Case No: F14YY798

IN THE CARDIFF COUNTY COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 19 April 2021

Before:

HIS HONOUR JUDGE HARRISON

Between:

MISS LYNDA BREAKINGBURY	**Claimant**
- and -	
MR JOHN MARTIN CROAD	**Defendant**

Ben Collins QC (instructed by **The Dental Law Partnership Solicitors**) for the **Claimant**
Julian Reed (instructed by **Radcliffes Le Brasseur LLP**) for the **Defendant**

Hearing dates: 2-3 November 2020, 5 February 2021

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HIS HONOUR JUDGE HARRISON

His Honour Judge Harrison:

1. Introduction

2. In this claim the Claimant seeks damages from the Defendant arising from her treatment as an NHS patient at the Fountain Dental Centre practice ("FDC") in Merthyr Tydfil. The Defendant retired as a dentist in about 2000 but was the owner of the practice until he sold it in 2012.

3. The allegations of negligence within the particulars of claim span the period 2008 to 2012 and relate to work carried out at the practice rather than work carried out by the Defendant personally.

4. Notwithstanding, his retirement as a dentist, the Defendant continued to enter into contractual relationships with the Local Health Board to provide dental services. He discharged his contractual obligations by way of a series of associate dentists working within the practice umbrella. This, I understand, is not an unusual arrangement.

5. The Claimant contends that this arrangement gave rise to a non-delegable duty of care owed by the Defendant to the Claimant and/or that in the particular circumstances of the case the relationship between the Defendant and associate dentist was such as to be "akin to employment" and consequently the principle of vicarious liability applies.

6. Proceedings were issued on 11th October 2019. The Defendant's defence dated 17th December 2019 averred that the associate dentists were all self employed

and individually insured. As such the existence of a non-delegable duty or the relevance of vicarious liability were denied. A limitation defence was raised.

7. By an order dated 27th April 2020 District Judge Phillips allocated the case to the multi-track and ordered that the issues of:

a. The Defendant's limitation defence,

b. The existence of a non-delegable duty of care and/or vicarious liability,

be dealt with as preliminary issues.

8. **Relevant Facts**

9. Miss Breakingbury was born on 3rd April 1960 and is now 60 years old. She appears to have first registered with the Fountain Dental Centre in December 2007. She had a long history of dental work with previous dentists and described herself as always having had trouble with her teeth. From the dental notes it is clear that Miss Breakingbury had had a significant number of extractions.

10. At paragraphs 7 and 8 of her statement dated 16th October 2020, disclosed for the purposes of the preliminary issues hearing she described her attendance at the practice thus

"7. *When I first attended the Fountain Dental Practice I recall being asked to fill out a form at reception to register with the practice as a new patient, although I cannot recall the precise details of the form I was asked to complete.*"

"8. I was seen by several different dentists at the practice over the time I was a patient there. I could not choose which dentist I saw, I was simply given an appointment and was seen by whichever dentist was available at the time. I would just turn up at the practice on the date and at the time I was given and would sit in the waiting room, waiting to be called in. I did not know which dentist I would be seeing."

11. The details of her attendances at FDC appear in the bundle of notes commencing at (tb 31). There is a helpful summary of appointments at pages 37 to 38. From those record it can be observed that there were 14 attendances in 2008, 3 attendances in 2009, 10 attendances in 2010, 19 attendances in 2011, and 7 attendances in 2012. There then followed a break of about 4 years until July 2016. In 2017 she appears to have had 10 appointments.

12. On 27th May 2011 Miss Breakingbury had also attended at another dentist namely Smart Smiles in Abercynon. This was a practice with which she was also familiar. She appears to have attended as an emergency patient. In cross examination it was suggested that she had gone there because she was in some way dissatisfied with FDC. In her view that was not the case. She felt the likelihood was that she had been unable to get and appointment elsewhere although she seemed to have no recollection of needing urgent attention. That the Claimant was in need of urgent attention appears to be clear. Whilst the Court did not have the relevant notes available to it, Miss Breakingbury was undoubtedly admitted to the Heath Hospital in Cardiff as an emergency during which a tooth was extracted. She seems to have remined an inpatient for 6 days due to an infection taking hold.

13. Having been discharged from hospital, Miss Breakingbury contacted Smart Smiles to explain why she had not attended for follow up. Save for that contact she did not return to Smart Smiles until many years later.

14. In July 2011 the Claimant went back to FDC for bridgework. She was probably seen by Dr Paschalis Papadimitrou. Further bridge work was seemingly undertaken in May 2012 and there then follows the 4 year gap identified above. When she did return in July 2016 the Claimant had problems with swelling and pain. Her case was recognised as difficult. The notes read

" *Treatment options- Prescription of antimicrobials to control infection*

Treatment options are going to be discussed with senior dentist as case is complex. PT advised and agreed.

15. X Rays taken in July 2016 seemed to show a possible misplacement of a post in the region of UR3 and also suggested that the root canal treatment for UR6 did not reach the apex of the tooth. Thereafter the notes are consistent with a complex case where the patient was anxious to avoid dentures and the dentist (usually Mr Edgar Ermida) explained the problems with the existing and future bridgework and why implants may be required. By the spring of 2017 the Claimant was advised to seek an appointment with a specialist.

16. In January 2018 Miss Breakingbury went back to Smart Smiles. She seems first to have gone to a practice in Neath and she now wanted a second opinion on their treatment plan. A radiograph was undertaken. The result of the radiograph is apparent from an email at TB 100:

"I will write an x ray report and send to you over the weekend...the bridge is crap and has been since it was placed if I was her and wanted implants, she should sue the dentist who did the bridge...give her number for Dental Law Partnership when you see her ... but you can't have the work done until the case is settled."

In its use of colourful language, the email explains how the Claimant first came to instruct solicitors and thereafter commence proceedings. The trigger for Mrs Breakingbury to bring proceedings appears to have been the prospect of costly remedial works and implants.

17. As previously set out Mr Croad is a retired dentist who has not practised since about 2000. Notwithstanding his retirement however he continued to own "the practice" and contracted with the Local Health Board to provide services. At paragraph 15 of his statement of 19th October 2020 he put it as follows:

"I was the practice owner, and I held the contract with the Health Board for the provision of Dental services to the NHS patients who were registered with the practice – I was the "Provider" of the dental services. I had an overarching obligation as the Provider to ensure that the dental services provided to patients who attended the surgery were safe and met the expected standard set by the Local Health Board and the general Dental Council- that necessarily involved some oversight and management by me to ensure that the associate dentists were working to the expected standard. However, as I have sold the practice and due to the passage of time, I have no access to any policies and procedures that were in place before 2011."

18. The contractual basis for the arrangement with the Defendant's practice is set out in documents dated March 2006 and March 2009 and which appear in the trial bundle at pages 247 and 413 respectively. The 2006 document is entitled "*Standard Clauses for a Personal Dental Services Agreement where the Local Health Board is not Providing Services Under the Agreement*" and the 2009 contract appears under the title "*Standard General Dental Services Contract*". The contents seem similar in all material respects.

19. Under the heading BACKGROUND on tb 50 the following introduction is provided:

"The LHB and the Contractor wish to enter into a personal dental services agreement under which the contractor is to provide personal dental services and other services in accordance with the provisions of this Agreement.

20. At paragraph 41 tb 271 the contract provides:

"Except in the case of orthodontic services and dental public health services, the contractor shall provide mandatory and additional services to a patient by providing to that patient a course of treatment."

21. At paragraph 77 of each agreement (tb 281 and 454 respectively) the contract sets out that 26,632 units of dental activity were to be provided by the contactor (i.e. the Defendant) and at schedule 4 to the agreements the gross sum paid by the LHB to the Defendant is £519,279 in 2006 and £569,634 in 2009.

22. Mr Croad met his contractual obligations by using associate dentists. Whilst the Court was not provided with a copy of any signed agreement from any

associate working at the material time, it was provided with a template associates contract prepared for the benefit of British Dental Association members. It appears at tb 552. Paragraph 1 General provides:

"*The Practice Owner hereby grants to the Associate a non-exclusive licence and authority (during the operation and subject to the terms and conditions of this Agreement) to carry on the practice of dentistry at the premises and surgeries of the practice owner at (address) which said premises and surgeries are hereinafter referred to as "the premises".*

23. The associate's obligation for "Contract Activity" appears at paragraph 32 of the template agreement which provides inter alia;

"the associate is required, in each NHS year, to provide, or to procure the provision of the number of units of dental activity shown in schedule 1 to this Agreement and for the period stated in the said Schedule"

24. The standard British Dental Association associate contract contains a specific section that considers the "Protection of Goodwill". It states "The goodwill relating to patients treated by the Associate at the premises belongs to the practice owner." It goes on in clauses 60 and 61 to impose restriction in relation to those patients of the Associate both during and after the agreement. For example at 61(iii) the agreement restricts the Associate from taking a patients to another practice by providing that he shall not:

> *"...solicit in any manner any person who was, at the date of their so ceasing, a patient of the Associate 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."

25. Paragraphs 15 and 16 of the BDA agreement deals with the associate's obligation for Professional Indemnity and Insurance cover and paragraph 63 under the heading miscellaneous the agreement provides:

"*The associate shall at all times remain liable for all dental, medical or clinical negligence, or alleged dental or clinical negligence, on the part of the Associate in connection with this Agreement."*

26. At paragraph 17 of his statement Mr Croad describes the position thus:

"*I believe the arrangements with associates were fairly common, at least as far as I understood at the time and as I recall them. The usual arrangement was that the associate undertook any treatment and the claims for payment were submitted to the NHS Health Board. The NHS would pay the practice for the treatment that was provided; the payment from the Health Board took the form of a monthly payment of 1/12th of the total value of the contract."*

27. At paragraph 18;

"The individual fee for a course of treatment undertaken by the associate dentist was usually split 50/50 between the provider and the performer – essentially the 50% of the payment received from the NHS for a course of treatment was a fee for the use of the practice and the practice facilities, such as the reception staff, dental nurses etc. In addition, if an appliance was provide to the patient, say a denture, then there would be a fee paid to the

laboratory to make the appliance- I believe that the laboratory fee would be split 50/50 between the associate and the practice."

28. In evidence Mr Croad confirmed that the standard BDA associate contract seemed to represent the position as he understood it and it would "follow along those lines". He added that if someone was not able to do there work then the associates "sorted out amongst themselves". They were a small team who adapted to perform the contract and who fulfilled the obligation to the Health Board.

29. Mr Croad's view of the "goodwill" value of the practice was a little unusual. Whilst he seemed to accept being paid something for the practice when he sold it, he was keen to emphasise that he did not run the practice as a business, that there were plenty of NHS patients available in Merthyr, and that he only made a small profit (although I note that no accounts having been made available to the Court).

30. Before concluding this summary of the relevant facts a discreet issue arises from the pleadings irrespective of any conclusion I reach regarding duty of care or limitation. Whilst there is agreement between the parties that the Defendant cannot be liable for anything done by the associates after he sold the practice in January 2012, Mr Reed for the Defendant argues that the relevant date is earlier and in fact relates to a series of undertakings given by Mr Croad in injunction proceedings brought by him against the health board and which culminated in an order made by HHJ Curran dated 13th June 2011 tb 241. The order of the Court restrained the Defendant Health Board from

taking any steps to treat the general dental contract between themselves and the Defendant as being terminated. It provided:

31. *"The Defendant is forbidden……from taking any steps to treat the general dental contract made between the parties hereto and effective from the 1 April 2009 as terminated and shall in all respects treat the said contract as subsisting and allow the Claimant to provide services as provided for by the said contract"*

32. To obtain the injunction Mr Croad gave a series of undertakings including the following:

"2. The Claimant will take no part in the administration running or management of the practice or supervision of the staff save that the Claimant shall have permission to sign all documents including cheques as necessary to implement the provisions below for transfer to a new managing dental practitioner ("manager")."

"3. The Claimant shall not enter the premises (save for attendance after business hours on the date of this Order)"

"4. The Claimant shall have no professional contact with any patient for the purpose of treatment on the NHS.

"11. The Claimant agrees that all remuneration due from the 13th May 2011 under the contract shall be remitted to the manager."

33. Consequently, one of the subsidiary issues for me to resolve is whether this order itself removed any duty of care from Mr Croad in May /June 2011 or

whether that duty persisted until the sale of the practice in January 2012. This is relevant because some of the allegations of negligence relied upon in the claim fall within this 6 month period.

34. **Non-Delegable Duty**

The first preliminary issue to resolve is whether the factual circumstances as set out above imposed a non-delegable duty on the defendant, Mr Croad, as the provider of dental services. The Claimant's submission is that the provision of dental treatment is just the sort of clinical setting where such a non- delegable duty arises. Mr Reed on behalf of the Defendant seeks to draw a distinction between the case of a hospital and that of the individually insured dentists. Thus, whilst he accepts that in the context of a hospital it would not matter if a nurse were directly employed by the trust or through an agency, that should be regarded as very different to a dental practice owned by an individual.

35. The leading authority on the existence of such a non-delegable duty is provided by the Supreme Court in *Woodland v Swimming Teachers Association (2014) AC 537.* Lord Sumption undertook a comprehensive review of the authorities and identified five "defining features" relevant to the identification of cases where a non-delegable duty of care arises. Baroness Hale warned against treating these as statutory criteria for the existence of a duty and, of course, there is always room for refining and reconsidering in different contexts. However, they are an important statement of the relevant principles and I set them out in full:

(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 characteristic of such relationships that they involve an element of control over the Claimant….

(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.

36. The Claimant's submission is that a proper analysis of the facts of this case against the defining features leads inevitably to the conclusion that a non delegable duty arises. Furthermore, if the Court required any reassurance then it need look no further than the decision *in Ramdhean v The Forum Dental Practice Ltd (unreported, 28 January 2020)*. *Ramdhean* was a decision of HHJ Belcher sitting in the County Court in Leeds. As such it is, of course, not binding on this Court.

37. In *Ramdhean*, the Claimant needed an extraction of a wisdom tooth. Her dental practice did not perform such extractions. She was referred to another practice, the Forum Dental Practice Ltd "FDPL". FDPL in turn appointed an associate surgeon, Dr Agedo, to carry out the extraction. As an associate, Dr Agedo was self employed and held his own separate professional indemnity cover. The Claimant argued that FDPL nevertheless had a non-delegable duty in respect of the care provided by Dr Agedo. FDPL argued that the associate dentist model had been part of dentistry since 1948 and the inception of the National Health Service and there was no requirement for them to insure against an associate's negligence. The learned circuit judge applied the principles in Woodland and found that a non-delegable duty was owed by "FDPL".

38. As in the *Ramdhean* case, both parties before me placed some reliance on the Court of Appeal decision in *Farraj v King's Healthcare NHS Trust (2009) EWCA Civ 1203*. In *Farraj* the Claimant's parents were carriers of a gene which could cause an inherited blood disorder. They were being treated by a medical centre in Amman. When the wife was pregnant her treating

obstetrician in Amman sent samples to an NHS trust in the United Kingdom for analysis. In fact the sample provided needed further processing and tissue culture to make this possible. The NHS trust sent the sample for processing to an independent laboratory. The laboratory were doubtful that the sample provided to them was in fact foetal tissue but they never conveyed these doubts to the NHS trust. As it transpired their doubts were well founded and the wife gave birth to a child with the disorder.

39. In considering cross appeals the Court of Appeal examined whether the NHS Trust owed a non-delegable duty to the Claimants. They held that it did not. However, in so doing they recognised, *per curiam*, that there was persuasive authority that a public hospital probably owed a non-delegable duty to its patients to ensure that they were treated with skill and care irrespective of the employment status of the clinician. The reason why it did not arise in the instant case was because the Claimants were not patients of the Trust. At paragraph 88, Dyson LJ said:

> "*Patients are a vulnerable class of persons who place themselves in the care and under the control of a hospital and, as a result, the hospital assumes a particular responsibility for their well-being and safety.*"

40. It was this principle that was in part carried through to the decision of the Supreme Court in *Woodland* in which it was approved. Furthermore, it was central to the reasoning of the judge in *Ramdhean* in applying *Woodland* to the facts.

41. In the case before me, Mr Reed sought to draw a distinction between hospitals and dentists. He developed the submission by reference to a sort of obligation

to be treated by a hospital. This he contrasted with a dental practice whereby there remained an element of choice or election on the part of the patient. He submitted that Woodland really identified limited categories of case where a non delegable duty arose, namely schools, hospitals and prisoners. In so far as *Ramdhean* sought to extend the principle to dental practices it was wrongly decided.

42. **Is the Claimant a patient?**

On any sensible construction of the meaning of the word, the answer seems to me to be yes. Patients in the clinical context are vulnerable to injury. The Supreme Court in *Woodland* seemed to have no difficulty with this concept as giving rise to the non-delegable duty. It was in extending the concept beyond the clinical setting that the Court said that it was then necessary to consider whether for some other reason a Claimant was to be regarded as vulnerable or dependent upon the protection of the Defendant and as examples of that Lord Sumption gave prisoners or residents of care homes. In *Ramdhean* the argument on this element of the guidance in *Woodland* had centred upon whether the practice had merely been performing an administrative function. That argument was not advanced by Mr Reed, neither in my view could it be. Put shortly, in my view it is not possible to distinguish the nature of the relationship that a doctor or nurse has with their patient and that of a dental surgeon.

43. **Antecedent relationship**

In my judgment the facts relevant to the consideration of this element are as follows. Firstly, on the evidence before me Miss Breakingbury regarded

herself as a patient of "the practice". She registered with the practice and they provided her dental care. Secondly, "the practice" itself regarded her as "belonging" to the practice. As identified above and emphasised by Mr Collins for the Claimant, the contractual relationship between associate dentist and the FDC made it clear that the patients were not to be poached if an associate moved on. Thirdly, the contractual obligation with the Health Board is on FDC. They had the obligation to provide the service and it is they who were paid for that service. How the practice chooses to provide that service is a matter for them. Here associate dentists were used to discharge the obligation, but a significant proportion of the payment for that work went to the practice. Fourthly, on the evidence of Miss Breakingbury, and I accept that evidence, she did not choose which dentist dealt with her. As far as she was concerned she went to the same practice as she attended over many years and she was told by the practice who would see her. Now clearly on the evidence of the dental records, the same dentist would see her for periods of time, but when that dentist moved on or was not available she did not transfer, she was simply allocated a new associate dentist by the practice. Fifthly, on any occasion whereby she had to make payment, the Claimant paid the practice and not the individual dentist.

44. In my judgement these factors taken together point towards an antecedent history consistent with the Defendant owing a non-delegable duty.

45. **The Claimant's lack of control**

As a patient of the FDC practice Miss Breakingbury had no control over how they provided dental care to her. It was up to the practice who did the work. Of

course Miss Breakingbury could move to another practice if she wished, but that is not really the point. It is in relation to this characteristic of a non delegable duty that perhaps Mr Reed's suggestion that a hospital might differ from a dental practice applies. Mr Reed sought to distinguish the "obligation" of a hospital to treat a patient and the "election" of a dental patient to seek treatment from a practice. I am not at all persuaded that this distinction is a real one. In my view, what is at the heart of this characteristic is the Claimant's lack of control over how the service she elects to receive is provided. There is, it seems to me, no obligation on a hospital patient to receive any treatment advised, there is always an element of election or consent. In my view the fact a dental patient could go to another NHS practice does not answer the point. FDC had a contractual obligation with the health board to treat NHS patients. Miss Breakingbury registered with them. As such the practice was her dentist and they could provide the service in whatever way they choose. It was not open to her to insist on how they did so.

46. **The Defendant's delegation of an integral function or part of the positive duty**

The practice FDC accepted Miss Breakingbury as a registered patient. They were paid for that dental care provided to her within the ambit of the Local Health Board contract. They delegated the provision of that care to associates. The associates made clinical decisions in the provision of that care but in my view they made them effectively on behalf of FDC. In my view this characteristic is made out.

47. **Negligence related to a core function**

In my view this characteristic is readily met. The pleaded allegations of negligence relate to the central function of the practice, namely the provision of dental services.

48. Having found that the characteristics identified by Lord Sumption have been met, it is nevertheless necessary to stand back and ask whether it is right to impose a non-delegable duty. The characteristics are not a statute and as such the Court must pause and consider the overall position. In so doing, it seems to me that there is good reason to impose a duty in this case. It is undoubtedly a cause of great concern to the Defendant. It may well be something that the wider dental community might find unexpected. However if one stands back and asks if a practice (here the Defendant personally since he owns it) should owe a duty to a patient for whose care they are paid by the local health board, then the answer must in my judgment be, yes. The Defendant may well be entitled to an indemnity from the individual associate dentists and that may well go some way to dealing with any perceived unfairness, but that is a matter for the practice and the associate. It should not, it seems to me, prevent a Claimant recovering against the practice with whom she is registered and who have been paid for her care.

49. **Vicarious Liability**

As an alternative, the Claimant contends that irrespective of any non-delegable duty the Defendant should be held liable for the tortious acts of the Defendant pursuant to the principles of vicarious liability. Having already found that the Defendant owed a non-delegable duty it is perhaps unnecessary.

50. The Courts are familiar with this principle, primarily in relation to the relationship of employer and employee. However, in this case the associate dentists were not employed by the practice. They made their own arrangements for tax etc.

51. Nevertheless the Claimant submits that in this case the vicarious liability principle applies.

52. The relevant judicial consideration of this point can be summarised thus. In *Various Claimant's v Barclays Bank [2020] ICR 893 SC* (Barclays Bank) Lady Hale referred to Lord Phillip's statement in *Various Claimant's v Catholic Child Welfare Society [2013] 2 AC 1*, (the Christian Brothers Case), that *"the law of vicarious liability is on the move"* and said at paragraph 1;

> *""Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other. Historically, and leaving aside relationships such as agency and partnership, that was limited to the relationship between employer and employee, but that has now been somewhat broadened... The second is the connection between that relationship and the tortfeasor's wrongdoing."*

53. In the *Christian Brothers Case*, Lord Phillips had looked at policy. At paragraph 35 he set out 5 reasons that usually make it, just fair and reasonable to impose vicarious liability, namely;

> *"(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer"*

54. In *Cox v Ministry of Justice [2016] AC 660*, Lord Reid JSC said at paragraph 20;

> *"The five factors which Lord Phillips PSC mentioned in paragraph 35 are not all equally significant. The first-that the defendant is more likely than the tortfeasor to have the means to compensate the victim, and can be expected to have insured against vicarious liability-did not feature in the rest of the judgment, and is unlikely to be of independent significance in most cases.... On the other hand, given the infinite variety of circumstances in which the question of vicarious liability might arise, it cannot be ruled out that there might be circumstances in which the absence or unavailability of insurance, or other means of meeting potential liability, might be a relevant consideration."*
>
> *"The fifth of the factors-that the tortfeasor will, to a greater of lesser degree, have been under the control of the defendant, no longer has the significance that it was sometimes considered to have in the past, as Lord Phillips PSC immediately made clear. As he explained at paragraph 36, the ability to direct how an individual did his work was sometimes regarded as an important test of the existence of the relationship of master and servant, and came to be treated at times as the test for the imposition of vicarious liability. But it is not realistic in modern life to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee; nor indeed was it in times gone by, if one thinks for example of the degree of control which the owner of a ship could have exercised over the master while the ship was at sea. Accordingly, as Lord Phillips PSC stated, the significance of control is that the defendant can direct what the tortfeasor does, not how he does it. So understood, it is a factor which is unlikely to be of independent significance in most cases. On the other hand the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability."*

55. In *Barclays Bank* Lady Hale went on to analyse and summarise the effect of the previous authorities. Recognising that Lord Phillips had identified the 5 policy reasons why the imposition of vicarious liability might be fair just and reasonable she emphasised that the policy reasons were not some sort of checklist. She noted that Lord Phillips had primarily looked at the details of the relationship in determining whether vicarious liability should arise. At paragraph 27 she 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. In doubtful cases, the five 'incidents'*

identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in Christian Brothers [2013] 2 AC 1, Cox [2016] AC 660 and Armes [2018] AC 355, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."

56. I agree with the submission made by Mr Collins that the relevant evidence that resolves this issue arises from the Defendant's own evidence. The practice was the "provider" of dental care and the practice had an overarching obligation to ensure that the dental services provided were safe and met the expected standard set by the Local Health Board. The associate dentists were given targets for units of dental activity for them to accomplish during the year. In evidence Mr Croad explained how, in times of difficulty the associates would share out any shortfall but that broadly they met their targets.

57. The setting of targets seems to me to be important. The practice was, in my judgment, telling the associates what they were required to do without telling them how to do it. In my view this is the sort of control that is sufficient to form the basis of vicarious liability and is to be regarded as "akin to employment".

58. The work undertaken by the associates was, in my judgment undertaken on behalf of the practice and for the benefit of the practice. The Defendant's business was the provision of dental care and that is what the associates provided. Furthermore, the business received a direct financial benefit from the work that they undertook. The practice brought the patients in and arranged for the treatment. As such they afforded the opportunity to the

associates and/or facilitated the risk that always arises from clinical treatment. Having considered the various factors in this case I am unable to conclude that the associates were engaged in their own separate business. There was sufficient control to establish vicarious liability and the fact that associates managed their own tax affairs and/or made their own insurance arrangements does not displace that conclusion. Neither, of course, do those factors prevent the Defendant from seeking indemnity or contribution from the associates.

59. I note that these findings are consistent with the conclusion of HHJ Belcher in the *Ramdhean* case.

60. **The sale of the practice**

As heralded above Mr Croad sold the practice in January 2012. It is accepted, as it must be, that thereafter he can have no responsibility for the actions of the associates. Mr Reed has argued for an earlier cut off date. His argument is based upon undertakings given by Mr Croad in injunction proceedings brought by him in 2011. Put shortly those undertaking prevented Mr Croad playing a part in the practice from about June 2011 onwards and required him to bring in a manager Mr Hancock (who later bought the practice). I am unpersuaded by this argument. As a matter of common sense, Mr Croad remained in control of the practice until its sale. The fact that he had to do this through a manager rather than personally does not, in my judgment, serve to diminish the legal responsibility that I have set out above. In my judgment responsibility runs to the point of sale.

61. **Limitation**

The final preliminary issue to resolve is that of limitation. The Defendant contends that the Claimant's claim is stature barred, it having been commenced more than 3 years after the cause of action arose.

62. The Claimant contends that the claim was commenced in time by reason of the operation of sections 11 and 14 of the Limitation Act 1980 in so far as they relate to the Claimant's date of knowledge. Alternatively, reliance is placed upon section 33 of the 1980 Act and the Court is invited to conclude that it would be equitable to disapply the limitation period and allow the claim to continue in any event.

63. **The statutory provisions**

Section 11 of the Limitation Act 1980 provides as follows:

"(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.

(4) Except where subsection (5) below applies [not applicable here], the period applicable is three years from—

(a) the date on which the cause of action accrued; or

(b) the date of knowledge (if later) of the person injured."

64. Section 14 (1) defines the date of knowledge thus:

"in sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—
(a) that the injury in question was significant; and
(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
(c) the identity of the defendant; ... and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."

65. Section 14 (3) deals with what is commonly "constructive knowledge"

"For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire-

a) From facts observable or ascertainable by him, or

b) From facts ascertainable by him with the help of medical or other appropriate expert evidence which it is reasonable for him to seek;

But a person will not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain and where appropriate to act on) that advice.

66. In this case it is the date of knowledge arising by way of section 14 that is relevant. In particular the question of when the Claimant should be regarded as having sufficient knowledge that she sustained injury as a result of treatment at the practice. In analysing this point it is the points of "significant injury",

"attributability" and "identity" that are relevant. The Claimant does not need to know that the act or omission to which the injury is now said to be attributable was negligent but she/he does need to reasonably believe the relevant facts.

67. However, such knowledge can also be constructive in the sense that it should have been acquired from facts reasonably observable and ascertainable. A Claimant cannot shut their mind to these facts and then argue that the limitation period does not begin to run. The burden of proving the relevant factual matrix has exercised the Courts over time. However, in *Crocker v British Coal Corp (1996) 29 BMLR 159*, Mance J, in a passage approved by the Supreme Court in *B v Ministry of Defence (2012) UKSC 9,* recognised the problem in different burdens applying to the same issue of knowledge. He favoured the approach of requiring the Claimant to discharge that obligation and that is how I approach the issue. Lord Wilson in AB and others v Ministry of Defence (2013) 1AC 78 said reasonable belief in the context of s14 meant "*a belief held with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal or other advice and collecting evidence*"

68. Miss Breakingbury's case is different from many cases involving limitation in that it involves an ongoing course of treatment both before and after the facts that are now said to amount to negligence. The evidence given by the Claimant was to the effect that she had always had bad teeth and that she spent a considerable amount of time at the dentist. Consequently, it is submitted on her behalf, that assessment of her date of knowledge must be seen against this

background. Specifically, whilst the Claimant undoubtedly suffered symptoms after receiving treatment, those symptoms must be seen against the background of her experience of such symptoms as being normal. As Mr Collins put it for the Claimant she had "a lower index of suspicion". In other words she knew no different that she had troublesome teeth. As a result, he submits that the Claimant's case should be seen as different to someone who develops deafness in later life. In those circumstances it is often said that a Claimant has a duty of curiosity, particularly if he worked in an industry that exposed him to noise. It would be quite wrong, Mr Collins submits, to fix Miss Breakingbury with knowledge based upon a similar requirement of curiosity.

69. Furthermore, it is as a matter of fact that the Claimant continued to go back to the same dental practice (often the same associate) whilst she continued to suffer from ongoing symptoms. Doing so would seem to be inconsistent with any suggestion that she had a belief that attributed "significant injury" to what the dentists were doing. The question then becomes whether in all the circumstances objectively she should have put 2 and 2 together and so be fixed with constructive knowledge.

70. On behalf of the Defendant Mr Reed first points to the 6 day period of hospitalisation of the Claimant at the Heath Hospital in 2011. He says that by any measure this must be regarded as a significant incident that either did or ought to have fixed the Claimant with sufficient knowledge to cause time to start running or at least spark her curiosity to investigate further.

71. Unfortunately, one of the unusual features of this case has been the inability of the parties to locate any medical record relating to this period of treatment as an inpatient. Initially, Mr Reed submitted that an adverse inference should be drawn from its absence. Since, at that stage it was assumed, that the document would be located I adjourned final resolution of this preliminary hearing until the document was made available. As it has transpired it has not been possible to obtain a copy and I invited further submissions from the parties on this issue. Those submissions were ultimately provided to the Court at the beginning of March of this year.

72. In summary Mr Collins submits on behalf of the Claimant that whilst the absence of the record is unfortunate, it does not alter the central point on the limitation issue, namely can the Court be persuaded that the Claimant did not have knowledge constructive or otherwise more than 3 years prior to the commencement of proceedings.

73. In my view resolution of this issue involves me forming a view of the nature of the evidence given by the Claimant before me. It is fair to say that she found the process of giving evidence difficult and she found it hard to remember details. It is perhaps hardly surprising. What she was able to describe however was the long term difficulty she experienced with her dental care. In her evidence she recalled asking why she experienced so many difficulties and she recalled being told by one dentist words to the effect that some people just have trouble.

74. Naturally she was asked questions about her attendance at different practices, and as I have noted above it was suggested that her visit in May 2011 to the

Smile practice might have been because she was dissatisfied. Her evidence on this point was that she probably went to Smile because she could not get an appointment otherwise although she could not be definite on this. When further questioned she said that she would not say that she went because she was unhappy, she said she knew "no different". She always had a little trouble and thought it was part of the treatment she was having. As she put it "I thought I had troublesome teeth."

75. As regards her attendance at the Heath Hospital she recalled going because she was in pain and it was an emergency. She remained in hospital because the procedure was nasty and she had "complications" with swelling and bleeding. He primary concern was to be "out of pain" and it was not a case of her being "worried" or "concerned". She did not recall any criticism of the previous dental work carried out on her.

76. Mrs Breakingbury was asked about her treatment at the practice before she left in 2012. She maintained the view that she did not leave because she had received what she thought was bad treatment or she had been treated badly. She was asked about the replacement bridgework that she had and whilst she thought something may not have been right she said that in 2011 and 2012 she did not think that there was anything to worry about. As she put it she had had so much treatment anyway.

77. The main focus of attack from the Defendant relates to this admission to the Heath Hospital. Mr Reed asserts that the Court should readily infer that she is likely to have been told enough to fix her with direct knowledge of the factors necessary to cause time to start to run. The thrust of the submission is that the

admission to the hospital is such a significant event that "it would be astonishing that the dental or medical profession did not explain to C what the problem was with her teeth or examine her teeth."

78. Further or alternatively, Mr Reed submits that the admission to the Heath Hospital must be sufficient to fix the Claimant with sufficient knowledge to be sufficiently curious to commence investigation and ultimately fix her with constructive knowledge.

79. In making the submissions Mr Reed effectively argues that it cannot be to the Claimant's advantage that the notes relevant to this admission are not available and that the Court should readily approach what is likely to have happened on the basis of his analysis.

80. In my view the Court has to approach this issue by deciding on the balance of probabilities what is likely to have happened at the time of that admission. In so doing I am mindful of Mr Reed's extensive submissions on the missing notes. However, in my judgment it is Mr Collins' approach to this issue that is most persuasive. The information available suggests that the admission was a consequence of the complications associated with a difficult extraction including infection. Indeed that is consistent with the Claimant's own recollection. Is it likely in such circumstances that a more generalised criticism of previous treatment would arise. More specifically if something was said that would be sufficient to make a patient curious as to the quality of the care received from the Fountain Practice why did the Claimant go back to that practice for her bridgework so soon after the admission. Having had to attend Smile in May, she would have had the perfect opportunity to switch practices

but she did not. I am persuaded on the balance of probability that nothing was said at or about the June 2011 admission that caused the Claimant to acquire actual knowledge or form the basis of constructive knowledge.

81. I have in addition considered the evidence given by the Claimant generally and specifically regarding her comments regarding the bridgework. Firstly, I am satisfied on the basis of what the Claimant said that she did not associate difficulties that she had with treatment from the practice that she now contends was negligent. Secondly, there is little doubt that the Claimant accepted problems with her teeth generally as the "norm". In *Khairule v North West Strategic Health Authority (2008) EWHC 1537* it was recognised that this sort of evidence can be relevant in considering whether or not a Claimant could be fixed with constructive knowledge or a duty of curiosity.

82. In reaching the conclusions set out above I am satisfied that the Claimant's date of knowledge accrued within 3 years of the commencement of proceedings and the limitation defence fails. The relevant date to start the limitation period was, I am satisfied on the balance of probabilities, shortly after the consultation in January 2018.

83. Before leaving this issue it is important that I consider in summary form the additional submissions made on behalf of the Defendant. The Defendant appears to raise a point regarding Article 6 of the European Convention on Human Rights. The suggestion seems to be that irrespective of the cause, the absence of the documents relating to the hospital admission means that a fair trial is not possible. The submission suggests that in the absence of the documents the Claimant should not be able to satisfy the Court of the factual

matrix of her claim or the basis of any finding that would allow her to overcome the limitation defence. I have considered this in respect of the matters set out above, i.e. whether or not I can be satisfied on the Claimant's evidence, and I have gone on to consider what appears to be a suggestion that I should consider striking out the claim due to the absence of the documentation. In the absence of any evidence of bad faith or deliberate concealment I am not persuaded that such an approach is warranted. The absence of the records does not, in my judgment prevent a fair trial. The provisions of sections 11 and 14 of the Limitation Act 1980 taken together with section 33 are, in my judgment sufficient protection of the right to a fair trial pursuant to Article 6.

Section 33

84. As a result of the conclusions set out above it is not necessary for me to go on to consider the provisions of section 33 of the Limitation Act to allow the claim to proceed. However, in general terms this is a case where the Court is likely in any event to have exercised its discretion under section 33 of the Limitation Act 1980 to allow the claim to continue. That section provides a broad unfettered discretion and states:

"(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

(a) the provisions of section 11 or 12 of this Act prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action or shall not apply to any specified cause of action to which the action relates. ...

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 or (as the case may be) by section 12;

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

85. In considering whether the Court would in any event have exercised its discretion to disapply the limitation period there is inevitably an element of hypothetical mental gymnastics. This is because section 33 (3) (a) requires the Court to consider delay, and this means post limitation expiry delay. In this case if I had found that the Claimant should have begun investigating a claim

in 2012 then I would have concluded that she should have had until perhaps late 2013 to have investigated enough to obtain knowledge. Limitation would have expired in 2016 and so the relevant period of delay would have been 2016 to 2019 when the claim was issued. Remembering that in *Donovan v Gwentoys (1990) 1WLR 472* the Court indicated that the wide discretion allowed all periods of delay to be considered, the Court would nevertheless had to have gone on to consider the prejudice caused by the delay between 2016 and 2019 (section 33 (b)). In the context of this case it seems to me that the prejudice caused by that period of delay would be limited. Unlike the limitation issue itself, the issue of liability will be a matter not of the Claimant's recollection but it would be an analysis of the treatment provided and recorded by appropriate experts. It seems to me that the effect of the passage of time on that exercise would be limited. I have also considered whether such delay would have caused prejudice to the Defendant in preventing him from claiming an indemnity from those dentists who carried out the treatment as associates. At one stage this seemed to be claimed on behalf of the Defendant but I am uncertain as to the extent to which it is maintained. I am not aware of any evidence that would suggest that contribution proceedings would not be open to the Defendant.

86. The remaining provisions of s 33 probably do not assist greatly.

87. Taking all factors into consideration, I would in the hypothetical circumstances set out above have concluded that a fair trial on the issue of liability and quantum could be undertaken and I would have exercised my

discretion by reference to the factors in section 33 to permit the claim to proceed. For the reasons given however it is unnecessary for me to do so.

88. Having reached the conclusions that I have, I would invite the parties to agree to agree an appropriate order and file the same within 7 days of the handing down of this judgment. In the event that agreement is not possible the parties should inform the Court within the 7 day period and the case will be listed for a short remote hearing to deal with the same.