take place where the parties have not necessarily identified issues, or all issues, beforehand. It might have been sensible to do so but…it could have been the case that if there had been a mediation,… the Second Defendant might have been able to say, "I'm prepared to make an offer at this stage on an entirely no admissions basis but to make this matter go away." That does not require any concessions …, and it is possible that exploration of the case around a table might have produced some progress".*

The lesson here is that given litigation risk, a party that without very cogent and well-articulated explanation takes the attitude when invited to engage in ADR that "*I will not settle. I do not have to settle, I am going to win*", may well have that conduct taken into account under CPR 44.3, and find itself facing an order for costs on the indemnity basis. Proper explanation as to why the invitation is being declined needs to be provided.

23. In *Ramdhean* the Second Defendant was ordered to pay £50,000 in costs on account in relation to the trial of the preliminary issue alone, with an implied expectation that assessed costs were likely to be still higher than this on the indemnity basis.

CONCLUSIONS

24. Both *Breakingbury* and *Ramdhean* are first instance cases and do not have binding authority. They were, however, decided by Circuit judges and there are now two cases, with the persuasive strength in numbers that this brings. Whilst the starting point in a dental negligence claim should continue to be that the claim should be brought against the specific dentist involved, there is the opportunity for a Claimant to look, in cases involving NHS contractual services, to the "Provider" NHS contract holder, alleging a non-delegable duty of care, or in the alternative vicariously liability. This may well be a useful route if a treating dentist cannot otherwise be located, or fails to engage, or is not indemnified.

25. Constructive knowledge or "duty of curiosity" in relation to S.14 of the Limitation Act can be "Claimant specific", in the sense that a Claimant who has been told they "*just have bad teeth*" may not initially have cause to suspect negligence, even in the face of symptoms. In some cases, this may extinguish a limitation defence.

26. When receiving an invitation to consider ADR, in particular mediation, it is important not only to respond, but if declining the invitation to explain why, with good reason, otherwise there may be a costs finding of unreasonable conduct.

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