Bevan Brittan

Claims Online

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Welcome to the summer edition of Bevan Brittan's Claims Online. In this edition, we look at two cases that have provided welcome clarification on vicarious liability and the circumstances where a claimant's refusal to be examined by an expert can result in the case being stayed. We also examine the decision of the Supreme Court in respect of commercial surrogacy arrangements.

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Vicariously liable? Depends on the relationship

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Two recent Supreme Court decisions have helped to clarify the law on vicarious liability and are relevant both to businesses who use independent contractors and their insurers.

In WM Morrison Supermarkets plc (Appellant) v Various Claimants (Respondents) [2020] UKSC 12 the Supreme Court allowed Morrison's appeal against a decision that found it vicariously liable for an employee who had uploaded the data of 98,998 employees to a publicly-accessible file-sharing website. In Barclays Bank v Various Claimants [2020] UKSC 13 the Supreme Court allowed Barclay's appeal against a decision that it was vicariously liable for sexual assaults performed by an independently contracted GP it had asked to perform medical examinations of prospective employees.

The contentious issues on vicarious liability generally fall into two categories:

- Employees: was the relationship between the employee's tortious act and the activity the employee was engaged to perform sufficiently close to justify the imposition of vicarious liability?
- Independent contractor: was the relationship between the Defendant and the independent contractor "sufficiently akin to employment" to justify the imposition of vicarious liability?

In Morrisons the Supreme Court considered the applicable test for vicarious liability for the tortious act of an employee. The question was whether the wrongful conduct is so closely connected with the acts the employee was asked to do, that it may fairly and properly be regarded as done by the employee acting in the ordinary course of employment. In this case, the employee's malicious act could not be construed as furthering Morrisons' business. Morrisons was not vicariously liable for the employee's actions.

In Barclays the tortious acts were the sexual assaults of an independent contractor GP against prospective employees of the bank. The GP was not an employee of the bank, was not paid a retainer and was not obliged to accept a certain number of referrals from the bank. He was able to refuse to perform an examination if he wished to. He was in business on his own account with a portfolio of patients and clients. The Supreme Court reaffirmed that the question is whether the tortfeasor is carrying on business on his own account, or whether he is in a relationship akin to employment with the defendant. Here, the relationship was not sufficient to justify the imposition of vicarious liability. If this question is unclear, the Court confirmed that that the key to this "will usually lie in understanding the details of the relationship".

This is welcome clarification on the application of vicarious liability and will be of some assistance to businesses and their insurers in limiting the application of this principle in claims involving independent contractors or the wrongful acts of employees. Where the tortfeaser is an independent contractor it seems likely that Claimants will no longer be able to rely on the fact that they had no choice in the selection of that contractor to provide the treatment / service in question, unless a sufficient relationship can be established in accordance with the principles in Barclays. For healthcare providers and their insurers the application of Barclays will require careful analysis in each case to consider the relationship between providers and those they contract to perform treatment.

When a Claimant refuses examination by the Defendant's expert

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In the case of LD v Basildon & Thurrock University Hospitals NHS Foundation Trust the Court were asked to impose a stay of proceedings, where a Claimant refused to agree to examination by the Defendant's expert.

At a hearing before a Master in March 2020, the Court was referred to the legal principals governing whether the Court should agree a stay of proceedings, set down by the Court of Appeal in *Starr v NCB [1977] 1 WLR 63, CA*.

Two stage test

In Starr, Scarman LJ said that where a Claimant refused to undergo an examination by the Defendant's expert the Court had to balance two fundamental rights, namely the Claimant's right to personal liberty, balanced by the Defendant's right to defend himself in the litigation.

There was a two stage test to be applied:

1. Was the Defendant's request for examination of the Claimant reasonable?
2. Was the Claimant's refusal of the request unreasonable?

The onus was on the party applying for the stay to establish that justice required the imposition of a stay.

The case

In LD v Basildon and Thurrock University Hospitals NHS Foundation Trust, the Defendant admitted a 4 day delay in performing surgery for a disc prolapse. The Claimant alleged that the delay in performing surgery had caused a number of problems, including urinary incontinence. However factual and medical causation were in issue and the Defendant denied that the delay caused the urinary dysfunction.

The Claimant had a history of having been raped two years prior to the index event, as a result of which she was reluctant to undergo intimate examination.

Expert instruction

At a Case Management Conference the Master gave directions allowing each party to rely on evidence from a urology expert. The Defendant was sympathetic to the Claimant's reluctance to undergo examination by both party's experts and it was therefore agreed that there should be joint instruction of another expert to carry out urodynamics testing of the Claimant's urological function. The result of the testing could then be considered by the parties' experts.

The Claimant proceeded to instruct an expert and obtain the urodynamic results without the Defendant's input into the choice of expert. The results of the testing showed the Claimant to suffer from urinary incontinence. The Defendant's expert reviewed the results and found them to be unsatisfactory. The equipment used by the Claimant produced a trace on a very small scale and a sensor detached during the examination, which made the results very difficult to interpret.

Application for a stay of proceedings

The Defendant requested that the Claimant undergo testing by their own expert. The Claimant initially agreed, but then cancelled the appointment. The Defendant applied for a stay of proceedings pending the Claimant agreeing to undergo testing.

At the hearing of the application, the Claimant argued that the test results obtained were reasonable and further testing was not necessary. The Claimant also argued that she had suffered a urinary tract infection (UTI) as a result of the urodynamics testing and refused to undergo further testing in case this caused a further infection.

The Defendant argued that they had had no input into the choice of the single joint expert. In fact the expert who had been used had been severely criticised by the Judge in a case which went to trial in the High Court in 2016, Stevie *Lynn Watts v Secretary of State for Health, [2016] EWHC 2835 (QB)*, in which the Defendant's solicitors had been involved. The Defendant argued that it was reasonable to require the Claimant to undergo testing by their expert and that had they been aware of the identity of the expert chosen by the Claimant they would not have agreed to their instruction.

Court decision – reasonable request by defendant

The court accepted the Defendant's contention that it would not have agreed to the expert chosen and would have been entitled to seek an alternative. There was no evidence that the urodynamics testing had caused the Claimant's UTI. Applying the test in *Starr*, the Court concluded that the Defendant's request that the Claimant undergo testing by its expert was reasonable. The Claimant had not put forward a substantial reason for not having the testing. The Claimant's fear of suffering a UTI as a result of further testing was not a substantial reason to refuse testing by the Defendant's expert. Accordingly, the stay of proceedings was ordered.

Summary

The decision confirmed the application of the principals set out in *Starr*. The judgment emphasised that without a substantial reason for a Claimant not wishing to undergo testing by a Defendant's expert, the Court would order a stay. The fact that an examination was unpleasant or distressing would not be sufficient reason for refusing examination.

Whittington Hospital NHS Trust v XX [2020] UKSC 14 – Progression over coherence?

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Background

Liability was admitted by the Trust for the delayed diagnosis of cervical cancer, which resulted in the Claimant having to undergo chemo-radiotherapy and being unable to conceive naturally. Prior to the treatment, she had eight eggs collected and frozen. The Claimant and her partner wanted to have four children. It was considered probable that, through surrogacy arrangements, they could have two children using her eggs and his sperm; but for the other two, donor eggs would be required using surrogacy arrangements in California on a commercial basis. If this was not funded she intended to use non-commercial arrangements in the UK.

At first instance, the Judge held that, following *Briody v St Helen's & Knowsley Area Health Authority [2000] EWCA Civ 1010; [2002] QB 856 ("Briody")*, he was bound to reject the claim for commercial surrogacy in California as contrary to public policy, and to hold that surrogacy using donor eggs was not restorative of the Claimant's fertility. In *Briody*, Lady Justice Hale (as she then was) held that ordering the defendant to pay the cost of surrogacy in California, where commercial surrogacy was legal, was "contrary to the public policy of this country" and therefore "it would be quite unreasonable to expect a defendant to fund it". She further held that a child obtained by donor egg surrogacy was "not in any sense restorative" of the Claimant's position before she was injured, in that "it is seeking to make up for some of what she has lost by giving her something different. Neither the child nor the pregnancy would be hers".

However, it was held that damages could be awarded to XX for two own-egg surrogacies in the UK. The Claimant appealed against the denial of her claim for commercial surrogacy and the use of donor eggs. The Trust cross-appealed against the award for the two own-egg surrogacies. The Court of Appeal dismissed the cross-appeal and allowed the appeal on both points. The Trust appealed to the Supreme Court.

The law on surrogacy

The legal position in the UK is that a woman who gives birth to a child is the legal mother, even if the child was born as a result of a surrogacy arrangement between the birth (surrogate) mother and a 'commissioning' family. Legal parenthood can only be obtained by a commissioning family by applying for a parental order after the child has been born. The court must be satisfied that no money or other benefit (other than reasonably incurred expenses) has been given or received by the commissioning family in relation to the surrogacy or the order for making the arrangements, handing over the child, giving agreement, or making the order, unless authorised by the court[1].

Conversely, in California, commercial surrogacy arrangements are legal and binding and a pre-birth order can be obtained confirming the commissioning parents' legal parenthood.

Decision of the Supreme Court

The appeal by the Trust raised three issues:

1. Can damages to fund own-egg surrogacy be recovered?
2. If so, can damages to fund arrangements using donor eggs be recovered?
3. In either event, can damages to fund the cost of commercial surrogacy arrangements in a country where this is not unlawful be recovered?

By a majority, the Supreme Court dismissed the appeal. The leading judgment was given by Lady Hale, who revisited the decision made by her younger self in *Briody*.

The first two points were unanimously answered in the affirmative, the Justices being influenced by changes in societal attitudes toward surrogacy; the changes in the legal framework of surrogacy (and also of what constitutes a family more generally); as well as the medical progress of assisted reproduction since *Briody*. Furthermore, Lady Hale accepted that her previous decision that surrogacy using donor eggs was not truly restorative of what the Claimant had lost was "probably wrong then and is certainly wrong now". Therefore, it was held that, as long as prospects of surrogacy success are reasonable, and

that there are clear indicators that a claimant intended to pursue surrogacy, there was no reason why the cost of own-egg surrogacy could not be recovered.

The third point proved more controversial. The starting point was that UK courts will not enforce a foreign contract if it would be contrary to public policy. However, most items in the bill for a surrogacy in California could also have been claimed if it occurred here. Furthermore, damages would be awarded to the commissioning parent and it is not against UK law for such a person to do the acts prohibited by section 2(1) of the 1985 Act (however, the court hearing an application for a parental order might refuse retrospectively to authorise the payments.) Lastly, the Law Commission have proposed a surrogacy pathway which, if accepted, would enable the child to be recognised as the commissioning parents' child from birth[2]. Therefore, given the developments that have taken place since *Briody*, awards of damages for foreign commercial surrogacy were no longer considered contrary to public policy. However, this was subject to the following limiting factors:

1. The proposed programme of treatments must be reasonable.
2. It must be reasonable for the Claimant to seek the foreign commercial arrangements rather than to pursue arrangements in the UK. It was suggested by Lady Hale that it was unlikely to be reasonable unless the foreign country had a well-established system to safeguard the interests of all parties involved, the surrogate, the commissioning parents and any resultant child. Unregulated systems where both surrogate and commissioning parents are at the mercy of unscrupulous agents should not be funded by awards of damages in the UK.
3. The costs involved must be reasonable.

However, Lord Carnwath (with whom the new President, Lord Reed, agreed) dissented on this third point. He considered that there is a broader principle of legal coherence, which aims to preserve consistency between civil and criminal law. He stated that:

"It would in my view be contrary to principle for the civil courts to award damages on the basis of conduct which, undertaken in this country, would offend its criminal law."

Comment

The ruling is clearly significant for Defendants and Claimants and we are likely to see the limiting factor of 'reasonableness' tested on both sides. We suspect that this ruling will mean more claims in respect of foreign commercial arrangements and, given the fact that the Californian regime is one of the more well established (and costly) in the world, it is likely that Claimants will often wish to claim damages in respect of arrangements made there. This is likely to result not only in significant inflation to damages awards in surrogacy cases, but also a significant increase in the legal costs associated with these cases, as Claimant lawyers seek to carry out thorough investigations into the practicalities, costs and logistics of Californian arrangements so as to put in evidence of the reasonableness of the same; and Defendants seek to carry out the same investigations to show that such arrangements are not reasonable or at least that there are other reasonable alternatives. Evidence from local Californian surrogacy lawyers and agents will possibly become a feature of these cases.

Perhaps the most troubling aspect of this Judgment, however, is not the inconsistency pointed out by Lord Carnwath, nor whether a progressive majority of the Supreme Court has gone beyond what the legislature has been prepared to sanction in terms of commercial surrogacy, but rather the fact that it will potentially require Judges to make normative judgements about the relative merits of the reasonableness of differing surrogacy jurisdictions. While it might be possible for a Judge to find that damages can be awarded for arrangements made in California, arrangements made in other jurisdictions such as Georgia, Nigeria or Ukraine might (and no judgement is passed here about the arrangements in those jurisdictions) be less able to protect the interests of the parties concerned and therefore may be found wanting under the reasonableness test. But is it really desirable for Judges in England and Wales to have to make that assessment at all? There is something at least a little uncomfortable about a Judge in an individual piece of litigation in this country, with limited evidence before him or her, all directed to further the interests of the parties to that specific litigation, having to make much broader findings about other countries' local responses to a particularly difficult social, legal and moral question about which people – and, indeed, national governments – have such deeply held and differing views. Whatever one's opinion on the rights and wrongs of commercial surrogacy and whether there should be further liberalisation and legislative reform in this area, the decision in XX appears to ask our judges to step into sensitive areas that perhaps they will not be entirely comfortable with.

Endnotes

1 Surrogacy Arrangements Act 1985, the Human Fertilisation Embryology Act 1990, and the Human Fertilisation Embryology Act 2008.

2 The Law Commissions' consultation period is now closed and a final report with reform recommendations and a draft Bill, is expected in early 2022.

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