Dentists And Doctors: Aligning Rights Of Action In Negligence Across The Medical Professions

In *Hughes v Rattan* [2022] EWCA Civ 107; [2022] 1 W.L.R. 1680 (*Rattan*), the Court of Appeal considered the legal basis of Dr. Rattan's (R's) liability in negligence to a patient, Mrs Hughes (H), whom he had never treated, but whom had received negligent treatment from three self-employed "Associate Dentists" (the Associates) at the practice which he owned (the Practice). The Associates each provided dental services under the N.H.S. Standard General Dental Services Contract. Heather Williams Q.C. (now Heather Williams J.) held at first instance (see [2021] EWHC 2032 (QB); [2022] 1 W.L.R. 194) that R was (i) in breach of a non-delegable duty of care *and* (ii) vicariously liable for the Associates' negligence (at [133]). The Court of Appeal was asked to determine each of these bases (see at [1]). It upheld the decision in favour of H on the first issue–R owed a non-delegable duty of care to H–and, having reached this conclusion, consideration of the second ground was "unnecessary" (see at [72]). The case owes its significance to being a test case: it considered whether a dental patient was a "patient" in the sense to which Lord Sumption referred in *Woodland v Swimming Teachers Association* [2013] UKSC 66; [2014] A.C. 537 and the nature of a dental Practice owner's liability for their Associates negligence, aligning the rights of action in negligence across the medical professions. Consequently, the judgment indicates that the purchase of insurance protecting against such liability will increase. It also highlights, yet again, the uncertainty in applying the "akin to employment" test in practice.

Bean L.J. delivered the leading judgment, with which Davies L.J. and Simler L.J. agreed, essentially endorsing Heather Williams Q.C.'s analysis with reference to the reframing of the doctrine of non-delegable duties by Lord Sumption in *Woodland*: she had been correct to find that R had owed P a non-delegable duty of care (see [2022] 1 W.L.R. 1680 at [71]) because she was a patient of the Practice as matter of law, as well as in layman's terms (see at [68]–[70]).

More specifically, the first characteristic of *Woodland* was satisfied because H was a patient especially vulnerable or dependent on the protection of the defendant against the risk of injury, in a similar manner to a patient receiving treatment in a hospital (see [2022] 1 W.L.R. 194 at [106]).

H asserted, in the course of her evidence, that she was a patient of the Practice: her appointments were booked with the Practice by a receptionist who made appointments with,

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and on behalf of, all the Practice's dentists; she made her payments at the reception irrespective of the dentist seen in clinic (see [2022] 1 W.L.R. 1680 at [5]); she was treated on Practice premises; the Practice took her details and maintained her records and her Personal Dental Treatment Plan named the defendant as the provider of the course of treatment (see [2022] 1 W.L.R. 194 at [112]). Moreover, H claimed that she did not have the option to choose to be treated by a specific dentist at the Practice and was unaware, until she arrived, which dentist would be treating her (see [2022] 1 W.L.R. 1680 at [5]).

R, however, claimed that H was at liberty to make an appointment with a particular dentist and in fact saw one specific dentist at her request after the period of alleged negligence. He pointed out that H required emergency treatment between 2009 to 2012, the period of alleged negligence, and that during this time she cancelled 29 appointments and postponed another, all of which likely contributed to her seeing a number of different dentists (see [2022] 1 W.L.R. 1680 at [12]). Furthermore, R maintained that individuals were not registered with the Practice such that H had a right to further treatment once her course of treatment was complete; in other words, she was not a patient of the Practice in the sense that she had any right to return (see [2022] 1 W.L.R. 1680 at [6]).

Nevertheless, H was a patient of the Practice as a matter of law, as well as in layman's terms because she had placed herself in the care of the Practice and, given the nature of dental treatment, was vulnerable to the risk of injury. Additionally, she was dependent on the Practice in respect of the treatment provided (see [2022] 1 W.L.R. 1680 at [54]). It is clear that all that is required is to establish that the claimant was a patient in the sense referred to in *Woodland* and not, additionally, that the patient was particularly vulnerable (see [2022] 1 W.L.R. 1680 at [71]).

The second characteristic was also satisfied, this being that an antecedent relationship existed between the parties, independent of the negligent act or omission, which placed the claimant in the actual custody, charge or care of the defendant. From the fact that H was a patient *of the Practice*, an assumption of responsibility could be imputed not just to refrain from conduct which would have foreseeably caused her damage but *to protect her from harm* (*Woodland v Swimming Teachers Association* [2014] A.C. 537 at [23], *Rattan* [2022] 1 W.L.R. 1680 at [71]). Indeed, R had agreed, under his contract with Bromley Primary Care Trust, to provide a specified amount of dental services *with reasonable skill and care* which the court at first instance considered influential (see [2022] 1 W.L.R. 194 at [111]).

The third characteristic, that the claimant had no control over how the defendant chose to perform their obligations–i.e. whether personally or by delegation–was satisfied because H

did not have any control over how R chose to perform his obligations under the General Dental Services Contract (see [2022] 1 W.L.R. 1680 at [71] and [58]).

R's legal team had conceded that in cases where characteristics one to three could be established, characteristics four–that the defendant has delegated to a third party an integral part of the duty assumed to the claimant–and five–that the third party has been negligent in performing the very function assumed by the defendant and delegated to him–were also proven. This was endorsed at first instance as correct (see [2022] 1 W.L.R. 194 at [122]).

The judgment is welcome because it avoids creating arbitrary distinctions between the rights of action of victims of dental and medical negligence: the former's rights appropriately no longer depend upon the employment status of the negligent practitioner. Consider, for example, a GP who negligently diagnoses and treats a skin abnormality as impetigo which later is proved ought to have been identifiable as a melanoma. It matters not whether the negligence was occasioned in a doctors' surgery by a partner, salaried GP, self-employed locum GP or an Acute GP in an NHS Trust hospital because the appropriate indemnity scheme will provide the claimant's damages–the recently introduced "Clinical Negligence Scheme for General Practice" (CNSGP) for negligence occasioned in a doctors' surgery and the long-established "Clinical Negligence Scheme for Trusts" (CNST) for incidents in the latter–irrespective of whether the basis of liability is breach of a non-delegable duty or vicarious liability. In addition to the benefits conferred upon the patient and their prospects of recovery, their damages are not an unpredicted expense of enormous quantity for the body liable for the negligence of their employees or associates, since the indemnity is provided by and absorbed by the appropriate indemnity scheme (see McGrath, "Alternative Compensation Schemes for Medical Malpractice in the United Kingdom" in Dobrochna Bach-Golecka (ed.), *Compensation Schemes for Damages Caused by Healthcare and Alternatives to Court Proceedings* (2021)).

More specifically, the harmonisation across the medical professions is beneficial because it spares the need for victims of dental negligence to sue individual dentists in pursuit of compensation. This was inadequate for several reasons, as Stuart-Smith L.J. summarised in *Pawley v Whitecross Dental Care Ltd and another* [2021] EWCA Civ 1827; [2022] 1 W.L.R. 2577 at [5]: individual dentists may not have professional indemnity cover on their own account or, when they do, they may have failed to engage with their insurer; moreover, it may be difficult or impossible to trace all individual treating dentists. All of these variables reduce the patient's prospects of being compensated for their injuries. Indeed, in *Ramdhean v Agedo and The Forum Dental Practice Ltd* [2020] 1 WLUK 406, a case involving a single treating

dentist, the doctor failed to comply with the terms of their insurance cover and eventually was impossible to trace.

Additionally, there are procedural difficulties in bringing a claim where a patient has been treated by more than one self-employed dentist. On this matter, *Pawley* prevents defendant dental practices from requiring that claimants join the Associates to the claim when the claimant is opposed to doing so. In *Pawley*, the patient claimed against two practices and appealed against the decision to join the individual dentists in the proceedings. The district judge had conceded that, while it was the patient's right to choose who to sue, the court had the power to join the individual dentists in the proceedings because the limitation period had expired and CPR 19.5 was engaged–a finding overturned on appeal, irrespective of the outcome of appeal in *Rattan* (see *Pawley* [2022] 1 W.L.R. 2577 at [33]).

This harmonisation of rights of action across the medical professions sends a strong message that it will be prudent for owners of dental practices to purchase indemnity cover against their Associates' negligence. Indeed, registered dentists ordinarily own dental practices; however, the business can be structured as a limited company (Dentists Act 1984, s.43) and the caveat that the majority of directors must be dentists or "registered dental care professionals" (see Dentists Act 1984, s.41) does little to detract from the focus here, that shareholders, as stakeholders, are vested in the financial health of the business. As such, it is likely that *Rattan* will signal a change in the liability insurance landscape: the purchase of insurance against such liability will increase as shareholders seek to minimise the impact of large and unexpected negligence claims on a practice's balance sheet, providing an example of the expansion of liability insurance *in response* to the expansion of tortious liability (see (1995) 58 M.L.R. 820 and (2004) 67 M.L.R. 384, *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 at [20]).

Although the Court of Appeal confirmed that the nature of the liability in *Rattan* was breach of a non-delegable duty *only*, rendering the vicarious liability discussion "unnecessary", it is not clear whether this will follow in all future cases of Associates' negligence since the nature of the Associates' contracts was significant here. Indeed, while Bean L.J.'s analysis is strictly obiter, it is insightful that he observed that he differed from the first instance decision "with some hesitation" (see [2022] 1 W.L.R. 1680 at [91]).

Bean L.J. remarked that Heather Williams Q.C. had asked the wrong question when determining whether each Associate had been working as an integral part of the business or on their own account (see [2022] 1 W.L.R. 1680 at [86–87]). The question is not:

> "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",

this question having derived from *Cox v Ministry of Justice* [2016] A.C. 660 at [127]. Rather, the correct approach is to ask whether each of the Associates was an independent contractor carrying on business on their own account or in a position "akin to employment", per *Barclays Bank* [2020] A.C. 973 at [27]), and accordingly to focus upon the contractual agreements between the Associates and R, each of which was based on the British Dental Association's standard template contract ([2022] 1 W.L.R. 1680 at [88]).

Bean L.J.'s analysis re-emphasises that the vicarious liability assessment is a case of delicately weighing and balancing various factors. In his view, the factors which weighed against such a finding were that R had agreed, in his contracts with the Associates, to provide specific equipment, furniture and the like necessary to carry on the business of dentistry, as well as to repair and renew said equipment; drugs and supplies customary to the profession of dentistry; a dental nurse and a receptionist–collectively referred to as "the Facilities" in the contracts (see [2022] 1 W.L.R. 1680 at [32] and [34]).

In contrast, the factors pointing away from such a finding were that the Associates (as well as Dr. Khan, an employee for whom R's vicarious liability was conceded) all: held professional indemnity cover for negligence claims on their own account, were responsible for their own tax and national insurance contributions and did not receive a pension or sick pay from R. Moreover, each had clinical control over the treatment provided to H in each of their consultations and were responsible for their own clinical audits.

In the view of the Court of Appeal, the factors which tipped the balance were that the Associates were able to choose the hours that they worked at R's Practice and were free to work at other practices. More precisely, these outweighed the facts that (i) the Associates were contracted to help R discharge his contractual obligations under his dental services contract with the Bromley Primary Care Trust and (ii) the degree of control he had in requiring the Associates to abide by the Practice's policies, including when annual leave could be taken, for example (see at [84]–[91]).

One can speculate that the reason for this "hesitant" conclusion is that the relationship between R and the Associates was not as discrete as the relationship between the bank and Dr. Bates in *Barclays Bank* [2020] A.C. 973. Another speculation is uncertainty about concluding that the lack of degree of control was one determinative factor in deciding that the

relationship was not one "akin to employment" since the emphasis after *Barclays Bank* is to shy away from a systematic consideration of Lord Phillips' five policy factors per *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1. Moreover, Lord Reed asserted in *Cox v Ministry of Justice* [2016] A.C. 660 at [21] that it was unlikely to be of independent significance "in most cases".

Nevertheless, the divergent approach of the two courts in *Rattan* reinforces the point that, while the law here is settled, it is not always straightforward to apply: Lady Hale noted in *Barclays Bank* that the factors in *Catholic Child Welfare Society* may be helpful in "doubtful cases" to identify relationships sufficiently analogous to employment (see [2020] A.C. 973 at [27]), yet the "akin to employment" test is an inherently fluid legal principle to the extent that the sense of its application is often only achievable, and transparent, with reference to the five policy factors, notwithstanding that some will be weightier than others on certain facts. Indeed, Lord Reed reserved an "insurance caveat" in *Cox*, expressed in cautious language (see [2016] A.C. 660 at [20]), the result of which is that in circumstances where the beating heart of the policy assessment–factors two, three and four–indicate that vicarious liability ought to be imposed, specific insurance considerations–the absence of insurance, the unavailability of insurance and other means of meeting a potential liability–may be deployed with supremacy, resulting in a finding to the contrary. This strengthens the argument that, despite the UKSC's distancing from a systematic consideration of the factors in *Catholic Child Welfare Society*, it is inescapable that policy reasoning is hard at work in the application of the "akin to employment" test.

It is clear that the doctrines of vicarious liability and non-delegable duties are "functionally identical" (see (2015) 31 P.N. 235 at 235). Traditionally, however, the latter is not limited to ICs and may apply where an employee has been negligent–the key to its application is establishing a narrower duty, a more prescriptive assumption of responsibility, to ensure that the delegatee takes care in the trusted task(s), and this narrower duty ostensibly sets the two apart. In reality, as *Ramdhean* and *Rattan* at first instance illustrate (see also Breakingbury v Croad 19 April 2021, Cardiff County Court (unreported)), because both doctrines offer alternative routes for attributing liability to one for the negligent of another whom they have appointed, the "akin to employment" test is crucial in delineating and defending the conceptual difference(s) between the two and must be applied with this in mind.

The better view may be to "refine" (see *Armes v Nottinghamshire County Council* [2017] UKSC 60; [2018] A.C. 355 at [36] (Lord Reed)) Lord Sumption's first criterion which refers broadly to a "third party" so that it applies to ICs, leaving employees and those in

relationships "akin to employment" the province of vicarious liability *only*. There is an arguable consonance in imposing liability on one person for the negligence of another in the context of a wider, more discrete relationship upon the establishment a narrower duty; and imposing liability on one person for the negligence of another in the context of a narrower relationship (between employers, employees and those akin to employed) upon the establishment of the wider vicarious liability test. Indeed, in the round, the former necessarily is subsumed in the latter. This appears to present the most straightforward means of maintaining the conceptual distinction between the doctrines, short of abandoning the akin to employment test altogether.

In summary, the Court of Appeal judgment in *Rattan* is as valuable as it is timely. It affirms that the approach taken at first instance was correct insofar as its non-delegable duty analysis, harmonising patients' rights of action, yet highlights that, while the doctrines of non-delegable duties and vicarious liability share functional equivalences, there exists between them a conceptual difference which the lower courts have struggled to interpret. Given the recent harmonisation of the indemnity schemes operated by N.H.S. Resolution, it will be likely to be a dental, rather than a medical, negligence case which presses the UKSC to examine the interrelationship between them. The better view may be that the justification for the doctrine of non-delegable duties, in a modern world, lies in operating as the vicariously liability equivalent for ICs; as such, given the latter's ever-increasing prevalence, a doctrine infrequently under the spotlight until its recent reframing may well come into its own.

The judgment also provides a recent example of the expansion of liability insurance *in response* to the expansion of tortious liability, as opposed to vice versa: it illustrates that the interplay between the two is reciprocal at least.

Senara Eggleton

The Dickson Poon School of Law, King's College London

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