Neutral Citation Number: [2021] EWHC 2032 (QB)

Case No: E74YX423

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2021

**Before** :

**HEATHER WILLIAMS QC**
**(SITTING AS A DEPUTY HIGH COURT JUDGE)**

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**Between :**

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| **MRS IRIS HUGHES** | **Claimant** |
| **- and -** | |
| **MR RAJENDRA RATTAN** | **Defendant** |

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**Ben Collins QC** (instructed by **The Dental Law Partnership**) for the **Claimant**
**Neil Davy** (instructed by **Dental Protection Limited Leeds**) for the **Defendant**

Hearing dates: 9 & 10 June 2021

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# 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.

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HEATHER WILLIAMS QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 21 July 2021.

**Heather Williams QC (sitting as a Deputy High Court Judge):**

## Introduction

1. This is a dental negligence claim brought against the Defendant, Mr Rattan, the former owner of the Manor Park Dental Practice ("the Practice"). The claim arises from NHS dental treatment provided to the Claimant, Mrs Hughes, by four dentists engaged at the Practice, Drs Shahin Boghani, William Beattie, Rubina Fur and Yavar Khan. Dr Khan was an employed assistant dentist; the others were self-employed associate dentists. I will refer to the four collectively as "the Treating Dentists" and to the three associates as "the Associate Dentists". Save as I indicate in paragraph 3 below, the Defendant contends that as a matter of law he is not liable for the acts and omissions of the Treating Dentists.

2. By an Order dated 25 February 2020 District Judge Fine directed the trial of the following preliminary issues, namely:

> "Whether the Defendant is liable for the acts or omissions of Drs Shahin Boghani, William Beattie, Yavar Khan and Rubina Fur by virtue of vicarious liability or a non-delegable duty of care."

3. By letter dated 23 September 2020 the Defendant admitted that he was vicariously liable for the acts and omissions of Dr Khan as at the relevant time he was a trainee engaged under a contract of employment. Aside from that, the preliminary issues remain in dispute and were listed for hearing before me. I emphasise that I am solely concerned with determination of the preliminary issues and not with the merits of the alleged negligence.

4. A witness statement was provided on behalf of the Claimant dated 20 May 2020. The Defendant filed two statements dated 20 May 2020 (the first of these addressed disclosure issues) and a further statement dated 21 October 2020. Both parties gave oral evidence, confined to matters relating to the preliminary issues. I was also referred to the contents of an agreed bundle of documents comprising largely the Claimant's clinical records and the relevant agreements between the Defendant and the Bromley Primary Care Trust ("the PCT") and between the Defendant and the Associate Dentists.

5. The parties are agreed that the question of whether the Defendant owed a non-delegable duty of care as the owner of the Practice in relation to the treatment provided by the Treating Dentists, depends upon the application of the factors identified by the Supreme Court in *Woodland v Swimming Teachers Association and others* [2013] UKSC 66, [2014] AC 537.

6. As regards the vicarious liability question, the issue is whether the relationship between the Defendant and the Associate Dentists was sufficiently akin to employment to make it fair and just to hold the former responsible for their acts and omissions. As confirmed by the Supreme Court in *Various Claimants v Barclays Bank plc* [2020] UKSC 13, [2020] ICR 893, this is the first of two criteria that must be shown when vicarious liability is in issue. The Defendant accepts that if this relationship criterion is met, then the second limb of the test, concerning the closeness of the connection between the relationship and the alleged wrongdoing, is satisfied.

7. By her Order dated 19 February 2021, HHJ Backhouse transferred these proceedings from the Central London County Court because the issues raised were legally complex and would benefit from consideration at first instance by the High Court and as the outcome would be likely to have significant consequences for other users and providers of dental services and for dental negligence litigation. Two earlier County Court cases, *Ramdhean v Agedo and another*, unrep. 28 January 2020 and *Breakingbury v Croad*, unrep. 19 April 2021, have considered similar issues, both finding in the respective claimant's favour. I am told that there has been no appeal from either of those decisions.

## The factual circumstances

### Agreed and disputed facts

8. The parties helpfully prepared a List of Agreed and Disputed Facts. It will be necessary for me to expand upon some of the agreed matters, in light of the oral evidence I heard and the relevant documentation. I will also address the matters in dispute in so far as it is necessary to do so. The agreed facts were stated to be as follows:

> "1. Between 28 August 2009 and 1 December 2015 the Claimant was a patient who attended at the Manor Park Dental Practice, 88 Manor Park Road, West Wickham, Kent, a dental practice owned by the Defendant, for consultations and dental treatment.
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> 2. Between 28 August 2009 and 6 November 2012 the Claimant was provided with NHS dental care at the practice by 4 dentists, Dr Shahin Boghani, Dr William Beattie, Dr Rubina Fur and Dr Yavar Khan.
>
> 3. On first attending at the Practice the Claimant was asked to fill out a form at reception.
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> 4. NHS dental care was provided at the Defendant's practice pursuant to a Contract between the PCT and the Defendant (the General Dental Services Contract) under which the Defendant contracted to provide dental services to patients at the practice. The GDS Contract provided for an annual quantity of courses of dental treatment (and, after variation, time spent on dental treatment) to be provided to patients at the practice. The GDS Contract allowed the Defendant as Contractor to sub-contract his obligations arising under the Contract, alternatively to employ or engage other dentists to carry out the dental treatment (styled Performers under the Contract).
>
> 5. Dr Khan was a trainee at the relevant time and was employed by the Defendant as an assistant dentist pursuant to a contract of employment for vocational training. In respect of NHS work he was also allocated to be a Performer under the GDS Contract.
>
> 6. Drs Shahin Boghani, Dr William Beattie, and Dr Rubina Fur were engaged by the Defendant as associate dentists pursuant to associate agreements. They were not employed under contracts of employment with the Defendant. In respect of NHS work they were also Performers under the GDS Contract.

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

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

8.1 Each personally held professional indemnity cover for negligence claims.
8.2 Were responsible for the standard of their own work.
8.3 Were responsible for their own tax and national insurance contributions.
8.4 Did not receive sick pay or pension from the Defendant.
8.5 Had complete clinical control over the dental treatment provided to the Claimant at each of their consultations.
8.6 Could work for other owners or businesses if they wanted.
8.7 Were responsible for their own clinical audits of their patients."

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

The parties' document described the areas of factual dispute at paragraphs 10 - 12. Whether Mrs Hughes was a patient of the Practice at the relevant times was in issue. Further, the Claimant's account was: (i) at no time did she choose which dentist treated her. She was simply given an appointment with a named dentist. She did not know which dentist she would be seeing until she was called through to the surgery; (ii) she made her appointments at reception, not with the individual dentists and saw whichever dentist was allocated to her when she arrived; (iii) she made her payments at reception, never to any individual dentist; and (iv) as far as she was concerned she was a patient of the practice.

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

## The Defendant and the Practice

11. The Defendant owned the Practice for 28 years, selling it in March 2015. During the period that the Claimant received treatment, he was the sole principal dentist. In 2009 he worked at the practice three days week, but he did not personally treat Mrs Hughes at any stage. Mr Rattan owned the premises and the equipment used at the Practice. He directly employed the reception staff and the practice nurses. During the period 2009 – 2012 approximately 70% of the Practice turnover was NHS work.

## The GDS Contract

12. The relevant General Dental Services Contract ("GDS Contract") between the PCT and the Defendant was made on 1 April 2009. It only related to NHS work. The terms of the contract were derived from the NHS (General Dental Services Contracts) Regulations 2005, as amended. The GDS Contract spanned 157 pages. I will summarise the most material aspects.

13. As set out at Schedule 1, the Defendant was "the Contractor". The recitals indicated that: "The PCT and the Contractor wish to enter into a general dental services agreement under which the Contractor is to provide primary dental services and other services in accordance with the provisions of this Contract". The specified address to be used for the provision of services under the Contract was the Practice address (clause 65).

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

15. The Contractor agreed to carry out a specified amount of work in the course of a financial year, calculated by reference to "units of dental activity" ("UDAs"). The Defendant undertook to provide 18,509 UDAs each year (clause 77). A failure to do so entitled the PCT to take action under the contract as set out in clauses 83 – 85 and 96 – 98.

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

17. The Contractor could provide services[1] under the Contract to any person requiring them (clause 25) and clause 30 recorded that the Contractor agreed to inform the patient of his / her right "to express a preference to receive services from a particular performer" and clause 31 that the Contractor would endeavour to comply with any reasonable preference expressed. Services to patients were to be provided by way of a "course of treatment" (defined in clause 1); and the Contractor was to use its best endeavours to ensure that a course of treatment was completed within a reasonable time of the date of the treatment plan (clauses 41, 42 and 47). The PCT had powers of intervention where it determined that there was an excessive number of courses of treatment that had not been completed (clauses 54 and 97).

[1] The services included "mandatory services", which entailed "all proper and necessary dental care and treatment", including "the care which a dental practitioner usually undertakes for a patient" (clause 74).

18. Part 13 of the GDS Contract placed responsibilities on the Contractor in relation to the keeping of patient records and the provision of patient information. Schedule 3 specified the information that the Contractor was to include in patient leaflets. Part 20 of the Contract set out the complaints procedure that the Contractor was required to establish and operate in relation to "any matter reasonably connected with the provision of services under the Contract".

19. The Contractor's obligation to the PCT to provide the specified number of UDAs could be met by sub-contracting or by engaging associates. Part 12 of the GDS Contract addressed who could perform the services. Clause 178 stated that "a dental practitioner may perform dental services under the Contract" provided "he is included in a dental performers list for a Primary Care Trust in England" and the inclusion was not subject to a suspension.

20. Clause 184 stipulated that: "The Contractor shall not employ or engage a dental practitioner to perform dental services under the Contract unless" the practitioner had provided details of the PCT list on which s/he appeared and "the Contractor has checked that the practitioner meets the requirements in clause 178". Clause 186 itemised further matters that the Contractor had to establish before employing or engaging a person to perform dental services, including that "he has taken reasonable steps to satisfy himself" that the relevant person "has the clinical experience and training necessary to enable him to properly perform dental services". The Contractor was also required to check the provision of satisfactory references by any person employed or engaged to perform dental services (clause 189). Clauses 195 and 196 required the Contractor to ensure that all such persons had in place arrangements for maintaining and updating their skills and knowledge and that they participated in any appraisal system provided by the PCT. Clauses 247 – 249 required the Contractor to establish and operate "a practice based quality assurance system" applicable to (amongst others) "any dental practitioner who performs services under the Contract".

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

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

23. The Defendant's contract with the PCT was varied in June 2011 as the Practice took part in a new pilot scheme. In short, the payment arrangements were amended so that some payments were to be made by the PCT to the Contractor on the basis of time spent, known as "sessions" (either a morning or an afternoon), rather than for the number of UDAs completed. It is unnecessary to detail this further as the parties are agreed that it does not impact upon the determination of the preliminary issues.

## The Associate Dentists

24. The amount the Associate Dentists were paid each month in respect of their NHS work depended upon how many UDAs (or later, sessions) they had carried out. The Associate Dentists were paid 50% of fees the Contractor received from the PCT in respect of the NHS work they undertook, less 50% of any laboratory fees and other specified expenses. Sums retained by the Defendant went towards the running costs of the Practice such as equipment, materials, maintenance and staff salaries. As regards the patient charge element of a course of treatment recovered pursuant to the NHS Charges Regulations[2], if the sum was not paid, the arrangement was that the bad debt would be borne 50/50 between the Defendant and the Associate Dentists (albeit, in practice the Defendant often elected to take the entirety of the sum).

25. In relation to private work, the Associate Dentists received 50% of the fees paid and certain expenses such as laboratory fees were split equally with the Defendant.

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

27. The Defendant has not retained all of the agreements he made with the Associate Dentists. However, the parties accept that each of the agreements for the relevant period were in the same terms as the agreement he made with Dr Rubina Fur effective from 1 April 2008 (the "Associate Agreement"). The Defendant used the British Dental Association's ("BDA") standard template contract. In the agreement the Defendant is referred to as the "Practice Owner" and the other party as the "Associate". I will summarise the relevant provisions.

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

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

30. Clause 5 listed agreements and obligations of the Associate, including that they:

[2] The Regulations set prescribed payment sums dependent upon whether the treatment fell within Bands 1, 2 or 3.

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

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

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

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

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

33. Nonetheless the Associate Dentists had clinical freedom in terms of their clinical decision-making, including the content of treatment plans they proposed and in terms of how they carried it out.

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

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

36. Provision was made for the Associate to take up to 26 weeks maternity / adoption leave and up to two weeks paternity leave (clauses 26 and 27). The Associate was entitled to the full amount of any sickness, adoption, maternity or paternity payments made by the

NHS (clause 25). No provision was made for payment of holiday pay, sick pay or pension contributions by the Defendant.

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

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

39. Collection of charges and fees was addressed in clauses 24 – 25. The former provided that the Practice Owner was to supervise the collection by practice staff of payments due from patients in respect of dental attendance by the Associate either under private contract or NHS arrangements. In consideration of the licence provided by the Agreement, the Associate would make payments to the Practice Owner in accordance with Schedule 2 (clause 25). I have summarised the effect of those arrangements at paragraph 25 above. The Practice Owner agreed to provide the Associate with a monthly statement setting out a breakdown of the figures. The Associate was responsible for discharging his / her tax and national insurance liabilities (clause 25(k)).

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

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

> "The goodwill relating to patients treated by the Associate at the premises belongs to the Practice Owner and the Associate shall not inform such patients of the new practising arrangements before or after termination of this Agreement nor seek to disclose details of his private or NHS lists of patients to a third party".

42. Clause 40(a) set out a series of further provisions that were for "the purpose of protecting the goodwill of the practice on the Associate ceasing" to be an associate of the practice. They included that the Associate should not:

> "For a period of 24 months from the date of his/her ceasing as aforesaid carry on practice as a general dental practitioner at premises situated within a radius of 2 miles of [the address of the Practice premises] whether as an associate, locum tenens, or contractor or performer in the General Dental Services / Personal Dental Services…(sub-clause (i))
>
> For a period of 24 months from the date of his ceasing as aforesaid within a radius of 2 miles from and whether as associate locum tenens or contractor or performer in the General Dental Services / Personal Dental Services provide any professional service of any kind normally provided by a general dental practitioner to any person who was at the date of his so ceasing or had been at any time within the period of twelve months prior to his so ceasing, a patient of the Practice as defined in clause 40(b) (sub-clause (ii))
>
> For a period of 24 months from the date of his ceasing as aforesaid solicit in any manner or any person who was, at the date of his so ceasing, a patient of the Practice to the intent that such person should become a patient of the Associate as a general dental practitioner or of any practice of general dental practitioners in which the Associate is a partner associate locum tenens, contractor or performer (sub-clause (iii))
>
> Advertise within the Restricted Area the Performers [sic] services as a dental practitioner (sub-clause (v)).".

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

44. The Associate Agreement did not provide for a disciplinary or grievance procedure. Disputes under the agreement were to be resolved by mediation (clause 45).

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

46. In September 2013 Dr Fur signed a new agreement with the Defendant. It reflected the fact that NHS payments were now based on the number of sessions of dental treatment provided. As it post-dated the treatment this claim concerns, the terms are not directly relevant. However, the Claimant places significance on clause 21 which stated: "For the purposes of the Working Time Regulations 1998 (as may be amended), the Associate agrees that 10.77% of their NHS income shall be their holiday pay".

## Dr Yavar Khan

47. Dr Yavar Khan was a post-graduate vocational trainee at the Practice between 1 September 2012 and 31 August 2013. He was employed by the Defendant under a nationally agreed contract of employment supplied via the London Deanery. Dr Khan was paid a nationally agreed salary which Mr Rattan claimed back from the NHS. He was the only employed dentist working at the Practice.

## Patients and patient record-keeping

48. Individuals were not registered with the Practice in the sense that they had a status which conferred a right to return for other treatment after their course of treatment was completed. Equally, they were free to elect to have future treatment at another dental practice of their choosing. Payment under the GDS contract was not related to the number of individuals registered with the practice, as was the case in a previous era.

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

50. Both NHS and private patients were provided with a "Personal Dental Treatment Plan" in respect of a course of treatment, indicating the diagnosis, proposed treatment and the charge (either the full charge for private treatment; or the banded figure if it was on the NHS). I was shown an example of the form. The top of the form has fields for the "Provider's details". It is accepted that this referred to the Contractor under the relevant GDS Contract; and Mr Rattan said this box would be completed with a stamp bearing his name. Under the field for inclusion of the patient's details, the text read: "The dentist named on this form is providing you with a course of treatment. Information regarding your NHS dental treatment is detailed overleaf".

## The Claimant

51. Mrs Hughes was born on 21 October 1956. She first attended the Practice on 28 August 2009 as she required a filling. She selected the Practice on the recommendation of her daughter, who accompanied her on that occasion. On attendance she was asked by the receptionist to fill out a form and duly did so. Unsurprisingly, the Claimant perceived this as a registration process. In all likelihood she completed a medical history form (see paragraph 49 above). The form from 2009 is no longer available, but Mrs Hughes agreed that it was similar to a medical history form in the bundle which she subsequently completed on 1 April 2014.

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

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

54. Given the period of time that has since elapsed and given that the names of the various dentists at the Practice would not have been familiar to her at the time, it strikes me as difficult for Mrs Hughes to be confident that she was not given the name of Dr Fur before she attended on the first occasion. In any event my conclusions do not depend upon resolving that particular point of dispute.

55. More broadly, the Defendant emphasised that the Claimant was free to request the services of a particular dentist. He said that if she did not do so then, as continuity of care was considered desirable, the patient would generally be booked to see the same dentist that they had seen previously, subject to availability considerations or the patient requesting a change. In the Claimant's case there were 29 cancelled appointments, one postponed appointment and six emergency appointments, which the Defendant explained had likely contributed to the fact that she saw a number of different dentists when attending appointments in respect of her dental problems. Her treatment record shows that she saw Dr Fur on three occasions between August and October 2009 and again in October 2010; Dr Boghani in November 2010; Dr Beattie on four occasions between December 2011 and February 2012; Dr Khan on three occasions between September and November 2012; Dr Navarro in March and June 2013; and Dr Mehta on numerous occasions between April 2014 and October 2015. (No allegations of negligence are made in respect of the latter two dentists.)

56. The Claimant agreed that she saw only Dr Mehta from April 2014 onwards. She explained that she had raised concerns via her daughter about the number of different dentists she had been seen by. She agreed that her request to be seen by the same dentist for each appointment was then adhered to. Prior to that, Mrs Hughes had not asked to be seen by a particular dentist. I accept that if she had made such a request it would have been honoured in so far as it was practically possible to do so, as shown by the arrangements subsequently made in respect of Dr Mehta. Her appointments were organised centrally by the reception staff who handled all of the administration tasks and allocated her an available dentist. Mrs Hughes saw a number of different dentists for the reasons identified by Mr Rattan. As I have indicated in relation to the first appointment, I do not find it necessary to decide whether the Claimant was told who she would be seeing at the time when she made the various bookings or subsequently when she attend the Practice for the appointments.

57. I accept that at all times Mrs Hughes considered that she was a patient of the Practice.

## Applicable law

### Non-delegable duties of care

58. The law of negligence is generally fault-based. As Lord Sumption JSC observed in *Woodland v Swimming Teachers Association and others* [2013] UKSC 66, [2014] AC 537 ("*Woodland*") at para 4:

> "Generally speaking, a defendant is personally liable only for doing negligently that which he does at all, or for omissions which are in reality a negligent way of doing that which he does at all. The law does not in the ordinary course impose personal (as opposed to vicarious) liability for what others do or fail to do…The expression 'non-delegable duty' has become the conventional way of describing those cases in which the ordinary principle is displaced and the duty extends beyond being careful, to procuring the careful performance of work delegated to others."

59. Lord Sumption proceeded to identify two broad categories of cases where non-delegable duties had been recognised. The first category, where the defendant employs an independent contractor to perform a hazardous function, does not arise in this case. The second category was said by Lord Sumption at para 7 to have three critical characteristics:

> "First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant."

60. In the same paragraph Lord Sumption explained:

> "The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of the duty which is his own. In these cases, the defendant is assuming a liability analogous to that assumed by a person who contracts to do work carefully."

61. Lord Sumption observed that the circumstances must be such that "the defendant can be taken not just to have assumed a positive duty, but to have assumed responsibility for the exercise of due care by anyone to whom he may delegate its performance" (para 11). He continued that: "Both principle and authority suggest that the relevant factors are the vulnerability of the claimant, the existence of a relationship between the claimant and the defendant by virtue of which the latter has a degree of protective custody over him, and the delegation of that custody to another person" (para 11). Lord Sumption then reviewed the circumstances in which non-delegable duties had been held to arise, including cases involving injuries sustained by employees, by school pupils and by hospital patients. I will return to the latter category.

62. After again emphasising that non-delegable duties of care were an exception to the fault-based principles on which the law of negligence is based (para 22), Lord Sumption identified five cumulative factors which indicated the existence of a non-delegable duty of care (para 23):

> "(1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes. (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is a characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. (3) The claimant has no control over how the defendant chooses to preform 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."

63. Lord Clarke of Stone-Cum-Ebony, Lord Wilson and Lord Toulson JJSC agreed with Lord Sumption's judgment. They also agreed with the concurring judgment of Baroness Hale of Richmond DPSC, who agreed with the factors identified by Lord Sumption at para 23, but "subject of course to the usual provisos that such judicial statements are not to be treated as if they were statutes and can never be set in stone" (para 38).

64. In the present case, the factors identified by Lord Sumption at (1), (2) and (3) of para 23 are in issue. I will refer to them in my discussion below as, respectively, "the first factor", "the second factor" and "the third factor" and the factors compendiously as "the *Woodland* factors". Mr Davy accepts that if the first three factors are established on these facts, then the factors identified at (4) and (5) would also be satisfied.

65. Lord Reed JSC observed in *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355 ("*Armes*") that where the *Woodland* factors were established, it was not routinely necessary for the judge to ask what would be fair and just as a second stage of the analysis (para 36).

*The hospital cases*

66. Lord Sumption reviewed the cases concerning hospitals at paras 14 – 16 in *Woodland*. Firstly he referred to *Gold v Essex County Council* [1942] 2 KB 293 ("*Gold*"), a case where a voluntary hospital operated by a local authority was held liable for the negligence of a radiographer employed by it. The main issue concerned vicarious liability, but Lord Greene MR considered more broadly the basis of the hospital's

liability for the negligence of those through whom it discharged its duty of care to patients. At p. 301 he said that whether the relationship was contractual, as in the case of a nursing home operated for profit, or non-contractual, as in the case of a hospital that gives free treatment: "the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once that is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf, and this is equally true whether or not the obligation involves the use of skill".

67. Secondly, Lord Sumption considered *Cassidy v Ministry of Health* [1951] 2 KB 343 ("*Cassidy*"), a negligence claim which also involved the actions of employed medical staff. A majority of the Court of Appeal (Somervell and Singleton LJJ) treated the case as one of vicarious liability, but Denning LJ considered that the critical factor was the hospital's relationship with the patient. He said (pp 362 – 363):

> "when hospital authorities undertake to treat a patient, and themselves select and appoint and employ professional men and women who are to give the treatment, then they are responsible for the negligence of those persons in failing to give proper treatment, no matter whether they are doctors, surgeons, nurses, or anyone else…It does not depend on whether the contract under which he [the doctor] was employed was a contract of services or a contract for services. That is a fine distinction which is sometimes of importance; but not in cases such as the present, where the hospital authorities are themselves under a duty to use care in treating the patient."

68. After referring to *Roe v Ministry of Health* [1954] 2 QB 66, where Denning LJ repeated the analysis he gave in *Cassidy,* Lord Sumption observed that "these dicta have never been adopted as part of the ratio of any English case. But the principle which they embody is supported by powerful dicta". He cited Lord Browne-Wilkinson's leading speech in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 where he referred to these earlier cases and observed at p 740:

> "It is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital…They are liable for the negligent acts of a member of the hospital staff which constitute a breach of that duty, whether or not the member of the staff is himself in breach of a separate duty of care owed by him to the plaintiff…"

69. Lord Sumption prefaced his identification of the five factors he itemised in para 23 with the observation that Lord Greene MR in *Gold* and Denning LJ in *Cassidy* were "correct in identifying the underlying principle". At para 24 he considered two more cases involving hospitals, *A (A Child) v Ministry of Defence* [2005] QB 183 ("*A (A Child)*") and *Farraj v King's Healthcare NHS Trust* [2010] 1 WLR 2139 ("*Farraj*").

70. *A (A Child)* concerned circumstances where the Ministry of Defence ("MoD") had contracted with an NHS Trust to arrange for German hospitals to provide health care for overseas service personnel and their dependents. The Court of Appeal upheld the

conclusion that the MoD were not responsible for the negligence of an obstetrician who delivered the child of a British Army soldier and his wife at a German hospital. Lord Sumption said he disagreed with the approach indicated by Lord Phillips of Worth Matravers MR in *A (A Child)*, that a non-delegable duty only arose where the claimant suffers injury whilst in an environment over which the defendant has control. He noted that the defendant "is not usually in control of the environment in which injury is caused by an independent contractor…where a non-delegable duty arises, the defendant is liable not because he has control but in spite of the fact that he many have none. The essential element…is not control of the environment in which the claimant is injured, but control over the claimant for the purpose of performing a function for which the defendant has assumed responsibility". Lord Sumption said that the true reason why the MoD did not owe a duty of care in *A (A Child)* was the finding of the trial judge that there was no basis for saying that the "secondary treatment in hospital…was actually provided by the army (MoD) as opposed to arranged by the army". Accordingly, there was "no delegation of any function which the ministry had assumed personal responsibility to carry out, and no delegation of any custody exercised by the ministry over soldiers and their families".

71. Lord Sumption also considered that the Court of Appeal was right to dismiss the negligence claim in *Farraj*. The claimant husband and wife were concerned about the wife's pregnancy and so she underwent DNA testing for beta thalassaemia. A sample was sent by her consultant obstetrician in Amman to the NHS trust in London for analysis. The hospital then employed an independent laboratory to analyse the tissue sample. Lord Sumption cited from para 88 of Dyson LJ's judgment, that the rationale of any non-delegable duty owed by hospitals (which he assumed existed) was that:

> "the hospital undertakes the care, supervision and control of its patients who are in special need of care. 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."

72. Dyson LJ (with whom Smith LJ and Sedley LJ agreed) explained that even on the assumption he had made as to the effect of the hospital cases, the defendant did not owe a non-delegable duty of care simply by virtue of being a hospital. The claimants were not admitted to the hospital for treatment and "in my judgment, there is a significant difference between treating a patient who is admitted to hospital for [the purpose of carrying out the tests] and carrying out tests on samples which are provided by a person who is not a patient…The special duty that exists between a patient and a hospital arises because the hospital undertakes the care, supervision and control of persons who, as patients, are in special need of care" (para 92).

73. Baroness Hale agreed with Lord Sumption that the time had come to recognise that Lord Greene MR and Denning LJ were correct in identifying the underlying principle for non-delegable duties of care (para 37). In relation to the hospital and the school cases she said at para 34:

> "No one has seriously questioned that if a hospital patient is injured as a result of a nurse's carelessness it matters whether the nurse is employed by the hospital or by an agency; or if a pupil at school is injured by a teacher it matters whether the teacher is

> employed by the school or is self-employed…The reason why the hospital or school is liable is that the hospital has undertaken to care for the patient, and the school has undertaken to teach the pupil, and that responsibility is not discharged simply by choosing apparently competent people to do it. The hospital or school remains personally responsible to see that care is taken in doing it."

## Vicarious liability

74. In her leading judgment in *Various Claimants v Barclays Bank plc* [2020] UKSC 13, [2020] ICR 893 ("*Barclays Bank*") Baroness Hale explained (at para 1) that:

> "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…The second is the connection between that relationship and the tortfeasor's wrongdoing."

75. As I have indicated earlier (paragraph 6) only the first of these two elements is in issue in this case. I will refer to it as the "relationship criterion". Having reviewed the authorities, Baroness Hale described the applicable test at para 27 as follows:

> "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."

76. Mr Collins QC emphasises that at para 16 Baroness Hale referred to relationships which are "*sufficiently* akin to employment to make it fair and just to impose" liability (emphasis added). Further, that at para 19 she cited with approval from Lord Sumption's judgment in *Woodland* at para 3, where he said:

> "The boundaries of vicarious liability have been expanded by recent decisions of the courts to embrace tortfeasors who are not employees of the defendant, but stand in a relationship which is *sufficiently* analogous to employment…" (emphasis added).

77. Whilst the parties are agreed as to the test to be applied, they differ in the significance that they attach to particular factors. It is therefore instructive to see how the test has been applied by the appellate courts.

78. The concept of a relationship that was "akin to employment" was first referred to by Ward LJ in *E v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938, [2013] QB 722 ("*E's* case"). The claim concerned allegations of sexual abuse by a priest appointed by the diocesan bishop occurring when the claimant was resident at a children's home operated by a Roman Catholic order of nuns. The defendants included trustees of a trust that had stood in the place of the bishop at the material time. A majority of the Court of Appeal (Ward and Davis LJJ; Tomlinson LJ dissenting) dismissed the appeal against the trial judge's finding of vicarious liability on the part of the trustees. Having reviewed the authorities, Ward LJ said (para 62):

> "If there is a close connection test, it is that the relationship between the defendant and the tortfeasor should be so close to a relationship of employer / employee that for vicarious liability purposes, it can fairly be said to be akin to employment. One may at least ask the very broad question whether the tortfeasor bears a sufficiently close resemblance and affinity in character to a true employee that justice and fairness to both victim and defendant drive the court to extend vicarious liability to cover his wrongdoing. For this purpose one is looking to identify the broad characteristics of the employer / employee relationship."

79. Ward LJ then sought to "capture the essence of what it is that makes a man an employee", observing that "generally speaking, an employee works under the supervision and direction of his employer: an independent contractor is his own master bound by his contract but not by his employer's order. An employee works for his employer: an independent contractor is in business in his own account" (para 64). Ward LJ then cited the very well-known words of MacKenna J at p 515 in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 that a contract of service exists if three conditions are fulfilled:

> "(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with it being a contract of service."

80. Ward LJ noted that as times had changed, so the emphasis upon control had been reduced (para 65). He observed that as there was "no single test, what one has got to do is marshal various tests which should cumulatively point either towards an employer / employee relationship or away from one" (para 69). He elaborated at para 70 as follows:

> "Whilst it may be useful to carry out some sort of comparative exercise for the purposes of ascertaining how close the relationship [in that case was] to a relationship of employer / employee as opposed to that of employer / independent contractor, my judgment is that one should concentrate on the extent to which, if at all, he is in a position akin to employment. The cases analysed in the immediately preceding paragraphs should be noted with a view to abstracting from them, if it is possible, the essence of being an employee. To distil it to a single sentence I would say that an employee is one who is paid a wage or salary to work under some, if only slight, control of his employer in his employer's business for his employer's business. The independent contractor work in and for his own business at his risk of profit or loss."

81. At para 72 Ward LJ referred to the "signposts which may point to vicarious liability" identified by Professor Richard Kidner in his article "*Vicarious liability: for whom should the 'employer' be liable*?" (1995) 15 LS 47. In summary, these signposts were:

(1) the degree of managerial control exercised by the 'employer'; (2) the level of control the contractor has in relation to how s/he arranges work, use of assets and payment; (3) the extent to which the activity is a central part of the employer's business from the point of view of the objectives of the business; (4) whether the activity is part of the employer's business or some separate business; and (5) whether the person is in business on their own account, taking the risks in respect of profit and loss. Ward LJ then applied those signposts in concluding that the relationship in that case was one akin to employment (paras 74 – 81).

82. In *Various Claimants v Catholic Child Welfare Society and others* [2012] UKSC 56, [2013] 2 AC 1 ("*Christian Brothers*"), a case also concerned with sexual and physical abuse allegations, Lord Phillips endorsed Ward LJ's "impressive" judgment in *E's* case. In a much cited passage at para 35, Lord Phillips identified the "policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied" as follows:

> "(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."

83. Lord Phillips had already noted that "the policy reasons are not the same as the criteria", albeit "one cannot…consider the one without the other and the two sometimes overlap" (para 34). He expanded upon this point at para 47, saying that he had identified: "the incidents of the relationship…that make it fair, just and reasonable to impose vicarious liability on a defendant. Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is 'akin to that between an employer and an employee'. That was the approach adopted by the Court of Appeal in *E's* case".

84. In relation to control, Lord Phillips observed that it was not realistic to look for a right to direct how an employee should perform their duties as many employees applied a skill or expertise that was not susceptible to direction by anyone else in the organisation, "the significance of control today is that the employer can direct what the employee does, not how he does it" (para 36).

85. Lord Phillips concluded that the relationship in that case between the teaching brothers and the Roman Catholic order "had many of the elements, and all of the essential elements, of the relationship between employer and employees" (paras 56 – 57). Baroness Hale, Lord Kerr of Tonaghmore, Lord Wilson and Lord Carnwarth JJSC agreed with Lord Phillips' judgment.

86. In *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 ("*Cox*") the Supreme Court allowed the claimant's appeal against a finding that the defendant was not

vicariously liable for the negligence of a prisoner who had dropped a heavy bag of rice on her back. The claimant worked as a catering manager in a prison, where she was assisted by prisoners assigned to work in the kitchen in return for prison service pay. Lord Reed, giving the leading judgment, cited para 35 of Lord Phillips' judgment in *Christian Brothers*, noting that the first and the fifth of the five incidents were likely to be of lesser significance than the other three inter-related incidents (paras 19 – 23). Lord Reed summarised Lord Phillips' approach as follows:

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

87. In *Barclays Bank*, after reviewing the judgments in *E's* case, *Christian Brothers* and *Cox*, Baroness Hale observed that there "appears to have been a tendency to elide the policy reasons for the doctrine of the employer's liability for the acts of his employees, set out in para 35 of *Christian Brothers*…with the principles which should guide the development of that liability into relationships which are not employment but which are sufficiently akin to employment to make it fair and just to impose such liability" (para 16). She noted that Lord Phillips had approved Ward LJ's approach in *E's case* and that in determining the *Christian Brothers* case he had not asked himself whether the five incidents he had listed in para 35 were present, but rather had addressed the detailed features of the relationship (para 18). Further, for the reasons she identified at paras 20 – 22, she did not see anything in Lord Reed's judgment in *Cox* which "cast doubt on the classic distinction between work done for an employer as part of the business of that employer and work done by an independent contractor as part of the business of that contractor" (para 22). After also considering Lord Reed's judgment in *Armes*, Baroness Hale concluded at para 24 that:

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

88. Baroness Hale indicated that in "doubtful cases" the five incidents identified by Lord Phillips "may be helpful in identify a relationship which is sufficiently analogous to employment", as 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". However, where "it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents" (para 27).

89. The Court therefore allowed Barclays Bank's appeal against the finding below that it was liable for sexual assaults committed by Dr Bates when he undertook pre-employment medical checks for the bank on the claimant job applicants. The bank arranged the appointments and provided the doctor with a pro forma report to fill in. He

was paid a fee for each report and this work was a comparatively minor part of his overall practice. The examinations took place in a consulting room in the doctor's house. Baroness Hale emphasised that Dr Bates was not at any time an employee of the bank or "anything close to an employee". He undertook work for the bank but he was not paid a retainer and he was free to refuse the offered examinations: "He was in business on his own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the bank" (para 28).

90. Baroness Hale noted that it was no longer the case that a person would be an employee for all purposes; employment law, tax, social security and vicarious liability. She commented that it would be tempting to align the law of vicarious liability with employment law by saying that the definition of a worker in section 230(3)(b) of the Employment Rights Act 1996 ("ERA 1996") (those who work under a contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contact whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual") encapsulates the distinction between people whose relationship is akin to employment and true independent contractors. She recognised that "asking that question may be helpful in identifying true independent contractors. But it would be going too far down the road to tidiness for this court to align the common law concept of vicarious liability, developed for one set of reasons, with the statutory concept of 'worker', developed for a quite different set of reasons" (para 29).

## The parties' submissions

### Non-delegable duty of care

91. The Claimant submitted that each of the *Woodland* factors were present in this case, so that the Defendant owed a non-delegable duty of care in relation to the provision of her dental treatment. Mr Collins QC said the first factor was met as the Claimant was a patient receiving advice, care and treatment; dental patients, like patients in other clinical settings, were vulnerable to injury. He said there was no distinction of principle between Mrs Hughes' circumstances and those of a patient in a hospital, where it is now accepted that a non-delegable duty of care would be owed.

92. Mr Collins submitted that the second factor was established as the treatment she received from the Treating Dentists was provided in the context of the Claimant's antecedent relationship with the Practice which placed her in the care of the Defendant. Whilst the Defendant was not under a duty to accept Mrs Hughes as a patient, once she completed the formalities that the Practice required her to do in order to receive treatment, the Defendant assumed a responsibility for her care. The GDS Contract, although between the Defendant and the PCT, was relevant as Mrs Hughes was treated pursuant to this contract, under which the Defendant agreed to provide NHS dental services to patients such as Mrs Hughes and to be remunerated accordingly. The Claimant had no relationship with any individual dentist until they began to treat her; she had booked the appointment with the Practice staff, who had allocated the dentist, and she paid the Practice for her treatment. This position was also reflected in the Associate Agreement; clauses 39 – 40 were aimed at ensuring that patients remained the responsibility of the Practice, rather than of individual dentists (paragraphs 42 - 44 above). Mr Collins also relied upon the Claimant's own understanding that she was a patient of the Practice.

93. Mr Collins submitted that the third factor was satisfied as the Claimant had no control over how the Defendant chose to perform his obligation to provide dental services to her, whether personally or through employees or contractors. Whilst the Claimant could request a particular dentist / to be seen by a different dentist, she could do no more than ask. She could not, for example, insist that she was only treated by the Defendant or his employees.

94. Mr Collins also relied upon the conclusions arrived at in the two County Court cases that have considered similar issues (paragraph 7 above).

95. Mr Davy for the Defendant emphasised that the existence of a non-delegable duty was exceptional. He said that if the Claimant was successful on this issue it would lead to a huge expansion of the circumstances in which such a duty arose. Mr Davy submitted that before consideration of the *Woodland* factors, the Claimant must show that there was an existing duty on the Defendant to do the specific task that was negligently performed. In context, this meant the Claimant had to prove that the Defendant owed her a duty to provide her with dental advice and treatment, as opposed to a duty simply to make arrangements for this care and treatment to be provided by the Associate Dentists. In fact the GDS Contract gave the Defendant complete freedom over whether he undertook the dental services himself or arranged for others to do so and the fact he could sub-contract his obligations or engage associates to provide the dental services showed that he never assumed any personal responsibility to the Claimant to provide her with dental treatment. Mr Davy also relied on the decision in *Armes*, where the Supreme Court held that the defendant local authority did not owe a non-delegable duty of care in relation to sexual and physical abuse suffered by the claimant during her foster placements, as it had no statutory responsibility for her day-to-day care whilst she was fostered.

96. Mr Collins disagreed that it was necessary to show that there was a personal duty on a defendant to perform the act in question as a pre-requisite to establishing the *Woodland* factors. He submitted that none of the authorities supported this proposition. Lord Sumption's description of the duty as being personal to the defendant in para 7 of *Woodland* (paragraph 60 above), referred to the *responsibility* remaining that of the defendant; he was not suggesting that a defendant need be under any personal duty to perform the act. Mr Collins also pointed out that a dental practice might be owned by a company who, necessarily, would delegate performance of the dental treatment, but that did not preclude the company being under a non-delegable duty if the *Woodland* factors were established.

97. In the alternative, Mr Davy contended that the first, second and third *Woodland* factors were not made out. As regards the first factor, he submitted that there was no magic in the Claimant being labelled a "patient". In any event she was only a patient of the Defendant in respect of the administrative service that the Practice provided; she was not a patient of his in relation to the dental treatment she received. He drew an analogy with *A (A Child)* and *Farraj* (paragraphs 70 - 73 above); the Defendant merely assumed a responsibility to arrange dental treatment, he did not accept a personal responsibility to the Claimant to provide treatment. Mr Davy submitted that a high threshold of vulnerability was required before it could be fair and just to impose non-delegable liability on the basis of a person's status as a patient.

98. Mr Davy also relied upon his proposition that the Defendant merely assumed a responsibility to arrange dental treatment by his associates, in support of his submission that there was no relevant antecedent relationship so that the second factor was not made out. He submitted that such a relationship required the Defendant to have undertaken both to personally treat the Claimant and to positively protect her from harm, both of which were absent on these facts. He said that the hospital scenario was distinct as in that situation there would be a statutory duty to treat the putative patient. Mr Davy submitted that the focus must be on the relationship between the Claimant and the Defendant, rather than on the relationship between the Defendant and the PCT under the GDS Contract and that the judgments in both of the County Court cases had fallen into error in this regard. He also contended that the Defendant lacked the necessary control over how the Associate Dentists provided dental treatment to Mrs Hughes.

99. As regards the third factor, Mr Davy accepted that the Claimant could not affect whether the Defendant performed his obligations personally or through the Associate Dentists, but he relied on the fact that she was free to choose which Associate Dentist she was to be seen by and if she did not like the arrangements made she could decide not to receive the proposed care and seek treatment at a different dental practice. He relied upon para 31 of *GB v Home Office* [2015] EWHC 819 (QB) ("*GB"*) where Coulson J concluded that the third factor was established as the claimant in that case was detained in an immigration removal centre ("IRC") and thus "she was obliged to accept the medical treatment she was given. There was no free choice. Her position was different to that of someone who was at liberty".

**Vicarious liability**

100. Mr Collins submitted that the relationship between the Defendant and the Associate Dentists was sufficiently akin to employment. He emphasised that it was not an employment relationship as such that had to be identified. He said that this was an example of the kind of "doubtful case" contemplated by Baroness Hale in *Barclays Bank* (paragraph 89 above) where a consideration of Lord Phillips' five incidents was relevant, in particular incidents (2), (3) and (4). In summary, he said that the alleged negligence occurred in the performance of work undertaken by the Associate Dentists on behalf of the Defendant. He was the provider of NHS dental services, pursuant to the GDS Contract and their role was to perform the UDAs (later, sessions) that he had agreed with the PCT to provide. In so doing, the Associate Dentists were enabling him to fulfil his commitment to the PCT. As such, their work was an integral part of the Defendant's business activity. The Defendant obtained income from the NHS in relation to all the UDAs undertaken by the Associate Dentists and they were paid 50% of the fees received. In very substantial part, the Defendant retained the profit / loss risks. Further, by entering into these arrangements, the Defendant created the risk of the negligence alleged in this case. The fact that the Associate Dentists had their own insurance and tax arrangements did not displace this analysis. Further, the Associate Agreement reinforced this position, particularly the terms concerning termination and goodwill.

101. Mr Davy, on the other hand, submitted that the Associate Dentists were independent contractors in business in their own right. He particularly emphasised the following factors: (i) the Associate Dentists were not paid a wage or salary and their income depended upon the extent to which they chose to work at the Practice; (ii) they were

not obliged to undertake any work at all; (iii) they bore some profit / loss risks, for example they could determine their split between private and NHS work, they were at risk of bad debts when patients did not pay and they could determine the laboratory they used, which in turn would impact on the level of expenses they had to pay; (iv) the Defendant had no control over their clinical work, he was not their supervisor and they were not accountable to him; they were not subject to a disciplinary process and they were personally responsible for responding to any complaints from patients about their treatment; and (v) they were free to work at other dental practices and the Associate Dentists each had their own independent business in the provision of dental treatment.

## Discussion and conclusions

### Non-delegable duty of care

102. I do not accept Mr Davy's submission that it is necessary to show that the Defendant assumed a personal responsibility to provide the Claimant with dental treatment as a pre-requisite to satisfying the *Woodland* factors. My reasons are as follows:

i) Despite his comprehensive review of the authorities, Lord Sumption did not identify any such requirement in *Woodland*, the leading case on this topic;

ii) Indeed Lord Sumption made clear that a personal obligation on the part of a defendant to undertake the work was not needed: "The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own" (para 7). I also note that at para 4 Lord Sumption characterised the issue as to the scope of the local authority's duty in the following terms, whether it was under "a duty to take reasonable care in the performance of functions entrusted to it, so far as it performed those functions itself, through its own employees" or a duty "to procure that reasonable care was taken in their performance by whomever it might get to perform them". In turn, it is clear from his judgment that Lord Sumption envisaged that the answer to this question lay in the presence or absence of the five factors he listed in para 23;

iii) An inquiry into whether such a criterion was established would require an examination of the nature of the antecedent relationship between the parties, and, as such, it would entail considerable overlap with the second factor identified in *Woodland* and pre-empt that evaluation. The *Woodland* factors were themselves intended to identify the circumstances in which a non-delegable duty arose;

iv) In so far as Mr Davy appeared to attach weight to the sheer fact that Mr Rattan was able to delegate performance of the agreed UDAs to Associate Dentists or sub-contractors, this is a neutral feature. The ability to delegate the relevant acts to third parties will be a feature of any case where a non-delegable duty is alleged to remain with the defendant, as absent a delegation of the work in question, the point would not arise. This is also recognised by Lord Sumption in the passage at para 7 of his judgment that I have quoted in sub-paragraph (ii); and

v) I do not consider that Lord Reed's analysis in *Armes* supports Mr Davy's contention. Lord Reed cited Lord Sumption's analysis with approval at paras 33 – 36; he did not suggest that there was an additional criterion, satisfaction of which was a necessary pre-requisite for the *Woodland* factors to apply. The Court's conclusion that the local authority was only under a statutory duty to arrange, supervise and pay for the children's day-to-day care, rather than a duty to provide them with day-to-day care, meant that the necessary antecedent relationship did not exist in that case: see paras 37, 38 and 47 in particular. This was described by Lord Reed as the "critical question…in the present case" (para 37) and it is apparent that he did not find it necessary to address the other *Woodland* factors in light of this conclusion.

103. I therefore turn to consider the *Woodland* factors. I appreciate that there is a degree of overlap between the factors and I recognise the importance of not losing sight of the overall picture. However, they provide a helpful analytical framework.

*The first factor*

104. For reasons that I elaborate on in relation to the second factor, it is apparent that Mrs Hughes was a patient of the Practice in respect of the supply of dental services and not just a patient of each of the Treating Dentists when they provided dental treatment to her. The Practice held her dental records and her contact details and arranged her appointments. Payment was made to the Practice in respect of a course of treatment. Her NHS treatment was provided and remunerated in accordance with the terms of the GDS Contract the Defendant had made with the PCT. Under this agreement, the Claimant was a patient to whom the Defendant was providing dental services; and the Defendant determined whether the dental services he had contracted with the PCT to supply would be provided by himself, his employees, associates or sub-contractors. Upon termination of an Associate Agreement, the Defendant took responsibility for the care of patients treated by an Associate whose treatment plans were not completed (paragraph 41 above). The goodwill relating to patients treated by an Associate was retained by the Defendant (paragraph 42 above) and Associates were restricted from working in competition with the Practice after leaving and from soliciting patients (paragraph 43 above). The latter provisions made multiple references to "patient of the Practice".

105. I consider that someone who is a patient for the purposes of receiving dental treatment falls within the rationale identified by the Supreme Court in *Woodland*, namely they have placed themselves in the care of the Practice in circumstances where they are vulnerable to the risk of injury (given the nature of dental treatment) and dependent upon the Practice in respect of the treatment provided: see in particular my references in paragraphs 68, 70 and 72 – 74 above to the discussion of the hospital cases in the judgments of Lord Sumption and Baroness Hale. Lord Sumption's description of the first factor (paragraph 63 above) does not support Mr Davy's proposition that a high threshold of vulnerability must be established *in addition* to showing that the claimant was a patient in the sense used in *Woodland*.

106. The circumstances in *A (A Child)* and in *Farraj* are distinguishable. In *A (A Child)* the MoD was no more than a referral agency, sourcing the obstetric services from the German hospital provider of those services. They did not run the hospital where the negligent treatment was given and the claimant was not their patient. Similarly, in

*Farraj* the claimants were not patients of the hospital that arranged for the independent laboratory to carry out tests. By contrast, Mr Rattan did not simply procure dental services, he ran the Practice where Mrs Hughes was treated and she was a patient of the Practice for the purposes of the dental services provided (as I address in further detail when I consider the second factor).

107. Mr Davy emphasised that aside from the County Court dental treatment cases, a non-delegable duty of care has not been found to exist in a medical case outside of a hospital setting. However, as the point does not appear to have arisen for consideration in other cases this is not something that carries significant weight in itself; the question for me is whether the *Woodland* factors apply to the present circumstances.

108. Accordingly, I conclude that the first factor is established in this instance; Mrs Hughes was a patient of the Practice and thus of Mr Rattan for the purposes of receiving dental treatment.

*The second factor*

109. For the reasons that I will go on to explain, I conclude that there was an antecedent relationship between the Claimant and the Defendant which placed Mrs Hughes in Mr Rattan's care in respect of the provision of dental treatment, entailing a positive duty to protect her from harm caused by that treatment. I consider that the arrangements made between the Claimant and the Practice, the terms of the GDS Contract and the nature of the Associate Agreement all support this conclusion.

110. I agree with Mr Collins' submission that the GDS Contract is relevant to understanding the nature of the relationship between the Claimant and the Defendant, specifically the nature of the NHS dental services being provided to her and who was responsible for their provision. Mrs Hughes was an NHS patient and all the dental treatment she received was covered by the GDS Contract. I do not have to decide whether the same duty would be owed to private patients. I note that under the GDS Contract:

    i) The Defendant, as the Contractor, undertook to provide an agreed amount of dental services to patients from the Practice address. The provision of those services was the Defendant's responsibility as the Contractor: see the contract terms I have referred to at paragraphs 14 – 16 and 18 above;

    ii) The Defendant, as the Contractor, was responsible for complying with the duties imposed by the contract; responsible for carrying out his obligations under the contract with reasonable care and skill; and for providing appropriate premises, equipment and facilities sufficient to enable proper performance of the contracted services (paragraph 17 above);

    iii) The Defendant, as the Contractor, agreed to a series of obligations in relation to patients of the Practice, including keeping records, providing patient information and proving a complaints procedure (paragraph 19 above);

    iv) Whilst he could choose to deliver the services by sub-contractors or via associates, the Defendant was subject to a series of requirements in relation to their selection, training and oversight (paragraphs 21 – 22 above); and

v) The Defendant received payment from the PCT in respect of all UDAs provided to patients of the Practice pursuant to the contract, irrespective of who had undertaken the treatment (paragraph 23 above). It was then for Mr Rattan to agree with any sub-contractors or associates he had chosen to use, how receipts and expenses were to be apportioned between them. Under the arrangements with the Associate Dentists he retained 50% of fees received.

111. As regards the arrangements made with the Claimant, I note in particular that:

i) Mrs Hughes provided her medical history and her personal details to the Practice, she was allocated a Practice reference number and her records were held by the Practice (paragraph 50 above);

ii) Her appointments were booked by the Practice staff, who determined the dentist she would see from those who the Defendant had arranged to work from the Practice, albeit she could request a particular dentist (paragraphs 54, 56 and 57 above);

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

iv) She made payment for the NHS Charge element of her treatment to the Practice reception staff. The Personal Dental Treatment Plan she was provided with setting out the treatment and charges named the Defendant as the provider of the course of treatment (paragraphs 51 and 53 above).

112. I agree with Mr Davy that the Claimant's own perception that she was at all times a patient of the Practice does not in itself carry weight. As Dyson LJ observed in *Farraj*, the subjective expectations of particular patients "would be an unacceptably uncertain and unprincipled basis for determining whether a non-delegable duty of care existed. Expectations would vary from patient to patient" (para 90). However, the factors that gave rise to Mrs Hughes' perception, specifically those I have identified in the preceding paragraph, are themselves relevant, objective indicators that she was for present purposes a patient of the Practice.

113. Mr Davy submitted that the present circumstances were different from the hospital situation as a hospital would be under a statutory duty to treat the person in question. Even if I assume that is generally the position in relation to hospitals[3], I do not consider that it provides a relevant point of distinction that assists the Defendant. None of the judgments that examined the position of hospital patients which I have discussed at paragraphs 67 - 74 above suggested that this was a significant feature. Further, once Mrs Hughes had booked an appointment with the Practice and completed the formalities required of her by the reception staff, she was a patient of the Practice for the purposes of receiving dental treatment which the Defendant provided pursuant to the GDS Contract.

114. Whilst the nature of the relationship between the Defendant and the Associate Dentists bears more directly on the vicarious liability issue, I note that arrangements under the

[3] I was not shown the relevant statutory provisions and Mr Collins suggested it was an oversimplification of the complex relationship between the duties on the Secretary of State to provide health services and the arrangements then made for the procurement of medical services from the various Trusts.

Associate Agreement support, rather than undermine, the analysis I have set out in the preceding paragraphs. The starting point is that in relation to NHS treatment, the Defendant made arrangements with the Associate Dentists to work from the practice in order to enable him to meet his UDA commitment under the GDS Contract. The fact that he felt it unnecessary to specify particular targets in the Associate Agreement (paragraph 39 above) does not alter the fact that this was the role that the Associate Dentists were performing, as reflected in the recitals to the agreement and clauses 17 and 18 (paragraphs 29 and 39 above). In addition:

i) The Defendant provided the premises, the equipment, the staff and the other the facilities which enabled the Associate Dentists to undertake dental treatment (paragraph 32 above);

ii) All records of patients attended and treatment provided were retained by the Practice (paragraph 41 above);

iii) Upon termination of the Associate Agreement, and in accordance with the GDS Contract, the Defendant took responsibility for the care of patients treated by the Associate whose treatment plans had not been completed (paragraph 41 above);

iv) The goodwill relating to patients treated by the Associate at the premises belonged to the Defendant as the owner of the Practice (paragraph 42 above); and

v) Clause 40 imposed a series of restrictions on the Associate upon termination effective for the following two years, including not to operate as a general dental practitioner within a two mile radius of the Practice, not to treat anyone who was a "patient of the Practice" at the time of termination or within the previous 12 months, within that geographical area; and not to solicit any person who was a "patient of the Practice" on termination (paragraphs 43 – 44 above).

115. Mr Davy also stressed the degree of clinical freedom available to the Treating Dentists. However, Lord Sumption explained in *Woodland* that the existence of a non-delegable duty does not require the defendant to be in control of the environment where injury is caused by the third party, but rather to have control over the claimant for the purpose of performing a function for which the defendant has assumed responsibility (paragraph 71 above). I have explained why I consider that the Claimant was in the Defendant's care and control for the purposes of dental treatment over which Mr Rattan had assumed a responsibility and in relation to which he could choose how to discharge that responsibility. The third factor, which I discuss below is also relevant to the question of control. Furthermore, the sheer fact that the Claimant was also under the care of the Treating Dentist whilst they provided her with dental treatment, did not in itself preclude an antecedent relationship with the Defendant from arising.

116. Whilst I have undertaken my own review of the evidence and the authorities and arrived at my own determinations, I note that much the same conclusions were arrived at in the two County Court cases. In both instances the circumstances were similar, albeit not identical to the present case.

117. *Ramdhean v Agedo and another*, unrep. 28 January 2020 ("*Ramdhean*") concerned a claim for alleged negligent NHS dental treatment provided by Dr Agedo. The treatment was given pursuant to the obligations of the Second Defendant, the Forum Dental Practice Limited ("FDPL"), under an Intermediate Oral Surgery ("IMOS") contract with the local Primary Care Trust. It took place at premises specified in the IMOS that were not owned or operated by the FDPL. Ms Ramdhean was referred to the FDPL by her regular dentist practice for a wisdom tooth extraction. Dr Adego was an associate of the FDPL. The judgment of HHJ Belcher at paras 33 - 44 indicates that she rejected a number of submissions analogous to those made on behalf of Mr Rattan in the present case, in particular that FDPL had insufficient control and that the FDPL's function was merely administrative, passing the patient to Dr Agedo for treatment. In rejecting that latter submission, the Judge had regard to the FDPL's position as Contractor for the provision of the dental services under the IMOS. In my judgment she was correct to do so, as I have done in relation to the GDS contract. The Judge found that all of the *Woodland* factors were established and that a non-delegable duty of care arose in relation to the treatment provided.

118. In *Breakingbury v Croad*, unrep. 19 April 2021 ("*Breakingbury*") the claim related to NHS dental work carried out by associate dentists at a dental practice owned by Mr Croad, who had a contract for the provision of General Dental Services with the Local Health Board ("LHB"). This appears to have been similar in nature to Mr Rattan's GDS Contract. The BDA template reflected the terms used in the agreements between Mr Croad and his associate dentists. Again it seems that some similar submissions were made, including that the circumstances were analogous to *Farraj* and materially distinct from treatment in a hospital, although, unlike *Ramdhean*, it was not argued that the dental practice had only been performing an administrative function (paras 36 - 42). HHJ Harrison found that the *Woodland* factors were present and that a non-delegable duty of care was owed. In finding that the necessary antecedent relationship was present, the Judge relied, amongst other features, on the termination and goodwill provisions in the associate agreement; the defendant's obligations as the contractor with the LHB; and the booking and payment arrangements with Miss Breakingbury (paras 43 – 44).

*The third factor*

119. As Lord Sumption's analysis makes clear, the relevant question is whether the claimant lacks control over *how* the defendant chooses to perform the obligations "whether personally or through employees or through third parties" (paragraph 63 above). I conclude that this factor was present. As I have already explained, Mr Rattan could choose whether to provide the NHS dental services himself or via employees, associates or sub-contractors. At most Mrs Hughes could request, although not insist upon, a particular dentist from that pool of dentists which he had selected to provide dental services at the Practice. The fact that the Claimant could chose to reject the services altogether and go to a different dental practice altogether is not in point, as Lord Sumption's description of the third factor shows.

120. I do not accept that the *GB* case assists Mr Rattan (paragraph 100 above). Inevitably a detainee in an IRC has a greater curtailment on their freedom of choice than a person in Mrs Hughes' position. However, neither person can control how the obligations stemming from the antecedent relationship regarding medical / dental treatment are performed. In the passage which Mr Davy relies on, Coulson J was simply emphasising

the lack of free choice that existed for someone in the detainee's position, he was not suggesting that those who were not in detention would be unable to satisfy the *Woodland* third factor or suggesting that Lord Sumption's criterion should be re-formulated.

*Conclusion*

121. I have already indicated that the Defendant accepts that if the Claimant establishes that she was a patient within the meaning of the first factor, that there was an antecedent relationship between her and Mr Rattan placing her in his charge or care in respect of dental treatment she received at the Practice and that she had no control over how he chose to perform his obligations, then the fourth and fifth factors would also be present. This is plainly a correct concession. The delegation to the Treating Dentists of the provision of dental treatment to Mrs Hughes was an integral part of the positive duty Mr Rattan had assumed and the alleged negligence related to the performance of the very functions he had assumed, rather than to a collateral aspect.

122. I therefore conclude that the Defendant owed a non-delegable duty of care to the Claimant in relation to the dental treatment she received at the Practice. In light of this conclusion, it is not strictly necessary from the point of view of the proceedings for me to also determine the vicarious liability position in relation to the Associate Dentists, but in light of the fact that the issue was fully argued before me and given the basis upon which this case was transferred to the High Court, I consider it appropriate to do so.

**Vicarious liability for the acts of the Associate Dentists**

123. As I have explained earlier, the question for me to resolve is whether the relationship between the Defendant and the Associate Dentists was sufficiently akin to employment to make it fair and just to impose vicarious liability. In *Barclays Bank* the Supreme Court re-affirmed the distinction between that situation and one where a genuinely independent contractor is in business in their own account. It is plain, post *Barclays Bank*, that this is the correct starting point, rather than beginning with a consideration of whether the five policy incidents identified by Lord Phillips in *Christian Brothers* are present. In reviewing the relevant caselaw, I have sought to identify the essence of what makes a person an employee and in turn, what can render a relationship sufficiently akin to employment for these purposes: see paragraphs 79 – 82, 87 and 88 above. Self-evidently, the sheer fact that the Associate Dentists were self-employed, responsible for their own tax and national insurance and not in receipt of the kinds of benefits that would be received by employees does not answer that question one way or the other.

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

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

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

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

    iii) The Associate agreed to comply with the Practice's policies and procedures; to comply with any requirements in the GDS Contract relating to appraisal, CPD, clinical governance and quality assurance; to comply with the Practice's complaints procedure; to submit to clinical audit; and to replace failed treatment as specified (paragraph 33 above);

    iv) Each Associate Dentist was subject to the Defendant's payment arrangements under which he retained 50% of the monies received for the NHS work they undertook (paragraph 25 above);

    v) The Defendant retained the goodwill relating to patients (paragraph 42 above);

    vi) The Associate Dentists were required to adhere to detailed restrictions applicable on termination aimed at ensuring that patients remained patients of the Practice and that the Practice retained their records (paragraphs 41 and 43 – 44 above);

    vii) The Associate Dentists' freedom to treat private patients was subject to the proviso that it did not contravene the terms of the Defendant's GDS Contract (paragraph 38 above); and

    viii) There was a limitation on the number of holidays that the Associate Dentist could take (paragraph 36 above).

126. In my judgment the most significant question for present purposes is whether the Associate Dentists were working as part of their own independent businesses or as an integral part of the Defendant's business when they provided dental treatment at the Practice. The importance of this aspect is readily apparent from Ward LJ's judgment in *E's* case (paragraphs 80 and 82 above); Lord Phillips' judgment in *Christian Brothers* (paragraph 84 above); Lord Reed's judgment in *Cox* (paragraph 87 above); and Baroness Hale's judgment in *Barclays Bank* (paragraph 88 above).

127. I conclude that the Associate Dentists were providing dental treatment as an integral part of the Defendant's dental practice. Whilst I weigh in the balance the fact that they were able to work at other dental practices too and the features that I have highlighted in paragraph 124 above, I am particularly influenced in reaching this conclusion by the combined effect of the following:

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

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

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

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

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

    vi) The Defendant exercised elements of control over the dental treatment work which the Associate Dentists undertook, as I have summarised in paragraph 125 above; and

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

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

129. As Baroness Hale observed in *Barclays Bank*, whilst there is no direct read across with the concept of a worker under the ERA 1996 (and none was urged upon me by Counsel), it also encapsulates the crucial distinction for present purposes between a person whose relationship is akin to employment and one who is a true independent contractor where the other party is their client or customer. However, for the avoidance of doubt, I have not sought to apply the section 230(3)(b) ERA definition and nor do I attach any particular significance to the reference to holiday pay under the Working Time

Regulations 1998 in the subsequent associate agreement (paragraph 47 above). It was apparent from Mr Rattan's evidence that this was an addition from the new BDA template rather than something he had specifically applied his mind to and it is unclear whether it was inserted simply in case associates were found to be "workers" within the meaning of the Regulations[4] by a Court or Tribunal at some future juncture.

130. Given that I have concluded that the Associate Dentists were in a relationship with the Defendant sufficiently akin to employment by application of the long-standing indices, it is unnecessary for me to also consider Lord Phillips' five policy incidents in any detail. Mr Collins accepts that the first and fifth incidents are relatively insignificant. The second and third incidents overlap significantly with the conclusions I have already expressed. The fourth incident focuses upon whether the Defendant created the risk of the tort being committed by the Associate Dentists as a result of recruiting them to undertake the work in question. I accept that the Defendant did create this risk and that is why the obligations on him in terms of oversight and management were in place. Accordingly, if it were appropriate to also consider these incidents, they tend to reinforce the conclusion that I have already arrived at.

131. Both of the County Court cases that I referred to earlier concluded that the defendant practice owner was vicariously liable for the alleged negligent treatment. However, I do not derive any assistance in respect of this issue from *Ramdhean*. It was decided prior to the defendant's successful appeal to the Supreme Court in *Barclays Bank* by applying Lord Phillips' five incidents in *Christian Brothers* (para 67), HHJ Belcher rejecting the submission that she should consider whether the relationship was akin to employment (para 72). *Breakingbury* was decided after the Supreme Court's decision in *Barclays Bank*, but in so far as HHJ Harrison relied primarily on the UDA targets that the associates were subject to in finding that there was sufficient control (paras 56 and 57), the circumstances were factually different to the present case. As the Judge considered that the targets established a sufficient level of control, understandably, he did not go on to address other potential indicators of control. He did conclude that the work undertaken by the associates was done on behalf of and for the benefit of the practice (para 58), but the full circumstances are not clear from the relatively succinct reasoning on this point. Accordingly, there is limited assistance that I derive from this decision. As I explained in relation to the non-delegable duty issue, I have arrived at my own assessment and conclusion on the basis of the material before me.

*Conclusion*

132. As I indicated earlier, the Defendant accepts that if the Court finds that the relevant relationship between Mr Rattan and the Associate Dentists was sufficiently akin to employment, then the second element of the vicarious liability test is also satisfied.

133. Accordingly, the answer to the preliminary issues question (paragraph 2 above) is that the Defendant is vicariously liable for the acts and omissions of Drs Shahin Bogani, William Beattie, Yavar Khan and Rubina Fur in respect of the Claimant's dental treatment at the Practice and the Defendant owed her a non-delegable duty of care in respect of this treatment.

[4] The Working Time Regulations 1998 use the same definition of "worker" as section 230(3)(b) ERA 1996.

134. The claim will therefore proceed. The parties will need to consider appropriate directions for the future conduct of the case and I have granted an extension of time for submissions on matters consequential to this judgment.