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

Respondent

DR SIMON BARNES

SKELETON ARGUMENT ON BEHALF OF THE RESPONDENT
GROUND I

The Ground of Appeal

1. A GP's receptionist does not owe a duty of care to give accurate information about whether his employer's services can be provided free of charge.

Authorities

2. The Respondent relies on the following authorities:

- *Darnley v Croydon Health Services NHS Trust* [2018] 3WLR, paragraphs [15]-[16].
- *Caparo Industries Plc. Respondents v Dickman and Others Appellants* [1990] 2 A.C. 605, pages [620-621].
- *Kent v Griffiths and others* [2001] QB 36, paragraphs [4] and [49].

Submissions

Introduction

3. The Court of Appeal was correct in holding that the established category of duty expressed in *Darnley* does not extend to the present facts.

Darnley is not a comparable case

4. The established duty in *Darnley* was 'to take reasonable care not to cause physical injury to patients presenting themselves complaining of illness or injury, even before they were treated or received into care' (per Lord Lloyd Jones JSC at [16H]).

5. *Darnley* can be distinguished in the following ways:

   a. **Nature of loss**: the damage complained of in *Darnley* was physical injury. The damage which is the subject of the present case is economic loss. Therefore the present case does not fall into the 'distinct and recognisable situation in which the law imposes a duty of care' ([16A]). In *Darnley,* the harm that the established duty seeks to prevent is explicitly linked to the primary aim of the healthcare provider: patient health. This is not true of the present case, and consequently Darnley can be distinguished.

b. **Immediacy of harm:** The duty in *Darnley* is specific to its A&E context [16H]. The threat of immediate harm in emergency situations necessitates accurate information at the first point of contact. This distinguishes *Darnley* from the present case, where there is not the same immediate threat to patient wellbeing.

c. **Reasonable reliance on information:** In the present case, it was unreasonable for the Appellants to rely on the information. The receptionist had qualified his statement: he said he did not think that blood tests of that type could be provided on the NHS but that it would *probably* be 'several hundred pounds'. It was therefore reasonable to expect the Appellants to check the information that they had received. This can be distinguished from *Darnley* where the patient was given no reason to believe that the information he had received was incorrect; his reliance on the receptionist's information was therefore reasonable.

Darnley should not be expanded

6. The common law has 'taken as a starting point established categories of specific situations where a duty of care is recognised and it has been willing to move beyond those situations on an incremental basis' (per Lord Lloyd-Jones JSC in *Darnley* [15]).

7. For the reasons listed above in paragraph 5, the context of *Darnley* is sufficiently removed from the context of the present case that an expansion of the duty to include GP receptionists could not be said to be 'incremental'. Therefore the Court should not impose a duty of care on the Respondent by analogous reasoning.

Applying the test from Caparo v Dickman, a new duty should not be created

i. Reasonable foreseeability

8. It was not reasonably foreseeable that as a result of the alleged breach of duty - providing false information regarding the cost of a sickle cell trait test - the Appellants would suffer loss in the form of having a child with sickle cell disease and cerebral palsy. The receptionist was not aware of the parents' intentions to have a child nor of their financial circumstances.

ii. Proximity

9. In *Caparo*, Lord Bridge at p.620H-621B identified the 'salient features' of proximity as being:

    a. that the Defendant knew his statement would be communicated to the Claimant;
    b. that the Defendant was aware of the nature of the transaction which the Claimant had in contemplation;
    c. that the Claimant would be 'very likely' to rely on the statement for the purpose of entering into that transaction.

10. Applying this test for proximity to the present facts:

    a. the receptionist knew that he was talking to the Appellant;
    b. the receptionist was not aware that the Appellants were considering conceiving a child;
    c. although the receptionist could expect the Appellants to rely on the information to some degree, he had qualified his response by stating upfront that he did not know the answer. It was reasonable to expect the Appellants to confirm this information through other channels.

11. Consequently, whilst the first limb of the test is satisfied, the receptionist's lack of knowledge regarding the wider intentions of the Appellant, and his reasonable belief that the Appellants would not rely on his qualified information, evidence that the proximity requirement of the *Caparo* test is not satisfied.

iii. Fair, just and reasonable

12. For reasons of public policy it would not be fair to impose on GP receptionists a duty of care to provide accurate information about whether his employer's services can be provided free of charge.

    a. In other public healthcare cases such as *Darnley* (per Lord Lloyd Jones JSC at [16H-A]) or *Kent v Griffiths* [2001] (per Lord Woolf MR at [4], [49]) the duty of care was established only when the medical professional had assumed responsibility for the patient. This occurred when all of the facts regarding the patient's situation were known. These duties are desirable from a policy perspective because they reflect the patient's entry into a relationship with the wider healthcare provider. However, it is not fair from a policy perspective to impose a similar duty on GP receptionists who cannot be said to have assumed responsibility in the same manner, but who would bear a similar liability.

    b. There is a balance to be struck between on the one hand protecting and giving confidence to medical professionals and administrative staff, and on the other protecting patients from negligent healthcare. However, in the present case the balance of convenience favours not imposing an additional duty on GP receptionists. Establishing a novel and extendable category of duty on GP receptionists would likely result in medical administrative staff becoming less willing to give out important information, which could have serious implications for patient access to treatment.

Conclusion

13. The numerous differences between *Darnley* and the present case serve to prevent the duty of care applied in *Darnley* from applying to the present case as an 'established category' of duty. Moreover, these distinguishing factors are great enough to prevent the Court reasoning by analogy and 'incrementally' extending the duty established in *Darnley* to apply to GP receptionists giving information about the cost of treatment. Consequently, the Court should consider the *Caparo* test in order to establish whether a new category of duty of care should be imposed. Public policy considerations strongly point away from imposing this duty. Therefore we respectfully request that your Lordships dismiss this appeal.

The Ground of Appeal

14. The damage relating to the child's cerebral palsy was not within the scope of the receptionist's duty of care.

Authorities

15. The Respondent relies on the following authorities:

- *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 (commonly known as *South Australia Asset Management Corpn v York Montague Ltd* or "the SAAMCO case"), pages p213C and p.211 E-F.
- *Khan v Meadows* [2019] EWCA Civ 152, paragraphs [12], [19], [27] and [29].
- *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, paragraphs [40]-[41].

Introduction

16. Even if the receptionist owed a duty to provide patients with accurate information as to whether a sickle cell test could be provided free of charge, the scope of that duty extends only to the damage caused by the sickle cell disease, and *not* to the cerebral palsy caused by complications at birth.

Submissions

'But For' is not the appropriate test

17. On a 'but for' analysis, causation can be established between the breach (incorrect information about the cost of the test) and the loss (cerebral palsy which resulted from complications at birth).

18. However, there are clear limits to the 'but for' approach to causation in negligence. 'Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy' (*Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 (commonly known as *South Australia Asset Management Corpn v York Montague Ltd* or "the SAAMCO case"), per Lord Hoffman, p.213C).

19. For policy reasons, the law has intervened to curb liability which would lead to absurd and unfair results. An 'adequate link' is required between the breach of duty and the *particular* loss claimed (*Khan v Meadows* [2019] EWCA Civ 152, [29]).

Applying the Scope of Duty Test

20. The Court of Appeal was correct to apply the Scope of Duty test.

21. The Court is required to address three questions (*Khan* [19]):

    i. What was the purpose of the information, procedure or advice which was alleged to have been negligent?

    ii. What was the appropriate apportionment of risk taking account of the nature of the information, procedure or advice?

iii. What losses would in any event have occurred had the defendant's information, procedure or advice been correct or the procedure been performed?

22. The three discrete questions are to be considered in the round; they are not cumulative, nor are they posed in the alternative. They offer three separate approaches to aid the court in its determination of how far the scope of the duty extends.

Preliminary issue: information or advice?

23. The receptionist's misstatement amounted to information rather than advice. Lord Sumption in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21 explains the difference between the two [40]-[41]:

> *'Advice' cases are where it is the duty of the adviser to consider 'all relevant matters and not only specific factors in the decision': he is responsible for guiding the whole decision-making process.*
>
> *'Information' cases are where 'a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations ... are exclusively matters for the client'.*

24. On the present facts, the receptionist provided information which was a limited part of the material on which the Appellants relied when deciding whether to conceive. The Appellants were required to consider other factors and weigh up the risks. It therefore fits into the 'information' category.

25. The distinction is an important one. In the advice cases, the client will in principle be entitled to recover 'all loss flowing from the transaction' because 'the adviser's responsibility extends to the decision' (per Lord Sumption at [40]). In the information cases, the defendant is liable 'only for the financial consequences of its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater' (per Lord Sumption at [41]).

26. There are clear policy reasons for limiting liability in 'information cases'; the alternative is that any defendant would become the 'underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else's decision' (per Lord Sumption at [41]).

(i) Purpose of the information

27. The purpose of the information was to inform the Appellants of the correct price of the test. The purpose of providing this information was, in turn, to give the parents the opportunity to avoid the risk of having a child born with sickle cell disease. The purpose of the information was *not* to prevent pregnancy.

28. The receptionist's subjective knowledge is also relevant to the purpose for which he provided the information. In the case of *Groome* (cited at [12] of *Kahn*), Brooke LJ stated that one of the stages on the route to finding liability was that the defendant 'knew that the claimant…wanted no more children'. Had the receptionist known the intention behind the Appellants' enquiry, the scope of his duty might have extended to the birth of a child. However, the receptionist was entirely unaware of the reason for the Appellants' enquiry. The purpose of the information he provided is incumbent on the factual context.

(ii) Apportionment of risk, taking account of the nature of the information

29. In the case of *Khan,* on comparable facts, it was held that 'the doctor would be liable for the risk of a mother giving birth to a child with haemophilia… the mother would take the risks of all other potential difficulties of the pregnancy and birth both as to herself and to her child' (*Khan* [27(ii)]).

30. On the instant facts, the scope of the duty extended to providing the Appellants with the opportunity to avoid the risk of having a child born with sickle cell disease. Therefore, the risk of a child being born with sickle cell disease was borne by the Respondent.

31. All other risks associated with pregnancy and childbirth were borne by the Appellants at the point at which they decided to conceive. The receptionist at no point attempted to advise the couple on the risks of childbirth.

32. There is a further policy rationale behind this approach; the alternative is that any GP receptionist who provides information that is used in parents' decision to have a child, regardless of whether the provider of the information is aware that it will used for that purpose, could be liable for the costs of raising a disabled child.

(iii) What losses would in any event have occurred?

33. Had the information been correct, the Appellants would have taken the test, they would have discovered that Mr Shaw has the genetic trait, and the parents would have taken steps, with medical help, to conceive a child who did not have the disease. They would have had a child without sickle cell disease. However, the probability of them giving birth to a child with cerebral palsy is exactly the same as it was for the birth of baby James. The presence of sickle cell disease does not affect the risk of complications at birth. Therefore, the negligent misinformation had no effect on the occurrence of cerebral palsy.

34. This third limb of the Scope of Duty test is *not* a mere reworking of the 'But For' test; as explained above, the 'But For' test is not the appropriate test. The rationale behind the Scope of Duty test is not that of a rigid, step-by-step chain of causation, but rather one of policy: 'the scope of the duty, in the sense of the consequences for which the [defendant] is responsible, is that which the law regards as best giving effect to the express obligations assumed by the [defendant]: neither cutting them down so that the [claimant] obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the [defendant] a liability greater than he could reasonably have thought he was undertaking' (per Lord Hoffman in *SAAMCO* at p.211 E-F).

<u>Conclusion</u>

35. The Court of Appeal was correct to determine that the damage relating to the child's cerebral palsy was not within the scope of the receptionist's duty. The Appellants had accepted the risk that the child could be born with brain damage or other complications. We therefore respectfully request that your Lordships dismiss the appeal.

Elizabeth Walsh and Laurence Harris
Lead and Junior Counsel for the Respondent
14 June 2019