

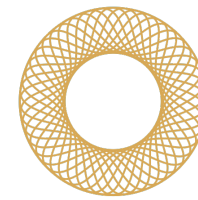
Outer Temple

International Clinical Negligence – from the Cayman Islands to Cumbria!



Outer Temple Travel Law Conference
Manchester
17 March 2022

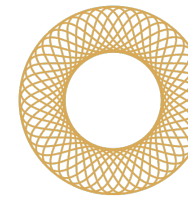




Introduction

- Part 1 ('Cumbria')
 - Clinical negligence basics (Tom Gibson)
 - C v North Cumbria University Hospitals NHS Trust [2014] EWHC 61 (QB)
 - Expert evidence (on breach of duty) – the approach a Court should take
- Part 2 ('Cayman Islands')
 - International features (Sarah Crowther QC)
 - Jurisdiction Governing law
 - Common issues: contract or tort? Local standards?

Part 1 – 'Cumbria'

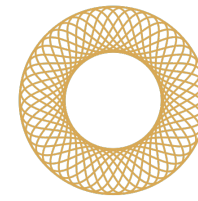


C v North Cumbria [2014] EWHC 61 (QB), Green J



- “This case concerns a narrow question: Was it negligent for a midwife to administer a second dose of a drug that induces labour?” [para 1]
- Facts: Mother (age 41), 41 weeks, admitted to hospital for induction
- 1st dose of Prostin (to stimulate contractions) - then a 2nd dose, 7½ hours later
- M suffers Uterine rupture (exceptionally rare)
- C delivered via forceps in theatre
- M suffers cardiac arrest and dies 5 days later (liability admitted)

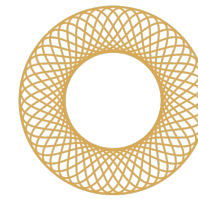
Facts - and the issue for trial



Outer Temple

- C: born asphyxiated, due to uterine rupture, due to 2nd Prostin dose
- Suffered hypoxic cerebral injury as a result
- "The Claimant now has microcephaly and dystonic cerebral palsy"
- D denies liability; 1 day High Court trial on breach of duty
- "The issue for me is a narrow one: It is whether in all the circumstances the administration of 3mg of Prostin at 19.00hrs on 9th December 2002 was below the standard of care that can reasonably be expected of a midwife" [para 7]

The law – the Bolam test



Outer Temple

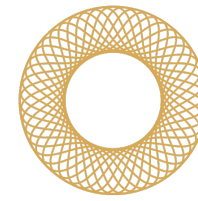
C. The law

20. There is no material difference between the parties as to the relevant test to be applied. I have below therefore set out the relevant authorities and then summarised the main principles to be applied. The test is usually called the “Bolam” test and derives from a direction given to a jury by McNair J recorded in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583 at 587, where the judge stated:

“I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in this particular art...Putting it the other way around, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that would take a contrary view”.

21. In the present case, and re-formulating the *Bolam* test, the question is whether no reasonably competent midwife would have acted and exercised her judgement in the way in which Midwife Bragg, who administered the second dose, did.

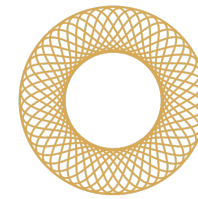
The law – different professional opinions



Outer Temple

22. It is therefore insufficient for a Claimant to demonstrate only that there exists a body of competent expert opinion which disagrees with the judgment which was taken upon the facts of the present case. This is no more than a recognition of the fact that in an area where professionals exercise a high degree of technical and medical expertise that there may be a range of different views all of which might quite legitimately be held about the same matter. Accordingly, if there exists a body of competent professional expert opinion which supports the decision as reasonable in the circumstances it matters not that other experts might disagree. Lord Scarman in *Maynard v West Midlands RHA* [1984] 1 WLR 634 at 638E stated:

“Differences of opinion and practice exist and will always exist in the medical and other professions. There is seldom only one answer exclusive of all others to problems of professional judgement. A Court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence”.



The law - Bolitho

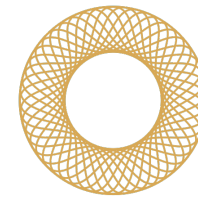
- Analysis of the Bolam test in Bolitho v City and Hackney Health Authority [1997] UKHL 46 (C v North Cumbria paras 23-24)
- Lord Browne-Wilkinson:
 - "... if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible."

Guidance on expert evidence



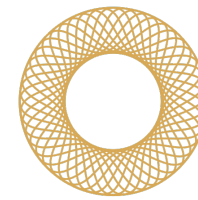
25. In the present case I have received evidence from 4 experts, 2 on each side. It seems to me that in the light of the case law the following principles and considerations apply to the assessment of such expert evidence in a case such as the present:
- i) Where a body of appropriate expert opinion considers that an act or omission alleged to be negligent is reasonable a Court will attach substantial weight to that opinion.
 - ii) This is so even if there is another body of appropriate opinion which condemns the same act or omission as negligent.
 - iii) The Court in making this assessment must not however delegate the task of deciding the issue to the expert. It is ultimately an issue that the Court, taking account of that expert evidence, must decide for itself.
 - iv) In making an assessment of whether to accept an expert's opinion the Court should take account of a variety of factors including (but not limited to): whether the evidence is tendered in good faith; whether the expert is "responsible", "competent" and/or "respectable"; and whether the opinion is reasonable and logical.

Guidance:

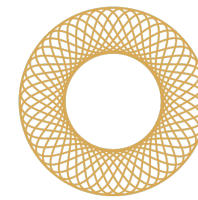


Outer Temple

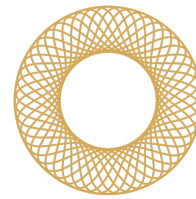
- "Responsible/competent/respectable" [discussion, para 25(vi)]
 - "In the course of my discussions with Counsel, both of whom are hugely experienced in matters of clinical negligence, I queried the sorts of matters that might fall within these headings."
 - "'Competence' is a matter which flows from qualifications and experience. **In the context of allegations of clinical negligence in an NHS setting particular weight may be accorded to an expert with a lengthy experience in the NHS.** Such a person expressing an opinion about normal clinical conditions will be doing so with first hand knowledge of the environment that medical professionals work under within the NHS and with a broad range of experience of the issue in dispute. This does not mean to say that an expert with a lesser level of NHS experience necessarily lacks the same degree of competence; but I do accept that lengthy experience within the NHS is a matter of significance. **By the same token an expert who retired 10 years ago and whose retirement is spent expressing expert opinions may turn out to be far removed from the fray and much more likely to form an opinion divorced from current practical reality.**"



- (Para 25(vi) continued)
- ""Respectability" is also a matter to be taken into account. Its absence might be a rare occurrence, but many judges and litigators have come across so called experts who can "talk the talk" but who veer towards the eccentric or unacceptable end of the spectrum. Regrettably there are, in many fields of law, individuals who profess expertise but who, on true analysis, must be categorised as "fringe".
A "responsible" expert is one who does not adopt an extreme position, who will make the necessary concessions and who adheres to the spirit as well as the words of his professional declaration (see CPR35 and the PD and Protocol)."

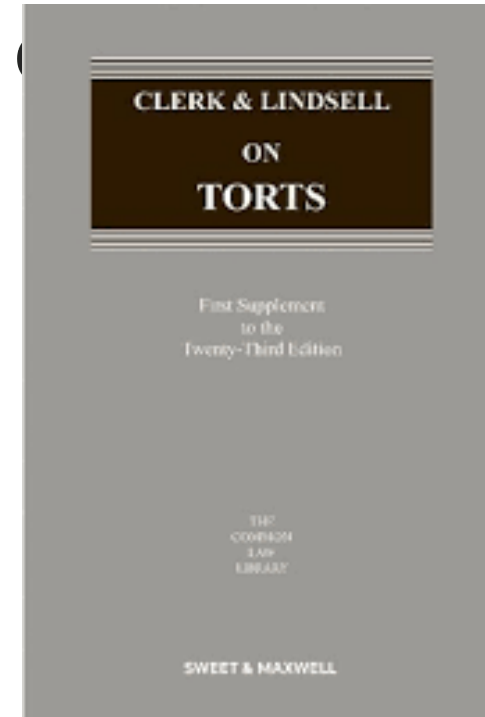
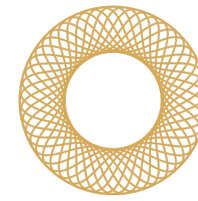


- Para 25(vii):
- “Logic/reasonableness: By far and away the most important consideration is the logic of the expert opinion tendered. A Judge should not simply accept an expert opinion; it should be tested both against the other evidence tendered during the course of a trial, and, against its internal consistency”.
- Has the expert addressed – clinical notes? NICE Guidelines? Witness statements (including other side’s)? Evidence at trial?
- “Far too often in cases of all sorts experts prepare their evidence in advance of trial making a variety of evidential assumptions and then fail or omit to address themselves to the question of whether these assumptions, and the inferences and opinions drawn therefrom, remain current at the time they come to tender their evidence in the trial.”

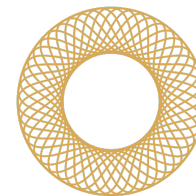


- "... a further issue arising in the present case emerges from the trenchant criticisms that Mr Spencer QC, for the Claimant, made of the Defendant's two experts due to the incomplete and sometimes inaccurate nature of the summaries of the relevant facts (and in particular the Clinical Notes)..."
- "Having said this, the task of the Court is to see beyond stylistic blemishes and to concentrate upon the pith and substance of the expert opinion and to then evaluate its content against the evidence as a whole and thereby to assess its logic. **If on analysis of the report as a whole the opinion conveyed is from a person of real experience, exhibiting competence and respectability, and it is consistent with the surrounding evidence, and of course internally logical, this is an opinion which a judge should attach considerable weight to.**"

Green J's Guidance – legacy!



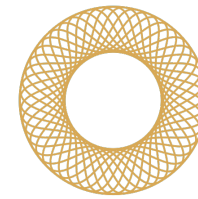
- Mentioned / followed in around 11 High Court clinical negligence cases from 2014 to 2022 (to date, according to Westlaw's Case Analysis)
- Cited in leading practitioner texts, including:
 - Clerk & Lindsell on Torts (23rd edition incl. 1st supplement); Chapter 9, section 2(c)(i), 'What amounts to medical negligence: general'
 - Jackson & Powell on Professional Liability (9th edition); Chapter 13 'Medical Practitioners', section 2(d), 'The Standard of Skill and Care'



C v North Cumbria: the four expert witnesses

- 72 I heard expert evidence from two midwives and two obstetricians. For the Defendant I heard evidence from Ms Susan Brydon (on midwifery) and from Dr Derek Tufnell (on obstetrics). For the Claimant I heard evidence from Ms Fiona Sommerville (on midwifery) and Dr Maggie Blott (on obstetrics). They produced written reports, participated in meetings with opposing experts to produce joint statements, and gave oral evidence.
- 73 The approach I take, consistent with *Bolitho*, is to assess the Defendant's evidence to see whether it falls within the bounds of reasonable evidence and is consistent and logical in the context of the wider evidence and I assess the Claimant's evidence not to see whether it is in and of itself reasonable (it is) but to determine whether it has the effect of placing the Defendant's expert evidence in such an altogether negative light that I should reject that evidence. The essential function of the midwifery evidence was to assess the conduct

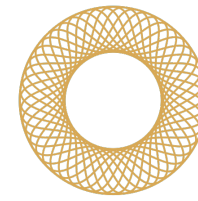
Green J's analysis



Outer Temple

- 77 I should say that I found the evidence given by the Claimant's expert obstetrician, Dr Blott, to be impressive. It was well researched, very clearly presented and well thought out both in writing and orally.
- 78 Ultimately I have not however been able to accept it because in my view it articulates a test which is simply too rigorous and too cautious an approach and which sets the bar of reasonableness at too high a level. It would have been reasonable for Midwife Bragg to have adopted the Claimant's highly cautious approach but that it is not the benchmark; the test is whether that is the only possible reasonable reaction in all the circumstances. And as to this I have formed the clear view that a less cautious approach was not a negligent or unreasonable approach and also fell well within the bounds of reasonable and normal midwifery conduct.
- 79 I have concluded that the Defendant's expert evidence accurately reflects a reasonable position both in relation to the overall assessment of risk and as to the assessment of Midwife Bragg's conduct specifically. Their conclusion was that when all of the factors facing Midwife Bragg at 19.00pm on 9th December 2002 were taken into consideration there was nothing which was sufficient to justify a conclusion that the administration of the second dose of Prostin was unreasonable. She exercised her judgment based on a combination of factors and it was a reasonable one, notwithstanding the tragic consequences that ensued.

The result

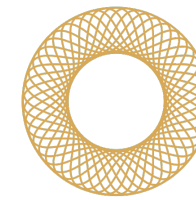


Outer Temple

88 I therefore conclude that Midwife Bragg acted within the bounds of reasonable judgment. I of course accept that she might, equally reasonably, have adopted a very cautious approach and had she done so this tragedy would not have occurred. But this reflects the fact that there are a range of possible reasonable actions that might have been taken in this case and Midwife Bragg's decision was within that range.

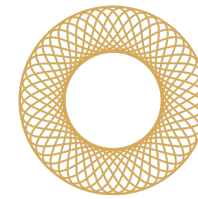
F. Conclusion / outcome

89 For all of these reasons the claim does not succeed.



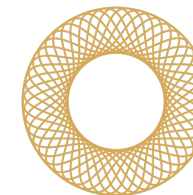
Conclusions (Part 1):

- George Orwell:
 - “All experts are equal, but some experts are more equal than others!”
- Instructing experts (onwards): analyse their CVs
 - Breach of duty (recent “first hand knowledge”, in the NHS) can require different expertise to causation and condition & prognosis
- Preparing reports: have experts (and lawyers) addressed all the relevant material – even the ‘unhelpful’ material?
- At trial: can experts adapt (as necessary) and give “reasonable and logical” evidence?



Part 2 – ‘Cayman Islands’

- Medical tourism and cross-border clinical negligence
- 2016 ONS study showed 144,000 UK citizens travelled abroad for non-emergency clinical treatment
- Travel was to 31 countries, but 72% went to 8 countries
- Care often outside NHS: cosmetic, bariatric, dental, fertility



The internet and medical tourism

14:26

IS CARE 00800 203 233

COVID-19: Treatment in Iscare Clinic Prague is possible without restrictions! [more info](#)

WELCOME TO THE WEBSITE OF PLASTIC SURGERY IS CARE IN PRAGUE!

We are the leading modern private Plastic Surgery in Prague with a tradition since 2006.

At the moment, we have more than 3000 clients from all over Europe with a majority being from the English and German speaking countries.

The philosophy of the Clinical Center IS CARE is simple. We value quality, expertise, and individual approach to clients, so that their expectations are fully met in

[plastic-surgery-prague.co.uk](#)

14:27

COSMETIC SURGERY ABROAD PRICES. WHAT'S INCLUDED?

- Full Consultation with a Surgeon
- Full Examination
- The Surgery
- All Medication
- An Overnight Stay in the Clinic for Poland (if required)
- All Post-Operative Treatments
- Dressings & Surgical Wear

Blood tests are charged at £20. You can bring instead blood tests from your GP which will speed up time in Poland.

The flight with Ryanair is normally £60-£120. The hotel of your choice start from £35 pounds (a hotel nearby that most people stay at). We don't change extra for admin or anaesthetic! For information call us on [02081444254](tel:02081444254) (uk 9am-9pm).

[Privacy - Terms](#)

AA europe surgery.co.uk

14:27

New Look Holiday PLASTIC SURGERY ABROAD

Cosmetic Surgery Prices

[Cosmetic surgery abroad](#) / [Cosmetic surgery prices](#)

Our cosmetic surgery prices will save you 70% to what you would pay for cosmetic surgery in the UK, you stay abroad in EU. You get world-class treatment comparable with any available in the UK.

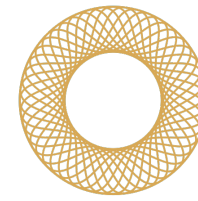
► [WHY IS OUR COSMETIC SURGERY SO MUCH CHEAPER?](#)

► [COSMETIC SURGERY PRICES INCLUDE](#)

► [FACIAL SURGERY PRICES](#)

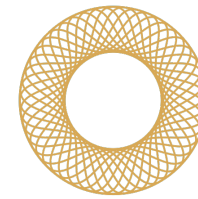
We use Cookies that help us to analyse web traffic. [ACCEPT COOKIES](#)

AA newlookholiday.co.uk



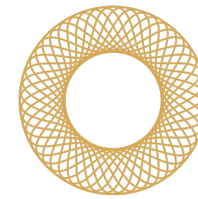
The legal issues

- Jurisdiction of the courts of England and Wales to hear claims arising out of negligence abroad
- The law governing the claim
- Contract? Who with? And on what terms?
- Standards of care



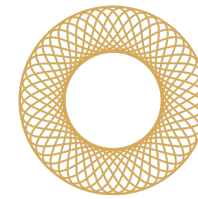
Jurisdiction

- Is it a 'package'?
 - Package Travel and Linked Travel Arrangements Regulations 2018 No 634
 - Carriage, accommodation car rental, 'other tourist service'
- Consumer contract jurisdiction?
 - CJA 1982 s 15B to 15E
 - Consumer may bring proceedings against the other party to the consumer contract in the part of the UK where he is domiciled s 15B(2)
 - Consumer is someone acting outside his trade or profession s 15E(1)
 - Consumer contract is with someone who, by any means, directs their professional activities to the part of the UK where the consumer is domiciled



Jurisdiction in tort

- 3 elements
 - Gateway
 - Reasonable prospect of success
 - Discretion / Forum non conveniens / FNC



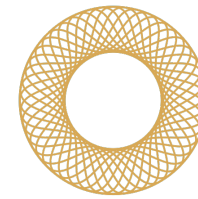
Tort Gateway: damage

(9) A claim is made in tort where –

- (a) Damage was sustained, or will be sustained, within the jurisdiction;
or
- (b) Damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.

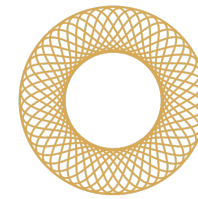
When is damage sustained?

Allen v DePuy International [2015] 2 WLR 442



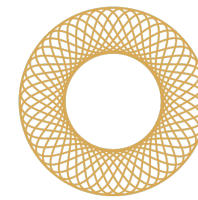
A reasonable case to answer

- Okpabi and others v Royal Dutch Shell [2021] UKSC 3
Group Company liability
- Brownlie v Four Seasons (Brownlie No 1) [2017] UKSC 80
Claim in contract / correct defendant
- Brownlie v FS Cairo (Nile Plaza) (Brownlie No 2) [2020] EWCA Civ 996
Foreign law and pleading



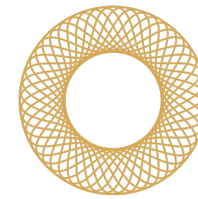
Appropriate Forum

- Lord Templeman in *Spiliada* [1986] UKHL 10
 - *Not mere convenience of the parties but suitability and appropriateness for the ends of justice*
 - *The courts of the place 'with which the action had the most real and substantial connection'*
 - *Burden on claimant said to be 'a heavy one'*



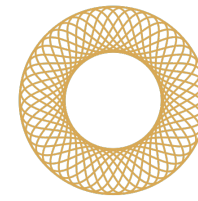
Applicable Law - contract

- Rome I
 - Art 6(1)
 - 'A contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional
 - (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
 - (b) by any means, directs such activities to that country or to several countries including that country.
 - And the contract falls within the scope of such activities.'



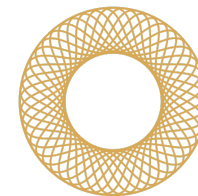
Applicable law - tort

- Art 4 Rome II
 - General rule: point 1: law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
 - Point 3: clear from all the circumstances of the case that the tort manifestly more closely connected with a country other than that indicated in point 1 or 2... e.g. pre-existing relationship in contract.



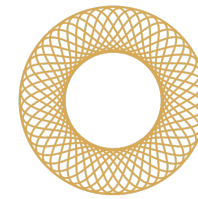
A case study: Clarke

- The facts
 - LC saw cosmetic surgery advertised in English on a website
 - Contracted by email exchange – no contract terms in writing
 - Pre-operative appointment in Wimpole St
 - Paid with a credit card direct to surgeon whilst in Poland



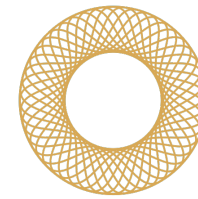
Things start to go wrong

- Surgery 9 Jan 2015 in Wroclaw
- Stayed in a hotel. Infective process signs and symptoms began
- Post-operative out-patient dressings change
- Implants removed in second procedure but infective process not sufficiently managed



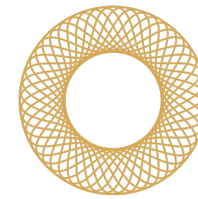
The legal situation

- Pre-Brexit: claim against insurer directly
 - Jurisdiction now:
 - CJA 1982 against surgeon / clinic in contract
 - Brownlie damage in jurisdiction in tort
- Claims against
 - Surgeon and Clinic: in contract and tort
 - Tort claim against insurer under Polish law
 - Was the applicable law of the tort claim really Polish law?
 - Art 4(3) existing consumer contract with Surgeon and Clinic: English law



Who was party to the contract?

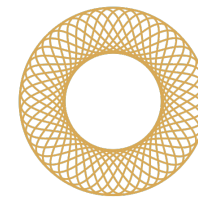
- No evidence of written terms
- Court satisfied that terms of website were incorporated into contract
- No evidence that surgeon was employee of the clinic and claim did not plead vicariously liable



What was the Polish law?

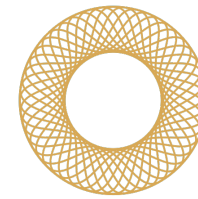
- Requirement to set out the detail of the case under Polish law
 - Brownlie v FS Cairo (Nile Plaza) (Brownlie No 2) [2021] UKSC 45
 - It is not enough to simply assert the application of a foreign law and then leave things there
 - The burden is on the party relying on the foreign law to set out its case.

Here there was some Polish law evidence, but no pleading and little detail – C given permission to amend mid-trial



Local standards of clinical negligence?

- Reference was made to the package holiday cases which state that the standard of care in England and Wales should not be transposed to services provided abroad.
- Where it was a term of the contract, as here, that the defendant was to operate to the same standard as a UK surgeon, then the local standards point does not apply (§107)
- In any event, the findings of the expert were so forceful that there was no room for any suggestion that the Polish standard was met.



Outer Temple

Thank you and time for questions