Bevan Brittan

Claims Online

July 2021

Claims Online

July 2021

Welcome to the Summer 2021 edition of Bevan Brittan's Claims Online. In this edition, in our first article Zara Bhakri looks at the Supreme Court judgment of *Khan (Respondent) v Meadows (Appellant)* [2021] UKSC21 in which the court considered the difficult question of whether a mother can sue for damages for a baby born with autism following a pregnancy, which, with appropriate care, would have been terminated but for an unrelated reason. Our second article from Ben Lambert looks at issues GPs should be aware of when conducting remote consultations. Our final article from Beth Warner looks at the recent High Court case of *Wormald v Ahmed* [2021] which highlights important considerations when dealing with Part 36 offers and protected parties.

Nicola Pegg
Partner
Editor
0370 194 5039 | 07500 029580
nicola.pegg@bevanbrittan.com

Claire Bentley
Associate (Professional Support Lawyer)
0370 194 1603 | 07500 229331
claire.bentley@bevanbrittan.com

Bevan Brittan Health and Social Care Publications

We produce a range of publications that are aimed at health and social care professionals. Please click here if you would like your name added to the distribution list for our health and social care publications.

Read more

Supreme Court Update: Scope of Duty of Care in *Khan v Meadows*

Zara
Bhakri
Associate
07551 458205 | 07919 263671
zara.bhakri@bevanbrittan.com

Last week the Supreme Court handed down its judgment in the case of *Khan (Respondent) v Meadows (Appellant)* [2021] UKSC21. The difficult question in issue – can a mother sue for damages for a baby born with autism following a pregnancy, which, with appropriate care, would have been terminated but for an unrelated reason? The progression of the case from the High Court to the Supreme Court has been an interesting journey to follow. The case questions the scope of a Defendant's duty of care in clinical negligence cases, and illustrates the difficulties, and at times inconsistencies, in applying the legal test of causation to medical situations.

In 2006, the Claimant (Ms Meadows) sought advice from the Defendant (GP, Dr Khan) regarding the risk of haemophilia in future pregnancies. Blood tests were unable to identify whether the Claimant was a carrier of the haemophilia gene; she required genetic testing to determine this. The Defendant advised the Claimant that the tests results were normal, from which the Claimant understood she was not a carrier of haemophilia. The Claimant went on to give birth to a son in 2011, and he was diagnosed with both haemophilia and, latterly, autism. It was accepted that Dr Khan had acted negligently but the central legal dispute related to whether the Defendant was liable only for the costs attributable to haemophilia (£1.4million), or also for the costs attributable to her son's autism (£7.6million). Factual causation was not in issue – had the Claimant been appropriately advised of the need to undergo genetic testing, this would have identified her haemophilia gene, she would have specifically opted to test for this during her pregnancy and she would have elected for a termination if positive.

In the High Court, the Claimant relied on the principle of "but for" causation, and sought to align the matter with other wrongful birth claims. The Claimant argued that, but for the Defendant's admitted negligence, the Claimant's son would not have been born and the Defendant should therefore be liable for all the consequences of the pregnancy, except those that cannot be recovered as a matter of law (such as the costs of bringing up a healthy child), as would be the case in other wrongful birth claims.

The Defendant argued that this was a novel point in clinical negligence, and sought to apply the "scope of duty principle" outlined in South Australia Asset Management *Corporation v York Montague* [1997] AC 191 ("SAAMCO"). The Defendant contested that there is a fundamental difference between a parent seeking information about a specific disability (and accepting all other risks relating to the pregnancy), and a wrongful birth claim where the parent seeks to terminate any pregnancy.

Mrs Justice Yip aligned her assessment of causation closely to *Chester v Afshar* (p55). She concluded that the risk that materialised, namely autism, had "everything to do with" the Claimant's initial reason for approaching the Defendant – namely, to seek advice about the continuation of a pregnancy. Accordingly, the Defendant should bear the liability for all outcomes of this pregnancy. Mrs Justice Yip awarded damages in the sum of £9million.

The Court of Appeal unanimously overturned this finding, in a concise judgment lead by LJ Davies. The Court concluded that Mrs Justice Yip had failed to apply the test in SAAMCO, which demands an adequate link between the breach of duty and the particular type of loss claimed. It is not enough to find a link between the breach of duty, and a stage in the chain of causation (i.e. the pregnancy) and conclude that the Defendant should be liable for all the consequences of the pregnancy. In summary, the development of autism was a "co-incidental injury" and fell outside the scope of the Defendant's duty of care.

The 7-judge panel of the Supreme Court has unanimously, upheld the Court of Appeal's finding. The judgment highlights the need in all negligence cases to assess what the scope of a defendant's duty of care is, by considering the purpose for which the Defendant's professional services were engaged. "Factual causation", although important to determine, actually had no relevance to the question of the scope of a Defendant's duty. Although the verdict was unanimous, the Lords took slightly different approaches to the appropriate tests for assessing the scope of the duty. Lord Hodge and Lord Sales (with Lady Black and Lord Kitchin in agreement) have determined a sequence of six questions, which will serve as a useful model for clinical practitioners considering the scope of duty principle. Lord Burrows (p79) found this approach unhelpful, and set out his own seven-part test to reach the same conclusion. The differing opinions but united conclusion make this judgment well worth the read for all within this area.

The clear headline for clinical negligence practitioners from this latest update from the Supreme Court is that the scope of a Defendant's duty merits early and clear consideration in all cases. This will, of course, be particularly germane to our Trust and GP clients in any cases relating to "advice" or "consent". It will also be interesting to see how the scope of duty test develops in other areas of medicine. For example, is a radiologist's scope of duty limited by the details provided on the scan report form, if another obvious diagnosis is missed? More generally, it is possible that this judgment reflects a subtle challenge to the controversial *Chester v Afshar*, and it remains to be seen how these findings will be reconciled in the future.

Remote consultations in GP practice: Risk factors to be aware of

Ben
Lambert
Senior Associate
0370 194 7802 | 07500 833722
ben.lambert@bevanbrittan.com

The Coronavirus pandemic has resulted in a revolution in the way General Practitioners conduct consultations. Before he resigned, the former Health Secretary Matt Hancock stated: *"We have moved to a principle of digital first in primary care and with outpatients: unless there are clinical or practical reasons, all consultations should be done by telemedicine."* This has been reflected in the statistics, with a drop in face-to-face GP appointments from 80% in 2019 to just 7-8% in mid-April 2020, with 100% remote triage.

There is no doubt that remote consultations can bring many benefits to patients, including reduced traveling, seeing patients in their own environment and greater flexibility. However the move to remote consultations also comes with challenges. In this article, we look at issues to be aware of when consulting remotely.

GMC guidance and the legal position

The GMC has three key principals relating to remote consultations. These are that:

- The same standards of good practice apply to remote as to in person consultations.
- You should agree with the patient the most suitable method of consultation within the resources available.
- Where you cannot meet the GMC standards for safe prescribing remotely, the consultation should be in person.

The same legal standard applies to a remote consultations as to consultations in person.

The doctor's treatment will be judged according to practice supported by a reasonable body of GPs, and if an appropriate examination cannot take place remotely, a GP will be expected to see the patient in person, unless there are circumstances which preclude this. Set against this background, what are the key factors to be aware of when consulting remotely?

Remote consultations: key points

- Is the consultation capable of taking place remotely? Where a physical examination is required, request a consultation in person.
- Does the patient consent to a remote consultation? Jointly agree on an acceptable consultation method, taking into account the patient's needs, circumstances and local risks of COVID 19.
- Consider confidentiality. Is the patient alone? If not, ensure that the patient consents to another person being present. Where family members or relatives use on line consultations on behalf of the patient, ensure consent has been obtained for them to be present.
- When consulting remotely with adolescents, establish who initiated the consultation. If a parent is present, consider requesting they leave the room for part of the consultation, so that you can hear the patient's perspective and allow them to express any concerns confidentially.
- Are there concerns about a patient's capacity or safeguarding? If there are concerns about whether a patient is able to make a decision freely because of pressure from others, consider whether a remote consultation is appropriate.
- For video consultations, is equipment set up correctly? Can you see and hear each other clearly? Ensure you are confident using the technology and make sure to apply appropriate privacy settings. Do you have a back-up option, such as the patient's phone number, if you encounter technical difficulties?
- Use NHS approved tools where possible, to ensure all the necessary requirements to comply with online consultation technical standards. The guidance provided to GPs by NHSx regarding remote working discourages the use of personal laptops/devices, which should not be used except in emergency situations.
- Remember the same requirements apply to remote consultations as face to face consultations. Take a full history from the patient. Clinical records should include relevant clinical findings, decisions made, actions agreed, and details of drugs prescribed. If there is any doubt instructions have been understood, summarise and get the patient to repeat back instructions. Safety netting advice should be recorded. Spend appropriate time with the patient. A detailed remote consultation should take at least as long as a face to face consultation.
- Some consultations may be less suited to a remote consultation. Patients for whom English is a second language, or who require an interpreter may experience difficulties communicating effectively remotely.
- There is a danger that subtle physical signs could be missed in a remote consultation. For that reason certain types of consultations may benefit from being held in person. Consultations about mental health problems, and consultations involving children may benefit from a face to face consultation.

Summary

Remote consultations have benefits, but also give rise to challenges. It is important that GPs are aware of those challenges and adapt to meet them. Be prepared to critically evaluate whether a remote consultation is appropriate, and if necessary request a consultation in person.

Part 36 and protected parties

Beth
Warner
Trainee Solicitor
0370 194 7713
beth.warner@bevanbrittan.com

Introduction

The recent High Court case of *Wormald v Ahmed [2021]* highlights important considerations when dealing with Part 36 offers and protected parties.

Under the Civil Procedure Rules, settlement, compromise or payment made on behalf of a protected party requires the approval of the court under CPR 21.10. In this case, the Defendant attempted to withdraw a Part 36 offer following the Claimant's acceptance. The Claimant was a protected party.

The court had to address three key questions:

- Where a protected party accepts a Part 36 offer, is the other party subsequently able to withdraw that offer before approval of the settlement?
- When the court is asked to approve a settlement, on what grounds (if any) can a Part 36 offer be withdrawn and approval of the settlement refused?
- Should the court grant permission for withdrawal of the offer or approve the settlement in the amount offered?

Facts of the Case

The Claimant sustained a traumatic brain injury in 2009 after being hit by the Defendant's vehicle. Due to his injuries the Claimant lacked capacity to conduct litigation and was deemed a protected party.

- In October 2014, the Defendant made a Part 36 offer of £2million.
- In November 2014, judgment was entered in the Claimant's favour for 60% of his damages to be assessed.
- On 14 September 2020, the Claimant suffered a cardiac episode and was in a critical condition. The Defendant's solicitors were advised that the Claimant had been admitted to hospital.
- On 18 September 2020, the Claimant's solicitors sent the Defendant's solicitors notice of acceptance of the Part 36 offer.
- Later that day, the Claimant died.
- On 21 September 2020, the Defendant's solicitors were advised of the Claimant's death.
- On 25 September 2020, the Defendant's solicitors attempted to withdraw the Part 36 offer.

The Claimant's estate argued that CPR Part 36 was carefully drafted to create certainty and its provisions prevailed. They sought a declaration that the offer had been accepted and could not be withdrawn, citing CPR 36.11(2): 'an offer may be accepted at any time...unless it has already been withdrawn'.

The Defendant argued that the offer could be withdrawn until it had been approved under CPR 21.10 and no such approval had been secured. Failing this, the Defendant argued that the settlement should not be approved as the offer was largely based on future care and would lead to an unwarranted windfall to the estate.

The Judgment

Whilst the Judge noted that the Civil Procedure Rules do not give a clear answer, the court found in favour of the Defendant. CPR 36.11 provides that acceptance of Part 36 offers is subject to CPR 21.10 and CPR 36.14 acknowledges that a settlement may require approval in order to be binding. The Court of Appeal case of *Drinkall v Whitwood [2003],* in which acceptance of a Part 36 offer by a child's litigation friend under the predecessor rules was not binding until approved by CPR 21.10, was a persuasive authority.

In response to the first issue, the Judge concluded as follows:

- A compromise made on behalf of a protected party through acceptance of a Part 36 offer requires the court's approval under CPR 21.10 (CPR 36.11 and CPR 36.14).
- Where a protected party accepts a Part 36 offer it is not binding until approved by the court (CPR 21.10).
- The proceedings are not stayed until the court approves the settlement (CPR 36.14).
- Until the settlement is approved the other party may

resile from its offer by giving notice of withdrawal (*Drinkall v Whitwood* [2003]). This has the effect of challenging the settlement.

- The notice of withdrawal, however, will not in itself be valid for the purposes of Part 36 (CPR 36.9), particularly in relation to costs consequences.
- Either party may apply for approval of the settlement (Practice Direction 21). The court will then decide whether the withdrawal is effective, or if the settlement should be approved.

In response to the second issue, the Judge gave guidance on what grounds withdrawal of a Part 36 offer or approval of a settlement could be refused. The Judge stressed that the primary considerations under CPR 21.10 remain the protection of the protected party and their dependants. However, the overriding objective is also relevant and courts must deal with cases justly. This includes ensuring that the parties are on an equal footing. The question is whether, in all the circumstances, approval of the settlement would be unjust. The assessment is to be made taking account of how matters stand at the date of the approval hearing.

In response to the third issue, the Judge concluded that on the evidence it would be unjust for the Defendant to be bound by the accepted offer. However, final determination as to whether the offer (or the withdrawal) should be approved was reserved to allow the Claimant's estate to apply to adduce evidence to comply with CPR Practice Direction 21 and respond to information requests made by the Defendant.

Significance

The judgment makes clear that Part 36 offers provide less certainty in claims involving protected parties. It is important to keep in mind that there may be circumstances in which either party are able to resile from their position before the approval hearing.

The issues in the case were caused by a lack of clarity as to the interaction between CPR Part 36 and CPR 21.10. The court stressed that whilst rules governing offer and acceptance under CPR Part 36 were important in providing clarity, they did not trump the need to achieve a just result in accordance with the protection provided under CPR 21.10 and the overriding objective.

Whilst in this instance, the Defendant could not have known the risk that it was facing at the time the offer was accepted, and that is part and parcel of the operation of Part 36, it does underline the importance of keeping under review previous Part 36 offers that may have been made many years before, particularly where there is a possibility of a significant change in the health or circumstances of the Claimant. Whilst decisions will be fact specific, it will be of reassurance to Defendants that Part 36 is not a straightjacket and that the court is able to exercise its discretion in accordance with principles of natural justice to allow an offer to be withdrawn pending approval of the court in these circumstances.

Bevan Brittan

Birmingham
One Temple Row
Birmingham
B2 5LG

Bristol
Kings Orchard
1 Queen Street
Bristol
BS2 0HQ

Leeds
Toronto Square
7th Floor
Toronto Street
Leeds
LS1 2HJ

London
Fleet Place House
2 Fleet Place
Holborn Viaduct
London
EC4M 7RF

Bevan Brittan LLP | @BevanBrittanLLP | www.bevanbrittan.com | 0370 194 1000