



Neutral Citation Number: [2022] EWCA Civ 107

Case No: B3/2021/1461/QBENF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION

HEATHER WILLIAMS QC sitting as a deputy judge of the High Court

QB 2021 000978

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/02/2022

Before :

LORD JUSTICE BEAN

LADY JUSTICE NICOLA DAVIES

and

LADY JUSTICE SIMLER

Between :

IRIS HUGHES

- and -

RAJENDRA RATTAN

Claimant/

Respondent

Defendant/

Appellant

Neil Davy (instructed by **Dental Protection Limited Leeds**) for the **Appellant Defendant**

Ben Collins QC (instructed by **The Dental Law Partnership**) for the **Respondent Claimant**

Hearing date: 13 January 2022

Approved Judgment

This judgment was handed down remotely at 10:30 on 4 February 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Bean :

1.

The Claimant Iris Hughes received dental treatment on a number of occasions between August 2009 and December 2015 at the Manor Park Dental Practice, West Wickham, Kent (“the Practice”). The Defendant Dr Rajendra Rattan was then the owner and sole principal dentist at the Practice, as he had been since 1986. The Claimant was not treated by the Defendant personally but by six different dentists. She alleges that the treatment by four of them – Drs Boghani, Beattie, Fur, and Khan – was negligent. Dr Khan was a trainee employed by Dr Rattan under a contract of employment, and it is no longer in issue that Dr Rattan is vicariously liable for any negligence proved against him. Drs Boghani, Beattie and Fur, however, were self-employed Associate Dentists, and the preliminary issue raised on this appeal is whether Dr Rattan is liable for their acts or omissions by virtue of either a non-delegable duty of care or vicarious liability.

2.

The claim was issued in the County Court on 7 September 2018, originally for damages limited to £20,000 (later amended to £40,000). On 11 February 2020 District Judge Fine ordered trial of the preliminary issue. It was originally listed for a one day hearing in the County Court before DJ Fine, but was never tried in the County Court. On 19 February 2021 HH Judge Backhouse made an order transferring the preliminary issue to the High Court, where it was heard by Heather Williams QC (as she then was: now Heather Williams J) (“the judge”) on 9 and 10 June 2021. By a reserved judgment handed down on 21 July 2021 the judge determined the preliminary issue in favour of the Claimant on both grounds. With permission granted by Asplin LJ the Defendant appeals to this court. It should be emphasised that the merits of the claim have yet to be tried.

The facts

3.

The parties helpfully prepared a List of Agreed and Disputed Facts. The agreed facts were stated to be as follows:

"1. Between 28 August 2009 and 1 December 2015 the Claimant was a patient who attended at the Manor Park Dental Practice, 88 Manor Park Road, West Wickham, Kent, a dental practice owned by the Defendant, for consultations and dental treatment.

2. Between 28 August 2009 and 6 November 2012 the Claimant was provided with NHS dental care at the practice by 4 dentists, Dr Shahin Boghani, Dr William Beattie, Dr Rubina Fur and Dr Yavar Khan.

3. On first attending at the Practice the Claimant was asked to fill out a form at reception.

4. NHS dental care was provided at the Defendant's practice pursuant to a Contract between the PCT and the Defendant (the General Dental Services Contract) under which the Defendant contracted to provide dental services to patients at the practice. The GDS Contract provided for an annual quantity of courses of dental treatment (and, after variation, time spent on dental treatment) to be provided to patients at the practice. The GDS Contract allowed the Defendant as Contractor to sub-contract his obligations arising under the Contract, alternatively to employ or engage other dentists to carry out the dental treatment (styled Performers under the Contract).

5. Dr Khan was a trainee at the relevant time and was employed by the Defendant as an assistant dentist pursuant to a contract of employment for vocational training. In respect of NHS work he was also allocated to be a Performer under the GDS Contract.

6. Drs Shahin Boghani, Dr William Beattie, and Dr Rubina Fur were engaged by the Defendant as Associate Dentists pursuant to associate agreements. They were not employed under contracts of employment with the Defendant. In respect of NHS work they were also Performers under the GDS Contract.

7. The Claimant was a patient of Dr Boghani, Dr Beattie, Dr Fur and Dr Khan whilst undergoing treatment provided by them.

8. Dr Boghani, Dr Beattie, Dr Fur and Dr Khan:

8.1 Each personally held professional indemnity cover for negligence claims.

8.2 Were responsible for the standard of their own work.

8.3 Were responsible for their own tax and national insurance contributions.

8.4 Did not receive sick pay or pension from the Defendant.

8.5 Had complete clinical control over the dental treatment provided to the Claimant at each of their consultations.

8.6 Could work for other owners or businesses if they wanted.

8.7 Were responsible for their own clinical audits of their patients."

4.

The Agreed Facts said at paragraph 9 that the Defendant did not hold direct indemnity cover for liability as a practice owner for any negligence on the part of the Associate Dentists or Dr Khan in the dental treatment they provided. However, by the time of the hearing, the Defendant's indemnity provider had indicated that practice owners with three or fewer practices would now be covered for such liabilities, whether they arose on a non-delegable duty or a vicarious liability basis. Paragraph 9 of the Agreed Facts also recorded that the Defendant is contractually entitled to an indemnity from each of the Associate Dentists.

5.

The document listed what were said to be the areas of factual dispute at paragraphs 10 - 12. Whether Mrs Hughes was "a patient of the Practice" at the relevant times was in issue. The document stated:

"The Claimant's account was: (i) at no time did she choose which dentist treated her. She was simply given an appointment with a named dentist. She did not know which dentist she would be seeing until she was called through to the surgery; (ii) she made her appointments at reception, not with the individual dentists and saw whichever dentist was allocated to her when she arrived; (iii) she made her payments at reception, never to any individual dentist; and (iv) as far as she was concerned she was a patient of the Practice.

However, the Defendant's position was that: (i) as a new patient, the Claimant was asked if she wanted to be seen by a particular dentist and she did not express a preference; (ii) thereafter it was open to her to request that she be seen by a particular dentist, but she did not do so; and (iii) in the absence of a request, the Claimant would be allocated her usual dentist or an alternative dentist if they were not available."

6.

Individuals were not registered with the Practice in the sense that they had a status which conferred a right to return for other treatment after their course of treatment was completed. Equally, they were free to elect to have future treatment at another dental practice of their choosing.

7.

New patients who attended the Practice were given a medical history form to complete by the receptionist. This included a checklist of medical questions and fields for insertion of the person's contact details. Records of their dental treatment were held at the Practice.

8.

Both NHS and private patients were provided with a "Personal Dental Treatment Plan" in respect of each course of treatment, indicating the diagnosis, proposed treatment and the charge (either the full charge for private treatment; or the banded figure if it was on the NHS). The judge was shown, as we were, an example of the form. The top of the form has fields for the "Provider's details". It was accepted that this referred to the Contractor under the relevant General Dental Services Contract; and Dr Rattan said in evidence before the judge that this box would be completed with a stamp bearing his name. Under the field for inclusion of the patient's details, the text read: "The dentist named on this form is providing you with a course of treatment. Information regarding your NHS dental treatment is detailed overleaf". No other dentist was named on the form.

9.

Mrs Hughes was born on 21 October 1956. She first attended the Practice on 28 August 2009 as she required a filling. She selected the Practice on the recommendation of her daughter, who accompanied her on that occasion. On attendance she was asked by the receptionist to fill out a form and duly did so.

10.

Mrs Hughes said in her oral evidence that her daughter had recommended a dentist at the Practice called "Andy", but when she arranged the appointment she was told that he was fully booked. She said the receptionist did not tell her when she made the booking who the appointment would be with and that she first knew that her dentist on that occasion would be Dr Fur when she came to get her from the waiting room. She said that after her treatment Dr Fur told her she would need a follow-up, so she made an appointment at the reception desk to see Dr Fur again. She paid at the reception desk at the end of each appointment.

11.

Dr Rattan agreed that all appointments were made via the Practice reception staff. He said that the normal procedure was for the receptionist to tell the person making the booking the name of the dentist they would be seeing as well as the date and time of the appointment. He had no direct knowledge of whether this had been done with the Claimant either for her first appointment or on subsequent occasions.

12.

The Defendant emphasised before the judge that the Claimant was free to request the services of a particular dentist. He said that if she did not do so then, as continuity of care was considered desirable, the patient would generally be booked to see the same dentist that they had seen previously, subject to availability considerations or the patient requesting a change. In the Claimant's case there were 29 cancelled appointments, one postponed appointment and six emergency appointments, which the Defendant explained had probably contributed to the fact that she saw a number of different dentists when attending appointments in respect of her dental problems. Her

treatment record showed that she saw Dr Fur on three occasions between August and October 2009 and again in October 2010; Dr Boghani in November 2010; Dr Beattie on four occasions between December 2011 and February 2012; Dr Khan on three occasions between September and November 2012; Dr Navarro in March and June 2013; and Dr Mehta on numerous occasions between April 2014 and October 2015. No allegations of negligence were made in respect of the latter two dentists.

13.

The Claimant saw only Dr Mehta from April 2014 onwards. She explained that she had raised concerns via her daughter about the number of different dentists by whom she had been seen. Her request to be seen by the same dentist for each appointment was then adhered to. She said that prior to April 2014, she had not asked to be seen by a particular dentist. The judge accepted that if she had made such a request it would have been honoured in so far as it was practically possible to do so, as shown by the arrangements subsequently made in respect of Dr Mehta. Her appointments were organised centrally by the reception staff who handled all the administrative tasks and allocated her an available dentist.

14.

The judge accepted that at all times Mrs Hughes considered that she was a patient of the Practice.

15.

The judge found, and it is not disputed, that the Associate Dentists had clinical freedom in terms of their clinical decision-making, including the content of any treatment plan they proposed and how they carried it out.

The General Dental Services Contract

16.

The relevant General Dental Services Contract ("GDS Contract") between the Primary Care Trust ("PCT") and the Defendant was made on 1 April 2009. It only related to NHS work. The terms of the contract were derived from the NHS (General Dental Services Contracts) Regulations 2005, as amended. The GDS Contract was 157 pages long.

17.

Schedule 1 named the Defendant as "the Contractor". The recitals indicated that: "The PCT and the Contractor wish to enter into a general dental services agreement under which the Contractor is to provide primary dental services and other services in accordance with the provisions of this Contract". The specified address to be used for the provision of services under the Contract was the Practice address (clause 65). I note that throughout the GDS Contract the pronoun used to refer to the Contractor is "it", reflecting the fact that the Contractor may be an individual, a partnership under the 1890 Act, a limited liability partnership or a company.

18.

Clause 1 defined a "patient" as "a person to whom the Contractor is providing services under the Contract"; and a "practice" as "the business operated by the Contractor for the purposes of delivering services under the Contract". Clause 47 provided that:

"...where the Contractor agrees to provide a course of treatment to a patient, it shall, at the time of the initial examination and assessment of that patient, ensure that the patient is provided with a treatment plan on a form supplied for that purpose by the PCT".

The form was required to specify the name of the patient and the name of the Contractor, but nothing is said in the GDS Contract, nor on the specimen form we were shown, about identifying the individual dentist who is to perform the work.

19.

“Course of treatment” was defined as meaning:

“(a) an examination of a patient, an assessment of his oral health, and the planning of any treatment to be provided to that patient as a result of that examination and assessment; and

(b) the provision of any planned treatment. (including any treatment planned at a time other than the time of the initial examination) to that patient,

provided by..... one or more providers of primary dental services”.

There is no dispute that “provider” in this clause refers to the Contractor. The term used to refer to individual dentists carrying out treatment is “practitioner”, or sometimes “performer”.

20.

The Contractor agreed to carry out a specified amount of work in the course of a financial year, calculated by reference to "units of dental activity" ("UDAs"). The Defendant undertook to provide 18,509 UDAs each year (clause 77).

21.

Clause 2.11 stated that: "Where this Contract imposes an obligation on the Contractor, the Contractor must comply with it and must take all reasonable steps to ensure that its personnel and contractors comply with it". Clause 40 provided that the Contractor would "carry out its obligations under the contract with reasonable care and skill". Clause 66 said that the Contractor would ensure that the practice premises used for the provision of services under the Contract were suitable for the delivery of those services and sufficient to meet the reasonable needs of the Contractor's patients. The Contractor was also to provide such other facilities and equipment as were necessary to enable it to properly perform the services (clause 68). The Contractor was obliged to comply with all relevant legislation and have regard to all relevant guidance issued by the PCT, the Strategic Health Authority or the Secretary of State (clause 261).

22.

The Contractor could provide services under the Contract to any person requiring them (clause 25). Clause 30 recorded that “where the Contractor has agreed to provide services to a patient pursuant to clause 25it shall inform the patient of his or her right to express a preference to receive services from a particular performer” and clause 31 requires the Contractor to “endeavour to comply with any reasonable preference expressed”.

23.

Part 13 of the GDS Contract placed responsibilities on the Contractor in relation to the keeping of patient records and the provision of patient information.

24.

The Contractor's obligation to the PCT to provide the specified number of UDAs could be met by sub-contracting or by engaging associates. Part 12 of the GDS Contract addressed who could perform the services. Clause 178 stated that "a dental practitioner may perform dental services under the

Contract" provided that he was included in a dental performers list for a PCT in England and was not subject to a suspension.

25.

Clause 184 stipulated that: "The Contractor shall not employ or engage a dental practitioner to perform dental services under the Contract" unless the practitioner had provided details of the PCT list on which s/he appeared and "the Contractor has checked that the practitioner meets the requirements in clause 178". Clause 186 itemised further matters that the Contractor had to establish before employing or engaging a person to perform dental services, including that "he has taken reasonable steps to satisfy himself" that the relevant person "has the clinical experience and training necessary to enable him to properly perform dental services". Clauses 195 and 196 required the Contractor to ensure that all such persons had in place arrangements for maintaining and updating their skills and knowledge and that they participated in any appraisal system provided by the PCT. Clauses 247 - 249 required the Contractor to establish and operate "a practice based quality assurance system" applicable to (amongst others) "any dental practitioner who performs services under the Contract".

26.

The Contractor was not permitted to sub-contract any of its rights or duties under the Contract in relation to clinical matters unless it had taken reasonable steps to satisfy itself that it was reasonable to do so, that the person in question "is qualified and competent to provide the service" and that they held adequate insurance (clause 198). A contract with a sub-contractor was required to prohibit further sub-contracting (clause 201). Sub-contracting was not permitted unless the Contractor had satisfied itself that the sub-contractor held adequate insurance against liability arising from negligent performance of clinical services (clause 252). The Contractor was required to hold adequate insurance "against liability arising from negligent performance of clinical services under the Contract" (clause 251).

27.

Payment was addressed in Part 14 of the GDS Contract. Clause 239 provided that the PCT would make payments to the Contractor promptly and in accordance with both the terms of the Contract and any other conditions relating to the payment contained in directions given by the Secretary of State. The Contractor could only collect from patients the charges that they were required to pay by the National Health Service (Dental Charges) Regulations 2005 (the "NHS Charges Regulations"). In 2009 the value of the Defendant's contract was £498,877. The contract sum was paid to him in 12 monthly instalments.

The Associate Dentists and their agreement with the Defendant

28.

The parties accept that each of the agreements for the relevant period was in the same terms as the agreement which Dr Rattan made with Dr Rubina Fur effective from 1 April 2008 (the "Associate Agreement"), using the British Dental Association ("BDA") standard template contract. The Defendant is referred to as the "Practice Owner" and the other party as the "Associate".

29.

The recitals noted that the Practice Owner held a GDS Contract with the PCT; and that the Associate agreed to abide by GDS regulations; agreed that s/he was a Performer for the purposes of the GDS Contract; and agreed to provide services under the GDS Contract and privately.

30.

The Practice Owner granted the Associate a non-exclusive licence to carry on the practice of dentistry at the Practice premises (clause 1). Clause 4 recorded that it was intended that the Associate be self-employed and that the Agreement was not intended to create a relationship of employer and employee and/or worker.

31.

Clause 5 listed agreements and obligations of the Associate, including that he or she:

i) Warranted that s/he was self-employed (clause 5.3);

ii) Would keep the Practice Owner indemnified from and against all costs and judgments which the latter suffered as a consequence of the direct breach or negligent performance or failure in performance by the Associate; and

iii) Agreed to inform the Practice Owner of any complaints, claims or NHS investigations against him/her and co-operate with the Practice Owner in relation to the handling of such matters.

32.

Clause 6 indicated that the Practice Owner would provide specified dental equipment and apparatus, plus furniture and other things incidental to the exercise of dentistry, along with the services of a dental nurse, a receptionist, such materials, drugs and supplies as were customarily used in the profession of dentistry and the services of a dental laboratory (collectively referred to as "the Facilities" in the Agreement).

33.

The Associate agreed to use the Facilities in a proper manner and to indemnify the Practice Owner against costs of repair or replacement occasioned by their negligence and to follow the maintenance, start-up and shut-down procedures for the operating room outlined in the relevant file in each surgery (clause 7). Both parties agreed to use their best endeavours to further the interest of the practice and to comply with the terms of the GDS Contract (clause 9). The Associate agreed to be a member of one of the British defence bodies or to carry insurance giving comparable benefits (clause 11). The Associate undertook to abide by the Practice's policies and procedures (clause 23); and to comply with requirements relating to Performers contained in the GDS Contract in relation to appraisal, CPD, clinical governance and quality assurance (clause 29). The Defendant's policies included matters required by the Care Quality Commission in terms of patient safety. Further obligations on the Associate included compliance with General Dental Council guidance; replacement of any treatment that failed within 12 months at no extra cost to the patient or the Practice Owner; co-operation with the clinical governance procedures; submitting to clinical audit, appraisal and observation; and following the Practice complaints procedure and keeping the Practice Owner informed of complaints made (schedule 3).

34.

The Practice Owner agreed to renew or repair any unsuitable equipment (clause 12). Clause 13 stated that he would cause the facilities to be available at specified times, save for agreed holidays, and the Associate would use reasonable endeavours to utilise the premises during those periods.

35.

As regards holidays, the Associate could not take more than 21 working days holiday from the Practice, unless agreed with the Practice Owner (clause 15). Both parties were required to give eight weeks' notice in respect of any holiday lasting five working days or more (clause 15).

36.

Provision was made for the Associate to take up to 26 weeks maternity or adoption leave and up to two weeks paternity leave (clauses 26 and 27). The Associate was entitled to the full amount of any sickness, adoption, maternity or paternity payments made by the NHS (clause 25). No provision was made for payment of holiday pay, sick pay or pension contributions by the Defendant.

37.

The Associate was permitted to offer advice or treatment of private patients at the premises, provided it did not contravene the terms of the Defendant's GDS Contract (clause 16).

38.

Clause 17 stated that: "The Practice Owner may introduce to the Associate patients desirous of NHS dental advice or treatment and will endeavour to introduce sufficient patients to allow the Associate to meet the UDA commitment defined in clause 19". However, the Defendant decided not to include a specific UDA commitment in the Agreement as he was confident that he would be able to meet the UDA target hours prescribed by the GDS Contract without having to do so. Accordingly, the Associate Dentists were free to work as much or as little as they chose and could also vary their hours of work at the Practice within the hours that it was open and the surgeries and staff were available. Clause 18 said that the Practice Owner would not: "place any restriction on the NHS patients that the Associate may attend or the types of treatment that he or she may provide save that all patients treated and treatment provided must be in accordance with" the Practice Owner's GDS Contract.

39.

Collection of charges and fees was addressed in Clauses 24 - 25. The former provided that the Practice Owner was to supervise the collection by practice staff of payments due from patients in respect of dental attendance by the Associate either under private contract or NHS arrangements. In consideration of the licence provided by the Agreement, the Associate would make payments to the Practice Owner in accordance with Schedule 2 (clause 25). The Associate was responsible for discharging his / her tax and national insurance liabilities (clause 25(k)).

40.

The Associate Agreement was terminable by either party giving no less than three months' notice (clause 31). Clauses 32 - 34 identified circumstances where the Agreement would be subject to immediate termination by the Practice Owner / Associate. Clause 26 stated that: "Upon termination of the Agreement and in accordance with [the GDS Contract] the Practice Owner undertakes to accept responsibility for the care of the patients treated by the Associate at the premises whose treatment plans are not complete". On termination, the Associate was to return all intellectual property to the provider; and all records of patients attended and treatment provided kept by the Associate were to be retained by the Practice Owner, who agreed to give the Associate reasonable access to them (clause 37).

41.

The goodwill relating to patients was retained by the Defendant. Clause 39 said:

"The goodwill relating to patients treated by the Associate at the premises belongs to the Practice Owner and the Associate shall not inform such patients of the new practising arrangements before or

after termination of this Agreement nor seek to disclose details of his private or NHS lists of patients to a third party".

42.

Clause 40(a) set out a series of restrictive covenants stated to be for "the purpose of protecting the goodwill of the practice" on the Associate ceasing to be an associate of the Practice. They included that the Associate should not:

"For a period of 24 months from the date of his/her ceasing as aforesaid carry on practice as a general dental practitioner at premises situated within a radius of 2 miles of [the address of the Practice premises] whether as an associate, locum tenens, or contractor or performer in the General Dental Services / Personal Dental Services...(sub-clause (i))

For a period of 24 months from the date of his ceasing as aforesaid within a radius of 2 miles from and whether as associate locum tenens or contractor or performer in the General Dental Services / Personal Dental Services provide any professional service of any kind normally provided by a general dental practitioner to any person who was at the date of his so ceasing or had been at any time within the period of twelve months prior to his so ceasing, a patient of the Practice as defined in clause 40(b) (sub-clause (ii))

For a period of 24 months from the date of his ceasing as aforesaid solicit in any manner or any person who was, at the date of his so ceasing, a patient of the Practice to the intent that such person should become a patient of the Associate as a general dental practitioner or of any practice of general dental practitioners in which the Associate is a partner associate locum tenens, contractor or performer (sub-clause (iii)).....

Advertise within the Restricted Area the Performer's services as a dental practitioner (sub-clause (v))."

43.

Clause 40(b) defined a "patient of the Practice" as including "any person who has received at the Practice NHS or private dental care or been in a capitation plan in the preceding 30 months from the Practice Owner or from any other associate / performer of the practice".

44.

During the currency of the Agreement the Associate Dentists were free to work for other dental practices as well. Dr Rattan described Dr Beattie working two or three days a week for another practice and Dr Fur as having undertaken work for another practice during part of the 2009 - 2012 period.

45.

The amount the Associate Dentists were paid each month in respect of their NHS work depended upon how many UDAs (or later, sessions) they had carried out. The Associate Dentists were paid 50% of fees the Contractor received from the PCT in respect of the NHS work they undertook, less 50% of any laboratory fees and other specified expenses. Sums retained by the Defendant went towards the running costs of the Practice such as equipment, materials, maintenance and staff salaries. As regards the patient charge element of a course of treatment recovered pursuant to the NHS Charges Regulations, if the sum was not paid, the arrangement was that the bad debt would be borne 50/50 between the Defendant and the Associate Dentists (albeit, in practice the Defendant often elected to take the entirety of the sum).

46.

This case is not concerned with private treatment, but it may be noted that in respect of private work the Associate Dentists received 50% of the fees paid and certain expenses such as laboratory fees were split equally with the Defendant.

47.

Associate Dentists had to arrange insurance and meet their own expenses in terms of accountants, CPD, journals and appropriate clothing. They did not have to provide their own equipment, although they might do so in relation to particular preferred items, with the Defendant's consent.

48.

The judge found for the Claimant on both grounds: non-delegable duty of care and vicarious liability. I will consider the two issues separately.

Non-delegable duty of care

49.

The first ground of appeal states:-

"The judge's conclusion that there be judgment for the Respondent in relation to the preliminary issue of whether the Appellant is liable to the Respondent on the basis of him owing her a non-delegable duty was wrong. In particular she wrongly found that the first three factors of the test set out by Lord Sumption in *Woodland v Swimming Teachers Association and others*[2014] AC 537 were satisfied."

50.

Woodland is now the leading case on non-delegable duties of care. At paragraph 23 Lord Sumption identified five cumulative factors ("the *Woodland* factors") which indicate the existence of such a duty:-

"(1) 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. (2) 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 a characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. (3) 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. (4) 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. (5) 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."

51.

In her decision the judge cited a number of passages from Lord Sumption's judgment. She noted that at [14]-[16] he had reviewed a number of cases concerning hospitals, in particular *Gold v Essex County Council* [1942] 2 KB 293, *Cassidy v Ministry of Health*[1951] 2 KB 343 and *Roe v Ministry of*

Health [1954] 2 QB 66. The judge also noted that Lord Sumption went on to consider and to distinguish two more recent decisions of this court involving hospitals: *A (a Child) v Ministry of Defence* [2005] QB 183 and *Farraj v King's Healthcare NHS Trust* [2010] 1 WLR 2139. Finally, she cited paragraph 34 of Baroness Hale's concurring judgment in *Woodland*:-

"No one has seriously questioned that if a hospital patient is injured as a result of a nurse's carelessness it matters whether the nurse is employed by the hospital or by an agency; or if a pupil at school is injured by a teacher it matters whether the teacher is employed by the school or is self-employed...The reason why the hospital or school is liable is that the hospital has undertaken to care for the patient, and the school has undertaken to teach the pupil, and that responsibility is not discharged simply by choosing apparently competent people to do it. The hospital or school remains personally responsible to see that care is taken in doing it."

52.

In her conclusions on the non-delegable duty of care the judge rejected the submission by Mr Davy that the Claimant had to show that the defendant "assumed a personal responsibility to provide the claimant with dental treatment as a pre-requisite to satisfying the *Woodland* factors." She noted that Lord Sumption had not identified any such requirement in *Woodland*. On the contrary, he had said at [7] that "the work required to perform such a duty may well be delegable, and usually is, but the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own." She held that the fact that Dr Rattan was able to delegate performance of the UDAs which he had agreed to provide to Associate Dentists or sub-contractors was therefore a neutral feature.

53.

She then considered the first three *Woodland* factors one by one, there being no dispute that if they were satisfied the fourth and fifth factors did not have to be considered.

54.

On the first factor, the judge considered that someone (such as the Claimant) who is a patient for the purposes of receiving dental treatment falls within the rationale identified by the Supreme Court in *Woodland*. Mrs Hughes placed herself in the care of the Practice in circumstances where she was vulnerable to the risk of injury given the nature of dental treatment and was dependent on the Practice in respect of the treatment provided. The judge held that Lord Sumption's description of the first factor did not support Mr Davy's proposition that a high threshold of vulnerability must be established in addition to showing that the Claimant was a patient in the sense used in *Woodland*.

55.

As to the second factor, the judge held that there was an antecedent relationship between the Claimant and the Defendant which placed Mrs Hughes in Dr Rattan's care in respect of the provision of NHS dental treatment entailing a positive duty to protect her from harm caused by that treatment. She considered that the arrangements made between the Claimant and the Practice, the terms of the GDS contract and the nature of the Associate Agreement all supported that conclusion. She noted that under the GDS Contract:-

"i) The Defendant, as the Contractor, undertook to provide an agreed amount of dental services to patients from the Practice address. The provision of those services was the Defendant's responsibility as the Contractor: see the contract terms I have referred to;

ii) The Defendant, as the Contractor, was responsible for complying with the duties imposed by the contract; responsible for carrying out his obligations under the contract with reasonable care and skill; and for providing appropriate premises, equipment and facilities sufficient to enable proper performance of the contracted services;

iii) The Defendant, as the Contractor, agreed to a series of obligations in relation to patients of the Practice, including keeping records, providing patient information and proving a complaints procedure;

iv) Whilst he could choose to deliver the services by sub-contractors or via associates, the Defendant was subject to a series of requirements in relation to their selection, training and oversight; and

v) The Defendant received payment from the PCT in respect of all UDAs provided to patients of the Practice pursuant to the contract, irrespective of who had undertaken the treatment. It was then for Mr Rattan to agree with any sub-contractors or associates he had chosen to use, how receipts and expenses were to be apportioned between them. Under the arrangements with the Associate Dentists he retained 50% of fees received.”

56.

As regards the arrangements made with the Claimant, the judge noted:-

“i) Mrs Hughes provided her medical history and her personal details to the Practice, she was allocated a Practice reference number and her records were held by the Practice;

ii) Her appointments were booked by the Practice staff, who determined the dentist she would see from those who the Defendant had arranged to work from the Practice, albeit she could request a particular dentist;

iii) She was treated at the Practice premises, using equipment, nursing staff and other facilities provided by the Defendant; and

iv) She made payment for the NHS Charge element of her treatment to the Practice reception staff. The Personal Dental Treatment Plan she was provided with setting out the treatment and charges named the Defendant as the provider of the course of treatment.”

57.

The judge referred to two county court cases cited to her: *Ramdhean v Agedo*, 28 January 2020, a decision of HH Judge Belcher, and *Breakingbury v Croad*, 19 April 2021, a decision of HH Judge Harrison, each of these being a claim by a dental patient for negligence in which the judge held that the Woodland factors were established and that a non-delegable duty of care arose. We were not shown transcripts of these judgments, and they did not form part of Mr Collins’ case on this appeal.

58.

Turning to the third Woodland factor, the judge noted that the relevant question posed by Lord Sumption is whether the claimant lacks control over how the defendant chooses to perform the obligations “whether personally or through employees or third parties”. She noted that Dr Rattan could choose whether to provide the NHS dental services himself or via employees, associates or subcontractors, and added:-

“At most Mrs Hughes could request, although not insist upon, a particular dentist from that pool of dentists which he had selected to provide dental services at the Practice. The fact that the Claimant

could choose to reject the services altogether and go to a different dental practice altogether is not in point, as Lord Sumption's description of the third factor shows."

59.

Accordingly the judge held that the Defendant owed the Claimant a non-delegable duty of care in relation to the dental treatment received at the Practice.

The parties' submissions on non-delegable duty

60.

Mr Davy's submissions on this topic were well summarised by a paragraph in his skeleton argument. He wrote that the circumstances of the present case are very different from the hospital cases considered in *Woodland* in that:-

"a) unlike a hospital accepting a patient, when the practice was contacted by the Respondent and agreed to make an appointment with a dentist, it did not assume a duty to the Respondent to provide dental treatment but merely a duty to make arrangements for the dental treatment to be provided by an associate;

b) unlike a hospital, the Appellant had no care or control of the Respondent in respect of the dental treatment that was ultimately provided. Any care or control was limited to the administrative functions carried out by the practice."

61.

Mr Davy focussed on the second *Woodland* factor. He submitted that the antecedent relationship which Lord Sumption regarded as essential must be one which places the Claimant in the actual custody, charge, or care of the Defendant. He emphasised the undisputed (indeed formally agreed) fact that each Associate had complete clinical control when performing treatment on the Claimant. He argued that Mrs Hughes' interactions with the Practice were "entirely administrative". He emphasised the choice of dentist available to the Claimant and contrasted this with the usual position in hospital where the patient has no such choice. Mr Davy relied on *Armes v Nottinghamshire County Council* [2018] AC 355, in which Lord Reed said at paragraph 37:-

"The critical question in deciding whether the local authority were in breach of a non-delegable duty in the present case, is whether the function of providing the child with day-to-day care, in the course of which the abuse occurred was one which the local authority were themselves under a duty of perform with care for the safety of the child, or was one which they were merely bound to have arranged to have performed, subject to a duty to take care in making and supervising those arrangements."

62.

Mr Davy also relied on the decision of Bell J in *A (a Child) v Ministry of Defence* [2003] PIQR P33 (upheld in this court: [2005] QB 183) and its approval by Lord Sumption in *Woodland*. The claimant in *A* was the child of an Army officer deployed in Germany. The Ministry of Defence had an arrangement for treatment of service personnel and their families in local German hospitals. Bell J concluded that although the Ministry had a common law duty to arrange medical care for service personnel and their families it did not assume a duty to provide the care itself. Lord Sumption, in approving the result in *A*, said that:-

"The Ministry of Defence was not responsible for the negligence of a hospital with whom it contracted to treat soldiers and their families. But the true reason was the finding of the trial judge (quoted at para 28 of Lord Phillips' judgment) that there was "no sound basis for any feeling... that secondary

treatment in hospital ... was actually provided by the Army (MoD) as opposed to arranged by the Army." There was therefore no delegation of any function which the Ministry had assumed personal responsibility to carry out, and no delegation of any custody exercised by the Ministry over soldiers and their families."

63.

Mr Davy submitted that the Defendant merely assumed a duty to arrange for the provision of the relevant treatment by the Associate Dentist. He also argued that the antecedent relationship between the Claimant and the Defendant should not be assessed by reference to the contractual relationship between the Defendant and the PCT or between the Defendant and each Associate Dentist, since Mrs Hughes was not a party to any of these contracts. Mr Davy also argued that no significance should be attached to the specimen Patient Treatment Form, since the latter document had only been produced by the Defendant when he was giving evidence, prior to which the Claimant had put her case on the basis that the relationship with the Practice was formed at the time of booking each appointment. (This was not his most attractive point: the Defendant should have disclosed the document long before the hearing.)

64.

As to the first Woodland factor, Mr Davy accepted that if the Defendant assumed a positive duty to the Claimant to provide dental treatment (as opposed to merely arranging for such treatment) for the purposes of the second Woodland factor it would follow that she was a patient within the terms of the first factor.

65.

As to the third Woodland factor, Mr Davy referred to *GB v Home Office* [\[2015\] EWHC 819 \(QB\)](#) in which Coulson J held that a detainee in an immigration facility effectively had no control over the medical treatment offered to her. Coulson J accepted a submission that this:-

"was completely different [from] the choices open to someone who was at liberty, and who could choose which NHS practice they went to and which doctor within that practice they saw."

66.

Mr Collins QC responded by contrasting the simplicity of the Claimant's analysis with the complexity of the Defendant's. The Claimant's case was that when she attended at the Practice or at the latest when she signed the Patient Treatment Form before the treatment was carried out, Dr Rattan, as sole proprietor of the Practice and the Provider named on the form, became under a non-delegable duty of care to her in respect of any NHS treatment. On the Defendant's case however, the business of the Practice carried on by Dr Rattan was threefold:

(a) to provide administrative services in respect of any patient attending at the Practice;

(b) to provide dental treatment if that treatment was to be provided by Dr Rattan personally or by Dr Khan, but not otherwise; and

(c) to be a business providing facilities for treatment carried out by any of the other dentists, in respect of which the Practice was little more than a booking agency.

67.

Mr Collins relied on the terms of the Patient Treatment Form; the GDS Contract; and the Associate Agreements, in particular the clauses in the latter which protected the Defendant's goodwill by means

of restrictive covenants which prohibited the Associate Dentists for a significant period after their departure from treating any “patient of the Practice”.

Discussion

68.

I consider that the judge was clearly right to hold that Dr Rattan was under a non-delegable duty of care to the Claimant in respect of the treatment she received at the Practice. She was a patient of his Practice, not just in layman’s language but as a matter of law. I reach this conclusion for a number of reasons.

69.

The Personal Dental Treatment Plan signed by the Claimant named Dr Rattan as the Provider of the treatment and stated that “the dentist named on this form is providing you with a course of treatment”. No other dentist was named on the form and there was no section of the form in which anyone other than the provider could be identified. Nothing is said about whether the whole course of treatment will be provided by one individual, nor whether he or she will be an employee of the Practice or an independent contractor. The form had to be signed by the patient next to a declaration which simply read:-

“I understand the nature of the proposed NHS treatment services and accept those services and the associated fees as detailed.”

70.

This document is consistent with the provisions of the GDS Contract. It is also consistent with the terms of the Associate Agreements under which patients are described as “patients of the Practice”. It is very significant in my view that the agreements subjected each Associate Dentist to stringent restrictive covenants (the reasonableness of which does not arise for consideration in this case) prohibiting them from treating, let alone soliciting, anyone who has been a “patient of the Practice” in the preceding 12 months, whether or not the individual Associate Dentist had ever treated, spoken to or even met that patient.

71.

I also consider that the judge was right to find that the Claimant satisfied all the factors identified by Lord Sumption at paragraph 23 of Woodland as giving rise to a non-delegable duty of care:-

(1) In the first factor “patient” must include anyone receiving treatment from a dentist. It is not suggested that Lord Sumption was using the term “patient” in the old sense (that is to say someone who lacks capacity and would nowadays be described as a protected party); nor is there anything in his judgment to suggest that the term is confined to accident and emergency patients or to those admitted to a hospital overnight as in-patients. Whether it includes medical or dental patients who are not actually subjected to treatment, but merely advised in consultation, is a question for another case and another day. But the sentence cannot be rewritten as though the Claimant had to be within a subset of especially vulnerable patients in order to qualify. Indeed, Mr Davy came close to conceding that if the second factor was satisfied then so too was the first.

(2) Turning to the second factor, an antecedent relationship between the Claimant and the Defendant was established at the latest on each occasion when the Claimant signed the Personal Dental Treatment Plan, which she was required to do before any NHS treatment was carried out. That relationship placed the Claimant in the actual care of the Defendant, not because he was a dentist

himself but because he was the owner of the Practice. It would have done likewise if the Practice had been run by a company or owned by a partnership. The duty, as Lord Sumption said in *Woodland* at [7], was, by virtue of the antecedent relationship, personal to the Defendant. "The work required to perform such a duty may well be delegable and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own." The duty owed by Dr Rattan was a positive or affirmative one to protect the patient from injury, not simply to avoid acting a way that foreseeably causes injury; and it involved an element of control over the patient.

(3) As for the third factor, the Claimant had no control over how the Defendant chose to perform his obligations, whether personally or through employees or third parties. She could express a preference as to which Associate Dentist she would like to see her, but no more than that. Of course she had control in the sense that she could refuse to be seen by anyone other than Dr X, or could refuse to be treated at all, but that applies to all dental patients and all hospital out-patients, at any rate those with full capacity. The right of a fully sentient adult to refuse treatment does not seem to me to have anything to do with Lord Sumption's third factor in *Woodland*. The decision of Coulson J in *GB v Home Office* does not assist the Defendant either. The fact that a prisoner or immigration detainee cannot decide to seek treatment elsewhere does not mean that any patient who can do so is not owed the non-delegable duty of care.

Conclusion on non-delegable duty

72.

I would therefore dismiss the appeal against the judge's finding that Dr Rattan was liable for any negligent acts or omissions of the Associate Dentists in treating Mrs Hughes, by virtue of a non-delegable duty of care. This makes it strictly unnecessary to decide the second ground, but as this is in the nature of a test case we were asked to deal with both issues in any event.

Vicarious liability

73.

The ground of appeal on this issue is that:

"The Judge's conclusion that there be judgment for the respondent in relation to the preliminary issue of whether the appellant is liable to the respondent for the acts and omissions of Drs Shahin Bogani, William Beattie and Rubina Fur on the basis of vicarious liability, was also wrong. In particular when assessing whether the relationship was akin to employment she:

a) Failed to take into account and give appropriate weight to all of the factors consistent with the Associate Dentists being independent contractors; and

b) Wrongly concluded that the Associate Dentists were an integral part of the appellant's business; and

c) Failed to take into account not only the factors suggesting that there was some control by the appellant of the Associate Dentists, but also the factors indicative of a lack of control; and

d) Failed to take into account and give appropriate weight to all of the relevant factors when considering whether the Associate Dentists were carrying on business on their own account or whether they were in a relationship akin to employment with the appellant."

74.

The judge referred to the leading modern authorities on vicarious liability in tort. She began by citing Baroness Hale of Richmond's judgment in *Various Claimants v Barclays Bank Plc* [2020] UKSC 13; [2020] AC 973. At [27] Lady Hale said:-

"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".

The judge noted that at [16] Lady Hale had referred to relationships "sufficiently akin to employment to make it fair and just" to impose "liability" and that in *Woodland* Lord Sumption had referred to "a relationship which is sufficiently analogous to employment" [emphasis added].

75.

The judge went on to cite from the judgment of Ward LJ in *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] QB 722 in which the phrase "akin to employment" was first used, and Ward LJ discussed in detail how to distinguish employees from independent contractors. She went on to cite from the judgment of Lord Phillips of Worth Matravers PSC in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1, generally known as the *Christian Brothers* case. Lord Phillips identified at [35] the policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer in a case where certain criteria are satisfied. The fifth of these was that "the employee will, to a greater or lesser degree, have been under the control of the employer". He noted that where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is akin to that between an employer and an employee.

76.

The judge cited the summary by Lord Reed JSC in *Cox v Ministry of Justice* [2016] UKSC 10; [2016] AC 660 of the approach of Lord Phillips in the *Christian Brothers* case as follows:-

"...a relationship other than employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question."

77.

Finally, reverting to the *Barclays* case, the judge cited the observation of Baroness Hale at [24] that:-

"There is nothing, therefore in the trilogy of Supreme Court cases discussed above to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded."

78.

The judge set out her conclusions on vicarious liability at [124] - [129]:-

"124. As I have explained earlier, the question for me to resolve is whether the relationship between the Defendant and the Associate Dentists was sufficiently akin to employment to make it fair and just to impose vicarious liability. In *Barclays Bank* the Supreme Court re-affirmed the distinction between that situation and one where a genuinely independent contractor is in business in their own account. It is plain, post *Barclays Bank*, that this is the correct starting point, rather than beginning with a consideration of whether the five policy incidents identified by Lord Phillips in *Christian Brothers* are

present. In reviewing the relevant caselaw, I have sought to identify the essence of what makes a person an employee and in turn, what can render a relationship sufficiently akin to employment for these purposes. Self-evidently, the sheer fact that the Associate Dentists were self-employed, responsible for their own tax and national insurance and not in receipt of the kinds of benefits that would be received by employees does not answer that question one way or the other.

125. As I have described earlier, and as Mr Davy emphasises, the income of the Associate Dentists was variable and they had a large amount of freedom over how much time they worked at the Practice and how they divided their work there between NHS and private patients. Whilst it is not necessary to establish the kind of irreducible minimum of mutual obligations found in an employment contract, I accept that this degree of freedom casts some light on the nature of the relationship and could, depending on the impact of the other features I will come on to discuss, be an indicator that the Associate Dentists were independent contractors, albeit it is not a decisive indicator of that.

126. As regards the degree of control that the Defendant had in respect of the Associate Dentists, it is clear that the latter were free to make clinical decisions and provide treatment as they saw fit. As I have just noted, they also had freedom over how much they chose to work. Nonetheless, a relatively slight amount of control may suffice for these purposes. I consider that a sufficient degree of control was present. In this regard I note the following in particular:

- i) The Defendant determined when the premises were open and when his nursing and reception staff were made available to the Associate Dentists;
- ii) The Associate Dentists agreed to provide services as a Performer under the terms of the GDS Contract which the Defendant had made with the PCT (paragraphs 29 and 39 above). In turn this meant that in carrying out dental treatment the Associate Dentists were subject to Mr Rattan's powers and responsibilities under that Contract, for example his duty to use reasonable endeavours to ensure that all courses of treatment were completed within a reasonable time;
- iii) The Associate agreed to comply with the Practice's policies and procedures; to comply with any requirements in the GDS Contract relating to appraisal, CPD, clinical governance and quality assurance; to comply with the Practice's complaints procedure; to submit to clinical audit; and to replace failed treatment as specified;
- iv) Each Associate Dentist was subject to the Defendant's payment arrangements under which he retained 50% of the monies received for the NHS work they undertook;
- v) The Defendant retained the goodwill relating to patients;
- vi) The Associate Dentists were required to adhere to detailed restrictions applicable on termination aimed at ensuring that patients remained patients of the Practice and that the Practice retained their records;
- vii) The Associate Dentists' freedom to treat private patients was subject to the proviso that it did not contravene the terms of the Defendant's GDS Contract; and
- viii) There was a limitation on the number of holidays that the Associate Dentist could take.

...

127. In my judgment the most significant question for present purposes is whether the Associate Dentists were working as part of their own independent businesses or as an integral part of the

Defendant's business when they provided dental treatment at the Practice. The importance of this aspect is readily apparent from Ward LJ's judgment in E's case; Lord Phillips' judgment in *Christian Brothers*; Lord Reed's judgment in *Cox*; and Baroness Hale's judgment in *Barclays Bank*.

128. I conclude that the Associate Dentists were providing dental treatment as an integral part of the Defendant's dental practice. Whilst I weigh in the balance the fact that they were able to work at other dental practices too and the features that I have highlighted in paragraph 125 above, I am particularly influenced in reaching this conclusion by the combined effect of the following:

i) The work was undertaken at the Practice premises owned by the Defendant, using staff, equipment and other facilities that he provided;

ii) The dental work the Associate Dentists undertook enabled the Defendant to meet his obligations to the PCT under the GDS Contract. Whilst he did not place particular targets on them, it is clear that he would not have been able to deliver the agreed number of UDAs (or later, sessions) had he not recruited associates to work at the Practice;

iii) Payment for the NHS work undertaken by the Associate Dentists was made by the PCT to the Defendant, who then retained a 50% share. Similarly the Practice collected the NHS Charges paid by patients (and private patients' fees) and the Defendant retained 50% of these fees;

iv) The Defendant had chosen to discharge his commitment to the PCT to undertake the agreed number of UDAs (and later, sessions) by retaining associates, rather than by other means;

v) As I have identified when addressing the non-delegable duty issue, Mrs Hughes was a patient of the practice for the purposes of receiving dental treatment and the Defendant had an antecedent relationship with her in respect of the provision of that treatment;

vi) The Defendant exercised elements of control over the dental treatment work which the Associate Dentists undertook, as I have summarised in paragraph 126 above; and

vii) Whilst the Associate Dentists bore an element of the business risk in terms of the amount of work they undertook, the risk of bad debts and certain expenses they were responsible for in whole or part (paragraphs 25 - 27 above), the Defendant plainly bore the substantial majority of the financial risk and potential profits in terms of the dental work undertaken at the Practice.

128. As regards the degree of control that the Defendant had in respect of the Associate Dentists, it is clear that the latter were free to make clinical decisions and provide treatment as they saw fit. As I have just noted, they also had freedom over how much they chose to work. Nonetheless, a relatively slight amount of control may suffice for these purposes: see paragraphs 81, 82 and 85 above. I consider that a sufficient degree of control was present. In this regard I note the following in particular:"

i) The Defendant determined when the premises were open and when his nursing and reception staff were made available to the Associate Dentists;

ii) The Associate Dentists agreed to provide services as a Performer under the terms of the GDS Contract which the Defendant had made with the PCT (paragraphs 29 and 39 above). In turn this meant that in carrying out dental treatment the Associate Dentists were subject to Mr Rattan's powers and responsibilities under that Contract, for example his duty to use reasonable endeavours ensure that all courses of treatment were completed within a reasonable time (paragraph 18 above);

- iii) The Associate agreed to comply with the Practice's policies and procedures; to comply with any requirements in the GDS Contract relating to appraisal, CPD, clinical governance and quality assurance; to comply with the Practice's complaints procedure; to submit to clinical audit; and to replace failed treatment as specified (paragraph 33 above);
- iv) Each Associate Dentist was subject to the Defendant's payment arrangements under which he retained 50% of the monies received for the NHS work they undertook (paragraph 25 above);
- v) The Defendant retained the goodwill relating to patients (paragraph 42 above);
- vi) The Associate Dentists were required to adhere to detailed restrictions applicable on termination aimed at ensuring that patients remained patients of the Practice and that the Practice retained their records (paragraphs 41 and 43 - 44 above);
- vii) The Associate Dentists' freedom to treat private patients was subject to the proviso that it did not contravene the terms of the Defendant's GDS Contract (paragraph 38 above); and
- viii) There was a limitation on the number of holidays that the Associate Dentist could take (paragraph 36 above).

129. I therefore conclude that the relationship here was sufficiently akin to employment to make it fair and just to impose vicarious liability. The circumstances in the present case are quite different from the position of Dr Bates in the Barclays Bank case whose work examining patients was entirely separate from the bank's business.

The parties' submissions on vicarious liability

79.

Mr Davy submitted that the judge failed to take into account, or failed to give appropriate weight to, the fact that the Associate Dentists were working in and for their own independent businesses at their own risk of profit or loss rather than in and for the Defendant's business. He listed in his skeleton argument no less than 24 "crucial factors" relevant to that assessment. I will cite most but not all of them:

- "a) The appellant never paid the Associate Dentists a wage or salary. Each Associate Dentist paid a licence fee for use of the premises and any sum they received in respect of NHS and private work was dependent on the amount of work they chose to do. There was no retainer or guarantee of a certain level of income.
- b) Each Associate Dentist could choose what hours to work (within the opening hours of the practice) and was free to do as much or as little work as they wished (and could choose to do no work at all).
- c) Each Associate Dentist could choose how much NHS and private work to do.
- d) Each Associate Dentist could work for other owners or businesses (and some of them did).
- e) Although the appellant agreed to use best endeavours to introduce patients to the associate, there was no obligation to provide a certain number of patients or even a fair share of patients.
- f) Each Associate Dentist could choose which laboratory to send work to and had to pay a percentage of lab fees. Different laboratories charged different amounts (for both NHS and private work) and accordingly the decision as to which lab to use would affect the sums they received.

- g) Each Associate Dentist had equal responsibility with the appellant for bad debts (and so was at risk of suffering a loss if patients did not pay).....
- h) Each associate was responsible for their own professional indemnity arrangements (and for paying the costs associated with this).
- i) Each Associate Dentist maintained their own tax and national insurance contributions (and were treated by HMRC as being independent contractors);
- j) Each Associate Dentist also had to pay for other business expenses such as attending courses for the purpose of their own professional development, professional clothing, the cost of any specific equipment that they wished to use that was not provided by the appellant and the fees of professional advisors (such as accountants).
- k) Each Associate Dentist did not receive holiday pay, sick pay or pension contributions from the appellant.....
- m) Ultimately, given that each Associate's profit or loss was dependent on how much work they did, what laboratory fees they chose to incur, what bad debts were suffered and what other expenses were incurred, they were entirely at their own risk of profit or loss.
- n) The appellant had very little control over the Associate Dentists..... Furthermore, the extremely limited control that he did have was restricted to situations where that was required in order for the appellant to fulfil his own obligations under, for example, the GDS contract.
- o) The associate agreements expressly stated that it granted the Associate Dentists a licence to use the premises (and required them to make payments to the appellant for that licence) and stated that for all purposes they would be self-employed. Although it is accepted that the Court must also consider the substance of the agreement in practice in addition to its form, the arrangements in practice were consistent with them being independent contractors and not employees.
- p) Each Associate Dentist was obliged to indemnify the appellant for any liability arising from their negligence.
- q) At the time, the appellant had no insurance in respect of vicarious liability for the actions of the Associate Dentists.
- r) The appellant had no control over how the Associate Dentists treated any patients.
- s) The appellant could place no restriction on the NHS patients that the Associate Dentists could see or the types of treatment they could provide (and they were free to refuse to treat any patient).
- v) The agreement could be terminated on notice by the appellant (without having to have or give a reason).
- w) There was no disciplinary or grievance procedure to follow and any disputes under the agreement were to be resolved by way of mediation.
- x) The appellant's business was the provision of facilities and making arrangements for dental treatment to be provided by the Associate Dentists. His business was not the provision of the dental treatment itself. This is considered in more detail above in relation to the issue of a non-delegable duty."

80.

Turning to the issue of the level of control, Mr Davy submitted that the judge was wrong to take into account the factors suggesting a degree of control by Dr Rattan over the Associate Dentists, without also taking into account those areas where he had no control. Mr Davy emphasised many of the factors listed in the previous paragraph, arguing that such limited degree of control which the Defendant had was restricted to matters necessary to allow him to protect his own business interests.

81.

Mr Davy also submitted that the judge was wrong to find that the Associate Dentists were working as an integral part of the Defendant's business: purely independent contractors, he said, often do work that is an integral part of a third party's business. Taking all relevant factors into account, the judge was wrong to conclude that the relationship between the Defendant and the Associate Dentists was sufficiently "akin to employment" to make it fair and just to impose vicarious liability.

82.

In response, Mr Collins emphasised that the judge had to make an evaluation of the facts and that it was for her to decide how much weight should be attached to the many factors involved in the assessment. He argues that in relation to many of the factors listed by Mr Davy "the Defendant seeks to re-argue a case on the facts which it may not do on appeal".

83.

Mr Collins submits that the payments made by the Defendant to the Associate Dentists of 50% of the sums which the Defendant received under the GDS Contract in respect of their work were properly to be categorised as wages, and that the term "licence fee" used in the Associate Agreements is wholly artificial. He submits that freedom as to hours of work is in no way inconsistent with a relationship "akin to employment". The judge was plainly right to find that the Defendant bore the substantial majority of the financial risk and potential profits from the work undertaken at the Practice. The judge, he submitted, dealt carefully and correctly with the issue of control and the fact that he had some control in order to fulfil his own obligations under the GDS Contract was a pointer in favour of a relationship akin to employment. The authorities such as the Christian Brothers case make it clear that the ability to control the manner in which work is performed forms no part of the test for vicarious liability.

Discussion

84.

The Defendant's case on vicarious liability, in a nutshell, is that the judge attached too much weight to factors pointing towards his relationship with the Associate Dentists being akin to employment and too little weight to the factors pointing the other way. I appreciate that a multi-factorial evaluation by a trial judge is one with which this court should be slow to interfere. But where the primary facts are very largely undisputed and the preliminary issue is one of law, the deference to be accorded to the trial judge's evaluation is reduced.

85.

I attach no significance to the description of the 50% of fees for NHS treatment retained by the Practice as a "licence fee": I agree with Mr Collins that such a label is wholly artificial. But nor can I accept that the 50% share retained by each Associate Dentist can be described as "wages". It is not suggested by Mr Collins that the Associate Dentists were employees of Dr Rattan, any more than it was suggested in *Uber v Aslam* that the drivers were employees of Uber. I also agree with the judge that whether the Associate Dentists were "workers" within the terms of the [Employment Rights Act](#)

[1996](#) is irrelevant to vicarious liability: see the comments on this topic by Lady Hale in *Barclays* at [29].

86.

The judge regarded the critical question as being the one asked by Lord Reed in *Cox v Ministry of Justice*, namely whether the alleged tortfeasor “carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party)”. If that had been the last word on the subject from the Supreme Court, I would have upheld the judge’s finding of vicarious liability, essentially for very similar reasons to those which in my view give rise to a non-delegable duty of care. The Associate Dentists were carrying on their activities as an integral part of the Defendant’s business and for its benefit, and were not conducting recognisably independent businesses of their own. “Recognisable” in this context seems to me to mean recognisable to someone with no knowledge of the contractual arrangements between the tortfeasor and the Defendant.

87.

However, *Cox* is not the last word on vicarious liability from the Supreme Court. In *Barclays* Baroness Hale (with whom the other members of the court agreed) said at [24] that “there is nothing in the trilogy of Supreme Court cases discussed above [including *Cox*] to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded.” At [27] she said that “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”. At [28] she set out the reasons for finding that *Barclays* was not vicariously liable for the wrongdoing of Dr Gordon Bates in the course of medical examinations he carried out for the bank:

“ Clearly, although Dr Bates was a part-time employee of the health service, he was not at any time an employee of the Bank. Nor, viewed objectively, was he anything close to an employee. He did, of course, do work for the Bank. The Bank made the arrangements for the examinations and sent him the forms to fill in. It therefore chose the questions to which it wanted answers. But the same would be true of many other people who did work for the Bank but were clearly independent contractors, ranging from the company hired to clean its windows to the auditors hired to audit its books. Dr Bates was not paid a retainer which might have obliged him to accept a certain number of referrals from the Bank. He was paid a fee for each report. He was free to refuse an offered examination should he wish to do so. He no doubt carried his own medical liability insurance, although this may not have covered him from liability for deliberate wrongdoing. He was in business on his own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the Bank.”

88.

Thus following *Barclays* the critical question now appears to have reverted to being whether the alleged tortfeasor’s relationship with the defendant can properly be described as being “akin” (or “analogous”) to employment, with the focus being on the contractual arrangements between tortfeasor and defendant. Although the relationship between the Defendant and the Associate Dentists was closer to the “akin to employment” line than that between *Barclays* and Dr Bates, I consider that the *Barclays* test for vicarious liability is not met in the present case.

89.

The points which in combination lead me to this conclusion are these, the first two being the most significant:

(1)

The Associate Dentists were free to work at the Practice for as many or as few hours as they wished;

(2)

They were also free to work for other practice owners and business, and some in fact did so;

(3)

The Defendant had no right to control, and did not control, the clinical judgments they made or the way in which they carried out treatment;

(4)

They chose which laboratories to use and shared the cost of disbursements to laboratories;

(5)

They were responsible for their own tax and national insurance payments, and were treated as independent contractors by HMRC;

(6)

Although the Defendant took most of the financial risk by virtue of running the premises and paying ancillary staff, they shared the risk of bad debts;

(7)

They were required to carry personal professional indemnity insurance and to indemnify the Defendant against any claims made against him in respect of their treatment of patients;

(8)

They had to pay for their own professional clothing and professional development, and for any equipment they wished to use which was not provided by the Practice;

(9)

There was no disciplinary or grievance procedure.

90.

There are some factors pointing the other way. The Defendant decided on the opening hours of the Practice and provided equipment and facilities; and he had a limited degree of control in that he was under a duty to the NHS to ensure that courses of treatment were completed within a reasonable period of time. The Associate Dentists were under a contractual duty to follow the policies and procedures of the Practice: it does not appear, however, that there were in fact any such policies or procedures which were relevant to show control. On balance I do not consider that these indicators outweigh those mentioned in the previous paragraph so as to make the relationship sufficiently analogous to employment to satisfy the Barclays test.

91.

For these reasons, though with some hesitation, I differ from the judge on the issue of vicarious liability. Nevertheless, since she was right to determine the preliminary issue in favour of the Claimant on the first ground, I would dismiss the Defendant's appeal.

Lady Justice Nicola Davies:

92.

I agree.

Lady Justice Simler:

93.

I also agree.