**IN THE SUPREME COURT OF THE UNITED KINGDOM**
**ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION) ENGLAND**

**BETWEEN**

**EVELINA AND RICHARD SHAW**

**Appellants**

and

**DR SIMON BARNES**

**Respondent**

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**Skeleton Argument on behalf of the Appellants**

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## FACTS

1. The Respondent, Dr Barnes, is the sole practitioner at the Yellow Tree Clinic ("the Clinic").

2. The Appellants are Christians. Their beliefs allow contraception but not abortion.

3. On 5 June 2015 the Appellants visited the Respondent for advice on contraception, and on conception in the future, given Richard's concern that he might be a carrier of sickle cell disease.

4. The Respondent advised them on contraception. He also told them that when they were ready to have a baby, his Clinic could arrange a blood test to identify whether Richard carried the sickle cell trait.

5. That Christmas the Appellants decided that they would like to try for a baby.

6. On 2 January 2016, Richard called the Clinic to arrange for the sickle cell test to be carried out. He spoke to Paul, the Clinic's new receptionist.

7. Paul incorrectly advised him that he did not think the NHS provided such a test; that Richard would have to use a private clinic if he wanted to arrange such a test; and that Paul thought the test would probably cost several hundred pounds.

8. The Appellants were unable to afford what they were led to believe were the costs of a private test. They decided to try for a baby without performing the test. Evelina fell pregnant two months later.

9. On 28 November 2016, Evelina gave birth to James, who suffers from sickle cell disease. During delivery, James's umbilical cord was compressed and he was temporarily asphyxiated, causing brain injury and cerebral palsy.

10. The Appellants sued the Respondent in negligence. They were successful at first instance.

11. The Respondent appealed to the Court of Appeal, who found in his favour.

12. The Appellants now appeal that decision.

## GROUNDS OF APPEAL

13. The Appellants have two grounds of appeal:

    a) A GP owes a duty to care to his patients. This duty extends to non-clinical staff and requires them to provide accurate information about the availability and costs of medical tests to patients.

    b) The damage relating to James's cerebral palsy was within the scope of Paul's duty of care and hence the Respondent is liable for the costs of raising a child with cerebral palsy.

## ISSUES

14. The questions the Court will need to determine are:

    (a) What was the scope of the Respondent's duty of care to the Appellants?

    (b) Did Paul owe a duty of care to the Appellants?

    (c) Did Paul breach that duty?

    (d) Did Paul's breach cause James's injury?

    (e) Was James's injury foreseeable?

## GROUND ONE

*The scope of the Respondent's duty of care*

15. The three-stage test from *Caparo Industries plc v Dickman* [1990] 2 AC 605 ("*Caparo*") should only be applied in novel situations: *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 ("*Darnley*"), 15.

16. Where the existence of a duty of care has already been established, the courts should consider whether to extend it on an incremental basis and by reference to analogous authority: Lord Bridge in *Caparo*, 618, approving Brennan J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43-44.

17. There are two relevant authorities from which the court can reason by analogy: *Darnley* and *Kent v Griffiths* [2001] QB 36 ("*Kent v Griffiths*").

18. In the most recent case, *Darnley*, the Supreme Court considered whether a hospital receptionist owed a duty of care in negligence to a patient who walked into the hospital's A & E department and left after 19 minutes without communicating his decision to leave.

19. Lord Lloyd-Jones held that the NHS Hospital Trust was under a duty of care to take reasonable care not to cause physical injury to patients: *Darnley*, 17. The scope of that duty, considered in the context of the healthcare service being provided, extended to taking reasonable care not to provide "misinformation to patients": Lloyd-Jones SCJ in *Darnley*, 16-19, approving Lord Woolf MR in *Kent v Griffiths*, 45. Moreover, that duty applied equally to clinical and non-clinical staff: *Darnley*, 17, 19.

20. In *Kent v Griffiths*, the Court of Appeal considered whether the ambulance service was under a duty of care to patients and if so whether inaccurate information provided by a call-handler breached that duty. At paragraph 45, Woolf MR asked:

> "Here what was being provided was a health service. In the case of health services under the 1977 Act the conventional situation is that there is a duty of care. Why should the position of the ambulance staff be different from that of doctors or nurses? ... The ambulance service is part of the health service."

He concluded that call-handlers employed by an NHS Ambulance Trust owe a duty of care to patients to provide accurate information on ambulance arrival times: *Kent v Griffiths*, 45, 49.

21. It follows that GP practices, which provide primary healthcare services, also owe their patients a duty of care to take reasonable care not to cause physical injury to patients. That duty applies to both clinical and non-clinical staff, and to the Respondent's Clinic.

22. In *Darnley*, Lloyd-Jones SCJ held that the moment the appellant in that case walked into and was booked into the hospital, "he was accepted into the system and entered into a relationship with the respondent of patient and healthcare provider": *Darnley*, 16.

23. In *Kent v Griffiths*, Woolf MR held that "acceptance of the call… established the duty of care" between ambulance service and patient: *Kent v Griffiths*, 49.

24. When the Appellants consulted the Respondent, they entered into a relationship with him of patients and healthcare provider. The scope of his duty towards them included advising them on contraception, conception, the risk that Richard might carry the sickle cell trait, and arranging for Richard to be tested.

*Whether Paul owed a duty of care to the Appellants*

25. This relationship and duty of care was in place when Richard spoke with Paul on the telephone on 2 January 2016.

26. The Respondent had employed Paul to work as the Clinic's receptionist. It is reasonable to assume that the Respondent intended Paul to act as the first point of contact for the Clinic's patients, just as Croydon NHS Trust employed hospital receptionists to act as the first point of contact for patients "seeking medical assistance": *Darnley*, 17.

27. Those receptionists were under a duty to provide "accurate information as to the availability" of "medical assistance," not "misinformation" that was "wrong" and "misleading": *Darnley,* 16-19.

28. Paul was under a duty to provide all patients who were in contact with the Clinic with accurate information about the services the Clinic offered as their primary healthcare service provider. This was especially true of patients who had already entered into a doctor-patient relationship with the Respondent and who were already under the Respondent's duty of care. Paul's duty therefore included providing the Appellants with accurate advice about the availability and costs of services such as the sickle cell test.

*The standard of care expected of Paul*

29. It is accepted that Paul had just started work at the Clinic. However, the law makes no allowance for whether an employee has been employed for one day or one year.

30. The Respondent, Paul's employer, was responsible for employing competent staff who were adequately trained and supervised.

31. Paul was expected to perform to the standard of a competent and well-informed receptionist in a GP clinic. Support for this conclusion can be found in *Darnley*: "the standard required is that of an averagely competent and well-informed person performing the function of a receptionist at a department providing emergency medical care": *Darnley*, 25.

32. The standard of care that a patient would expect of a receptionist in a GP clinic is that they would know whether the practice could arrange a medical test, or, if they did not know, that they would either find out and call the patient back, or advise the patient to make an appointment with their GP to discuss the matter in person.

*Negligent breach of duty*

33. It is submitted that Paul's advice fell well below the standard of a competent receptionist and hence was negligent. Paul knew that he lacked accurate knowledge. Nonetheless he still proceeded to tell Richard how much money he thought the sickle cell test might cost.

## GROUND TWO

*Did Paul's breach cause James's injury?*

34. In *Darnley*, Lloyd-Jones SCJ considered the Court of Appeal decision which held that the claim could not succeed because the scope of duty could not extend to liability for the consequences of a patient walking out without telling staff that he was about to leave: *Darnley*, 28. At paragraph 29, he rejected that reasoning:

> "Far from constituting a break in the chain of causation, the appellant's decision to leave was reasonably foreseeable and was made, at least in part, on the basis of the misleading information."

35. Arguments that the Appellants should take responsibility for their own actions will fail, following *Darnley.* The appellant in *Darnley* no doubt accepted some risk that after leaving the A&E department his injuries might worsen. However, Lloyd-Jones held that such risk-taking was based on the receptionist's misleading information. The same reasoning ought to apply in the present case.

36. It is submitted that the tort in the present case had as its starting point Paul's misleading advice to Richard. Faced with the news that the consultation would cost "several hundred pounds," which they could not afford, the Appellants decided to try for a baby naturally, without carrying out the sickle cell test. Their decision, based on Paul's misinformation, resulted in the pregnancy. Causation for the decision to conceive naturally is therefore established.

37. At this stage it is important to distinguish the current case from *Meadows v Khan* [2019] EWCA Civ 152 ("*Meadows v Khan*"). In that case the doctor was not held liable for the costs of raising a child with autism since the scope of that doctor's duty was limited to advising and investigating the risk of haemophilia as far as the mother was concerned.

38. In *Meadows v Khan*, the purpose of the service offered by the doctor was not to prevent the respondent from having *any* child but to prevent her having a child with haemophilia. The service was provided to enable the respondent to know if she was a haemophilia carrier, so that when she became pregnant, she would know whether or not to test the baby for haemophilia. If the test was positive, she would have an abortion.

39. In other words, even if she had tested positive for haemophilia and was accurately informed, the respondent in *Meadows v Khan* would have tried for a baby anyway and then would have had an abortion, depending on the test results. If Richard had tested positive, he and Evelina would have sought medical help to conceive a child free from the disease, or would have adopted a child. Put very simply, the ultimate purpose of the sickle cell test was to find out whether or not the Appellants should have children in the normal way.

40. The Appellants were one step further back in the decision-making process than the respondent in *Meadows v Khan*. The latter's decision was limited to whether or not she would continue her pregnancy to term based on the foetus's

haemophilia results *in utero* and therefore the doctor's scope of duty was limited to that isolated task. But the Appellants' decision concerned whether or not to try for a baby generally and therefore the Respondent's scope of duty extended to the Appellants' decisions concerning conception.

41. The Appellants accept the decision in *Meadows v Khan* "given the limits of the advice sought": advice confined to enabling the respondent to make an informed decision in respect of any foetus she conceived who tested positive for haemophilia: *Meadows v Khan,* 27. The advice sought in the present case was not limited to the issue of the sickle cell trait. Both the initial consultation with the Respondent and the telephone conversation between Paul and Richard were carried out in the context of whether or not the Appellants would decide to try for a baby naturally.

*Was James's injury foreseeable?*

42. In *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530 ("*Parkinson*") it was decided that the special upbringing costs associated with rearing a disabled child would be fair, just and reasonable.

43. Lady Justice Hale held that the two "serious contenders" for the cut-off points for disability were conception and birth. "Although conception is when the losses start, it is not when they end": *Parkinson,* 92. She applied the normal rule of tort that all losses suffered which foreseeably flow from the tort in question are recoverable.

44. At paragraph 92, Hale LJ concluded:

> "… any disability arising from genetic causes or foreseeable events during pregnancy (such as rubella, spina bifidia, or oxygen deprivation during pregnancy or childbirth) up until the child is born alive, and which are not novus actus interveniens, will suffice to found a claim."

45. Oxygen deprivation leading to cerebral palsy is a sad possible consequence of childbirth, as is autism. And yet the reason why the respondent could not recover for the costs of her son's autism in *Meadows v Khan* was because the scope of duty was limited to the issue of haemophilia in relation to any baby she might conceive.

46. Here in the present case, the scope of duty spans from the decision to conceive through to pregnancy and childbirth, and thus any foreseeable consequence thereof. It follows that James's injury was foreseeable and that Paul's misinformation caused that injury.

## CONCLUSION

47. The Appellants ask that the Court reverse the Court of Appeal decision, and find in favour of the Appellants on both grounds of appeal.

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