Neutral Citation Number: [2020] EWHC 3445 (QB)

Case No: QB-2017-000748

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2020

Before:

HER HONOUR JUDGE MELISSA CLARKE
(Sitting as a Judge of the High Court)

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Between:

MISS JAIDA MAE HOPKINS (a child and protected person by her grandmother and Litigation Friend, MRS DEBRA ANN HOPKINS)	**Claimant**
- and -	
(1) MS AZAM AKRAMY **(2) BADGER GROUP** **(3) NHS COMMISSIONING BOARD**	**Defendants**

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- -

Mr Simon Readhead QC (instructed by **Shoosmiths LLP**) for the **Claimant**
Mr Angus McCullough QC (instructed by **Weightmans LLP**) for the **3rd Defendant**

Trial date: 21 October 2020

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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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HER HONOUR JUDGE MELISSA CLARKE

Her Honour Judge Melissa Clarke:

I. Introduction

1. This is the judgment in the trial of a preliminary issue in relation to a claim for damages for personal injury arising from allegedly negligent medical treatment on 28 December 2008.

2. The question is whether on this date a Primary Care Trust ("**PCT**") owed a non-delegable duty of care to protect NHS patients from harm, including harm from the negligent provision of primary medical services by a third party. The parties believe the question is a novel one which has not previously arisen for the Court's determination.

3. In *Woodland v Swimming Teachers Association and Ors* [2013] UKSC 66 Lord Sumption, at paragraph 2, expressed reservations about the wisdom of determining the existence or otherwise of a non-delegable duty of care by way of trial of a preliminary issue. The parties have considered this. They have sought a summary determination as they agree: (i) the preliminary issue is capable of disposing of the claim against D3; and (ii) its resolution one way or another will make it easier for all parties to assess their position in the litigation. Master Eastman acceded to the request and ordered the trial of preliminary issue on 13 November 2019.

4. The Claimant and D3 have agreed an assumed set of facts, set out below, against which they ask for this question of law to be determined. It is important to note that the Court has not found those facts, and they may be the subject of further evidence and findings, which may be contrary findings, at any substantive trial. It is common ground that neither the substantive trial judge nor any of the parties will be fettered by the assumed facts.

5. The trial of the preliminary issue was heard remotely by video hearing. Mr Simon Readhead, Queen's Counsel, appeared for the Claimant and Mr Angus McCullough, Queen's Counsel, appeared for D3. I thank them for the assistance they have provided in their written and oral submissions. D1 and D2 did not participate beyond keeping a watching brief.

6. It is necessarily the case that the preliminary issues trial, being concerned only with issues of law, was a matter of dry legal argument. At the start of the trial the Court and both leading Counsel expressed to Mrs Debra Hopkins, the Claimant's grandmother and litigation friend who was in remote attendance, that although it would not focus on the circumstances and consequences of her young granddaughter's illness and treatment at this stage, that did not mean that she is forgotten. As Counsel acknowledged, irrespective of where liability may or may not ultimately be found to lie, the catastrophic consequences of the Claimant's illness are nothing less than a tragedy. She has been left very seriously disabled, wholly dependent on others and will require constant care and support for the rest of her life. I have no doubt that the sympathies of every participant in this case, whatever their role, are with the Claimant and her family.

II. The Parties

7. The Claimant is a child who was born on 19 June 2006. At all relevant times she was living with her grandmother, Mrs Debra Hopkins, and step-grandfather, Mr Hall.

8. D3 is the NHS body now responsible for, inter alia, the liabilities of the former South Birmingham Primary Care Trust ("**SB PCT**"). In 2008, SB PCT had a statutory duty to provide or secure the provision of primary medical services to NHS patients in South Birmingham.

9. D2 is a group of registered limited companies which in 2008 provided, *inter alia*, out of hours ("**OOH**") to NHS patients in South Birmingham at the Badger Medical Centre at Selly Oak Hospital ("**the BMC**"), pursuant to a contract with SB PCT dated 1 December 2006 ("**the 2006 Contract**").

10. D1 is a nurse practitioner who at the relevant time, being 27 December 2008, was engaged by D2 to provide OOH medical treatment and advice to patients at the BMC.

III. Assumed Factual Background

11. The Claimant became unwell on 26 December 2008, at which time she was aged 2½. She was eating and drinking very little and was not interested in television or her Christmas presents. She was also moaning and would not talk. All this behaviour was out of character for her.

12. The Claimant's condition did not improve. By 27 December 2008 she was unsteady on her legs and weak. Mrs Hopkins was worried, so she telephoned the local general practitioner's surgery. An automated message provided her with a telephone number for OOH emergencies. Mrs Hopkins telephoned this number. She was advised to take the Claimant to the BMC. Mrs Hopkins had not been to the BMC before. She assumed that it was part of Selly Oak Hospital. She took the Claimant there because she was advised to do so.

13. Mrs Hopkins says that if the BMC had not been mentioned:

> "I would have taken [the Claimant] to A&E at the hospital. I thought it was all NHS. [The Claimant] was an NHS patient. I had no knowledge that the Badger Centre was not run or managed by the NHS. I was not informed that it was managed by a private organisation separate from the NHS. I just thought "Badger" was the name of the clinic."

14. Later that morning Mrs Hopkins and Mr Hall attended with the Claimant at the BMC. This was based in a unit in Selly Oak Hospital. The Claimant was initially seen for triage by Ms Pritchard, a healthcare assistant employed or engaged by D2. Subsequently the Claimant was seen and assessed by D1. During the consultation the Claimant was examined by D1 and Mrs Hopkins provided D1 with an account of how the Claimant's condition had developed.

15. Following the consultation D1 recorded:

> "… Clinical code – Temperature … Clinical code – Upper respiratory infect(ion). N(o) O(ther) S(ymptoms) … Diagnosis entered – acute pharyngitis".

16. D1 prescribed penicillin and advised Mrs Hopkins to:

> "… (i)ncrease fluid intake, cont(inue) with paracetamol to control fever, if sxs (symptoms) worsen to call back for review, if sxs (symptoms) persist see own GP for review. (Patient to contact GP) (Advised to Call Badger Back if Necessary)…"

17. The Claimant's symptoms did not improve. On 29 December 2008 the Claimant was taken by ambulance to the Birmingham Children's Hospital.

18. An MRI brain scan showed hydrocephalus and multiple abnormal areas in her brain. The Claimant underwent an emergency neurosurgical procedure. She was nursed in the Intensive Care Unit and then a rehabilitation ward. She was discharged home on 6 March 2009.

19. The Claimant has suffered permanent neurological damage. She is now quadriplegic with a severe visual impairment, epilepsy and bulbar palsy.

20. The OOH service at the BMC was provided by a company within D2 pursuant to a contract dated 1 December 2006 with SB PCT. D2's company separately employed or engaged healthcare practitioners to provide OOH primary medical services to NHS patients. In particular, it engaged D1 to provide such services as a nurse practitioner at the BMC. It was in that capacity that D1 saw and assessed the Claimant on 27 December 2008.

IV. Matters leading to the Preliminary Issue trial

21. D1 has a policy of indemnity issued by the Royal College of Nursing, but this is limited to £3,000,000 inclusive of her own and any other party's costs and there is no discretion to extend the limit of the indemnity. It is common ground that the extent of the Claimant's disabilities arising from her illness are such that if liability is established against D1, this indemnity cover may not be sufficient to meet her claim for full damages and costs.

22. Although the 2006 Contract required D2 to carry *"adequate insurance against all liabilities arising from negligent performance of the Services under the* [2006] *Contract"* ('Services' being defined to include the OOH primary medical services provided to NHS patients at the BMC), D2 has confirmed that it is uninsured for the purposes of any liability to the Claimant. The extent of D2's assets against which the Claimant could enforce any judgment she may obtain, is unknown.

23. It is for these deficits in insurance provision that the Claimant sought, and obtained permission, to join D3 as a party. Both parties, rightly in my view, accept that the insurance position is mere background and should not colour my consideration of the legal question before me. I will ensure it does not.

24. So far as is relevant, the Claimant's case as a whole is that:

i) D1 is liable in negligence and/or breach of duty for failures in C's care. *D1 denies those allegations*;

ii) D2 owes a non-delegable duty of care to the Claimant for D1's acts, and/or D2 is vicariously liable for such negligence and breach of duty as may be proven against D1. *D2 in its defence admits that is so*;

iii) D3 is now responsible for any liabilities of the SB PCT arising out of clinical contracts entered into by the PCT in relation to 'Alternative Medical Provider Services', to the extent that such liabilities fall within the terms of paragraph 16(2) of the Health and Social Care Act 2012 South Birmingham Primary Care Trust Property Transfer Scheme 2013. *D3 admits that the 2006 Contract is such a contract.*

iv) D3 as successor to relevant liabilities of the SB PCT owes a non-delegable duty of care to the Claimant so as to render it liable in respect of any negligent acts or omissions of those providing medical care at the BMC, in particular D1 (where such negligence is to be established). *D3 denies that the SB PCT owed such a non-delegable duty of care to the Claimant but accepts that if it did, any liability for breach of that duty now falls upon D3.*

25. It is only the dispute at (iv) above which is before me now. This (together with the issue at (ii) above, now conceded by D2) was listed for a trial of preliminary issue by an Order of Master Eastman on 13 November 2019 in the following terms: Whether on 27 December 2008 the SB PCT owed a non-delegable duty of care to the Claimant such that if liability is established against D1, that may be enforced against D3 as the successor to the SB PCT. The scope of the duty of care is not here identified: Mr McCullough QC in his skeleton made a suggestion which Mr Readhead QC did not dispute and with what I hope is an uncontroversial tweak, I identify it as being for the SB PCT to take reasonable care in the performance of primary medical services provided to the Claimant.

V. The Statutory Framework

26. I remind myself that I am concerned with the relevant statutory framework in force at 27 December 2008, which is the date that the Claimant was seen by D1 at the BMC. The following is a summary of that framework which I do not understand to be disputed by the parties.

27. The Minister or Secretary of State for Health has, since 1948, been required to establish and/or promote a comprehensive national health service. In 2008 this duty was defined by the NHS Act 2006 ("the Act") which came into force on 1 March 2007. This provided at section 1:

> "Secretary of State's duty to promote health service
>
> (1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement –

> (a) in the physical and mental health of the people of England, and
>
> (b) in the prevention, diagnosis and treatment of illness.
>
> (2) The Secretary of State must for that purpose provide or secure the provision of services in accordance with this Act."

28. Section 3 of the Act provided:

> "3. Secretary of State's duty as to provision of certain services
>
> (1) The Secretary of State must provide throughout England, to such extent as he considers necessary to meet all reasonable requirements–
>
> > (a) hospital accommodation,
> >
> > (b) other accommodation for the purpose of any service provided under this Act,
> >
> > (c) medical, dental, ophthalmic, nursing and ambulance services,
> >
> > (d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as he considers are appropriate as part of the health service,
> >
> > (e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service,
> >
> > (f) such other services or facilities as are required for the diagnosis and treatment of illness.
>
> (2) For the purposes of the duty in subsection (1), services provided under–
>
> > (a) section 83(2) (primary medical services), section 99(2) (primary dental services) or section 115(4) (primary ophthalmic services), or
> >
> > (b) a general medical services contract, a general dental services contract or a general ophthalmic services contract,
>
> must be regarded as provided by the Secretary of State …"

29. Section 3 of the Act made clear the Secretary of State's duty under section 1(c) was in relation to the provision of medical, dental etc services. Section 3(2) is the first

reference to primary medical services under section 83(2). It provided that for the purpose of the duty set out in Section 3(1), section 83(2) must be regarded as being provided by the Secretary of State.

30. Section 83 of the Act related to primary medical services. It is common ground that the medical services provided to the Claimant by the 2nd Defendant were *"primary medical services"* pursuant to section 83 of the Act. This provided:

> "83 Primary medical services
>
> (1) Each Primary Care Trust must, to the extent that it considers necessary to meet all reasonable requirements, exercise its powers so as to provide primary medical services within its area, or secure their provision within its area.
>
> (2) A Primary Care Trust may (in addition to any other power conferred on it)–
>
> (a) provide primary medical services itself (whether within or outside its area),
>
> (b) make such arrangements for their provision (whether within or outside its area) as it considers appropriate, and may in particular make contractual arrangements with any person ..."

31. Primary Care Trusts ("**PCTs**") had been established by orders of the Secretary of State pursuant to section 1 of the Health Care Act 1999 which amended the NHS Act 1977. From 1 October 2002, pursuant to regulation 3(3) of the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002/2375 (the "**2002 Regulations**"), the functions of the Secretary of State were to be exercisable by PCTs.

32. PCTs were expressly given responsibilities for primary medical services from 1 April 2004 under section 16CC of the NHS Act 1977 as amended by the Health and Social Care (Community Health and Standards) Act 2003.

33. Section 7 of the Act provides that the Secretary of State may direct a PCT to exercise any of his functions and he has power to make directions as to how NHS bodies, including PCTs, should exercise those functions.

34. Section 19 of the Act applies to functions exercised by a PCT under or by virtue of the Act. This will cover functions which the Secretary of State has directed a PCT to perform for him pursuant to Section 7 and it is clear that this will include functions exercised by a PCT under section 83(2) of the Act (which, pursuant to Section 3(1), although carried out by the PCT, must be regarded as being provided by the Secretary of State).

35. Section 22 of the Act provides that PCTs have a statutory duty to administer the arrangements made for the provision of services in its area.

36. Section 34 of the Health & Social Care Act 2012 abolished PCTs. Pursuant to arrangements made under section 300(1) of that Act, the transfer of the property, rights and liabilities of a PCT was made to D3.

VI. The law relating to non-delegable duties of care.

37. The key authorities relied upon by the parties are *Myton v Woods* (1980) 79 LGR 28; *A (A child) v Ministry of Defence* 2005 QB 183, [2004] EWCA Civ 641; *Farraj v King's Healthcare NHS Trust* 2010 1 WLR 2139, CA; *Woodland* (ibid); *GB v Home Office* [2015] EWHC 819 (QB); *Armes v Nottinghamshire County Council* [2017] UKSC 60; *Razumas v Ministry of Justice* [2018] EWHC 215 (QB), [2018] P.I.Q.R. P10.

38. As is made clear in the authorities, particularly *Armes* at [38], *Myton* and as is common ground, a non-delegable duty of care may arise under statute or may arise under the common law. Whether or not it arises under statute is a matter of statutory interpretation, i.e. by seeking the meaning of the words which Parliament used (*R v Environment Secretary, Ex p Spath Holme Limited* [2001] 2AC 349 at 397A). As Lord Reed stated in *Armes at [38]*, in relation to a statutory non-delegable duty, *"everything turns on the particular statute"*.

39. In the case of *Woodland,* Lord Sumption provided guidance for assessing the circumstances in which a non-delegable duty will arise, at [23] and [24] ("**the *Woodland* criteria**"). However at [7] he made clear that he was only concerned with "*cases where the common law imposes a duty on the defendant*". Lord Reed at [38] of *Armes* also identified that Lord Sumption's guidance related only to the common law.

40. Mr McCullough QC identifies that in *Woodland,* Lord Sumption was seeking to derive the criteria which would enable the identification of a non-delegable duty at common law, in the absence of a statutory context. He submits that in this case it is not necessary to look at the common law at all, as there is an applicable statutory regime found in, *inter alia,* the Act, and analysis of that regime will determine whether or not a PCT's duties under section 83(1) are delegable or non-delegable. Having said that, he suggested that the *Woodland* criteria can be used "as a cross-check" to the statute. Respectfully, I do not agree with this latter point. The *Woodland* criteria do not, in my judgment, play any role in statutory interpretation. Where the court finds a statutory non-delegable duty, the fact that without such statutory provision(s) a non-delegable duty would not be imposed by a common law analysis cannot affect the position imposed by Parliament, and so the *Woodland* criteria do not provide a cross-check. Where the court finds that the statute is silent on delegability, again the *Woodland* criteria do not provide a cross-check although they will provide the answer to the question of whether the common law imposes a non-delegable duty. However, if the court finds that the statute provides that the duty is delegable, the common law cannot override that.

41. Accordingly my primary focus will be on interpretation of the statutory regime and the authorities in which consideration was given to non-delegable duties of care in a statutory context. Mr Readhead QC for the Claimant does not dissent from this as the starting point. I accept his submission that it is only if that does not provide me with an answer should I go on to look at whether there is a non-delegable duty of care

under the common law, and if I reach that position I will look at Woodland in detail then.

42. In *Myton v Woods*, the local education authority had a duty under section 55 of the Education Act 1944 to *"…make such arrangements for the provision of transport and otherwise as they consider necessary or as the Minister may direct for the purpose of facilitating the attendance of pupils at schools or county colleges… and any transport provided in pursuance of such arrangements shall be provided free of charge."*. Under section 39 of the Education Act 1944 the local authority had to provide "*suitable*" arrangements for the children. The case involved two young brothers with learning difficulties who required transport to their special needs school four miles from home. The local education authority made suitable arrangements with a taxi company for daily transport. They were told where the boys needed to be picked up and set down. One day, the taxi driver negligently left them on the other side of the busy main A-road to the designated safe drop-off point, and left them to make their own way across the A-road to get home. One boy crossed safely: the younger was hit by a van and suffered significant injuries. The Judge at first instance had found that the local authority was liable, stating: *"I take the view that this is a duty personal to the education authority. It is not a duty for which they can escape responsibility by employing an independent contractor. If they wish, of course, they may employ an independent contractor, but they still remain personally liable to see that that duty is carried out."*

43. The Court of Appeal overturned this decision, holding that the local authority, having made suitable arrangements, had no liability for the contracted taxi driver's negligence. Lord Denning MR (with whom Lord Waller and Lord Dunn agreed) stated:

> "In this case no officer of the education authority was negligent. The only negligence was on the part of the taxi driver… In the circumstances the liability of the education authority depends on the law as to the difference between an employer's responsibility for his servant's negligence or default (in which case he must answer) and his liability in respect of an independent contractor. The rule is that he is not liable for the negligence of an independent contractor in the ordinary way: except he delegates to the contractor the very duty which he himself has to fulfil. If it is his own duty which is not fulfilled, he cannot escape responsibility for negligence by saying that it was delegated to a contractor."

44. Lord Denning went on to hold:

> "It seems to me that the local authority fulfilled their duty both under the statute and at common law to provide suitable arrangements. When they made this perfectly good arrangement with the taxi firm, as they did, to take the children to and from school, it seems to me that they did all that was reasonable. They are not responsible for the subsequent negligence of the taxi driver in the way he carried out his duties".

45. In *A (A Child)*, the Ministry of Defence put in place arrangements for service personnel in Germany and their dependants to receive medical care at German hospitals. Previously this had been provided at British military hospitals. A claim was made in respect of the care provided at one such hospital. The Ministry of Defence was held not to have owed a non-delegable duty in respect of the medical care provided. There was no relevant statutory framework applicable in this case: if a non-delegable duty had been held to exist it would have arisen under common law.

46. Lord Sumption considered *A (A Child)* in *Woodland* and commented at [24]:

> "… The Ministry of Defence was not responsible for the negligence of a hospital with whom it contracted to treat soldiers and their families. But the true reason was the finding of the trial judge (quoted at para 28 of Lord Phillips MR's judgment) that there was "no sound basis for any feeling… that secondary treatment in hospital… was actually provided by the Army (MoD) as opposed to arranged by the army."…"

47. In *GB v Home Office* [2015] EWHC 819 (QB), the claimant was detained by the defendant at Yarl's Wood Immigration Removal Centre, which was run by a private contractor, Serco, on behalf of the defendant. While there, she was seen by a doctor employed by the local GP surgery who prescribed her with an anti-malarial drug which was said to have caused her to suffer a severe psychotic reaction. She claimed in negligence against the Home Office.

48. The main statutory provisions, which were complex, included section 149 of the Immigration and Asylum Act 1999 ("IAA") which permitted the contracting out of removal centres by the Secretary of State. Further provisions of the IAA provided the Secretary of State with a statutory duty to protect GB from harm, and statutory powers to monitor, to intervene and install a controller to take over the management of the removal centre, to make rules and provide instructions governing how contracted out removal centres are to be run. The Detention Centre Rules 2001, made pursuant to powers provided to the Secretary of State in the IAA, set out extremely detailed rules governing almost every aspect of management of removal centres, and included r.33 entitled "Medical practitioner and health care team" which provided rules in 13 sub-paragraphs, including at (1) *"Every detention centre shall have a medical practitioner… "* and *(2) "Every detention centre shall have a health care team (of which the medical practitioner will be a member) which shall be responsible for the care of the physical and mental health of the detained persons at that centre".*

49. Coulson J (as he then was) held that the Home Office owed a non-delegable duty for a private contractor who provided healthcare at a detention centre. Although it is not explicitly stated, upon reading the judgment it can be inferred that he found it was a common law non-delegable duty, not a statutory one, as: (i) the IAA did not include any specific provision for contracting out the provision of healthcare services to detainees at removal centres; (ii) he reached his conclusion after applying the *Woodland* criteria; (iii) he did not interpret the statutory framework, although certain provisions were relevant to his consideration of the *Woodland* criteria.

50. In *Armes v Nottinghamshire County Council* [2017] UKSC 60, the Supreme Court found that a local authority did not owe a non-delegable duty to ensure that children

in its care who had been placed with foster carers were treated with reasonable care. The relevant duty under section 21 of the Children Act 1980 was *"…(1) A local authority shall discharge their duty to provide accommodation and maintenance for a child in their care in such one of the following ways as they think fit, namely – (a) by boarding him out… (b) by maintaining him in a community home … or (c) by maintaining him in a voluntary home…"*. It was common ground that placement with foster carers fell within s21(1)(a). Lord Reed considered the meaning of *"non-delegable duties of care"* and identified the question for determination in the case at [31] and [32] of his judgment*:*

> "[31] The expression "*non-delegable duties of care*" is commonly used to refer to duties not merely to take personal care in performing a given function but to ensure that care is taken. The expression thus refers to a higher standard of care than the ordinary duty of care. Duties involving this higher standard of care are described as non-delegable because they cannot be discharged merely by the exercise of reasonable care in the selection of a third party to whom the function in question is delegated.
>
> [32] Tortious liabilities based not on personal fault but on a duty to ensure that care is taken are exceptional, and have to be kept within reasonable limits. Yet there are some well-known examples: it is well established that employers have a duty to ensure that care is taken to provide their employees with a safe system of work, that hospitals have a duty to ensure that care is taken, in the treatment of their patients, to protect their health, and that schools have a duty to ensure, in the education of their pupils, that care is taken to protect their safety. The question which arises in the present case is whether local authorities have an analogous duty to ensure that care is taken, in the upbringing of children in their care to protect their safety."

51. Lord Reed accepted that there was a distinction between a duty to arrange and a duty to perform, and discussed this at [37]:

> "[37]… The critical question, in deciding whether the local authority were in breach of a non-delegable duty in the present case, is whether the function of providing the child with day-to-day care, in the course of which the abuse occurred, was one which the local authority were themselves under a duty to perform with care for the safety of the child, or was one which they were merely bound to arrange to have performed, subject to a duty to take care in making and supervising those arrangements…"

52. At [38] he considered the criteria identified by Lord Sumption in *Woodland* in the following terms:

> "Although Lord Sumption focused upon situations in which a non-delegable duty of care was deemed to have been assumed

> voluntarily, it is of course possible for the necessary relationship to be created by statute… But everything turns on the particular statute. The point is illustrated by the decision of the Court of Appeal in *Myton v Woods* (1980) 79 LGR 28, where a claim was made against the local authority for the negligence of a taxi firm employed by the authority to drive children to and from school. The authority had no statutory duty to transport children, but only to arrange and pay for it. The claim was therefore dismissed. Lord Denning MR said at p 33 that the authority was not liable for an independent contractor "except he delegates to the contractor the very duty which he himself has to fulfil". That decision was approved in the *Woodland* case. One could similarly ask in the present case whether the local authority had a statutory duty to provide the children with day to day care, or only to arrange, supervise and pay for it".

53. Lord Reed's conclusion at [47] was that the implication of the word *"discharge"* in section 21(1) meant that *"the placement of the child constitutes the performance of the local authority's duty to provide accommodation and maintenance. It follows that the local authority do not delegate performance of that duty…".*

54. Finally, in *Razumas,* which was a clinical negligence claim brought against the Ministry of Justice by a prisoner, the statutory framework was relatively complex. For decades, every prison was required under section 7 of the Prison Act 1952 to have a medical officer, who pursuant to rule 20(1) of the Prison Rules 1999 *"shall have the care of the health, mental and physical, of the prisoners in that prison".* However it was common ground that there had been a transfer of responsibility for the provision of medical services in prison from the Ministry of Justice to the NHS. Section 249(1) of the NHS Act 2006 provided that *"In exercising their respective functions, NHS bodies (on the one hand) and the prison service (on the other) must co-operate with one another with a view to improving the way in which those functions are exercised in relation to securing and maintaining the health of prisoners".* Rule 20(1) of the Prison Rules 1999 was amended by the Prison and Young Offender Amendment Rules 2009 which provided that *"The governor must work in partnership with local health care providers to secure the provision to prisoners of access to the same quality and range of services as the general public receives from the National Health Service".* The Ministry of Justice's position was that although it accepted it had a non-delegable duty of care before 2003 or, at the latest, 2006, it no longer did since the statutory obligation to provide healthcare to prisoners had been transferred from prisons to the NHS.

55. It is apparent from [130] of the judgment of Cockerill J that the claimant contended for a non-delegable duty which arose not from statute but from the common law. Cockerill J found at [153] that although the Ministry of Justice had a statutory duty in respect of custody and maintenance of prisoners which were not in question in the complaints made*, "the provision of healthcare forms no part of the statutory or common law duty. That is the duty of the PCT and its subcontractors – as reflected in the statute and other documents".*

VI. Statutory Duty

Claimant's submissions

56. The Claimant's arguments as set out in the skeleton argument of Mr Readhead QC were as follows:

i) In 2008 PCTs including SB PCT were under a statutory duty by virtue of section 83(1) of the Act to exercise its powers so as to provide primary medical services or secure their provision within the area of South Birmingham. The language imposing that duty is mandatory and the scope or content of that duty is defined by section 83(1);

ii) That duty had been delegated to PCTs by the Secretary of State, and it was imposed on no other NHS body except for PCTs;

iii) By paragraph 16(1) of Schedule 3 to the 2006 Act, Parliament provided that any liabilities arising from the exercise of functions delegated to a PCT by the Secretary of State were those of the PCT: *"Any rights acquired, or liabilities (including liabilities in tort) incurred, in respect of the exercise by a Primary Care Trust of any function exercisable by it… are enforceable by or against the Primary Care Trust (and no other body)"*;

iv) In addition, when performing their functions, NHS bodies and the Secretary of State are required by section 1B of the 2006 Act and section 2 of the Health Act 2009 to have regard to the NHS Constitution. The key principles of the NHS Constitution include principle 5: *"The NHS works across organisational boundaries and in partnership with other organisations in the interest of patients, local communities and the wider population. The NHS is an integrated system of organisations and services bound together by the principles and values reflected in the constitution. The NHS is committed to working jointly with other local authorities' services, other public sector organisations and a wide range of private and voluntary sector organisations to provide and deliver improvements in health and well-being…"*;

v) Accordingly, although Section 83(2) provides that a PCT may either provide primary medical services itself or make such arrangements for their provision as it considers appropriate, it is the Claimant's submission that this cannot, and does not, define the scope or content of the duty imposed upon PCTs under section 83(1), and it does not enable a PCT to outsource its responsibility and or duty for such services carried out by third parties on its behalf, as paragraph 16(1) of Schedule 3 to the 2006 Act explicitly provides that the liability remains with the PCT alone. The responsibility and the duty for the provision of primary medical services within the area of South Birmingham in December 2008 therefore remained with SB PCT.

57. However, at trial Mr Readhead QC accepted that he had misread Schedule 3, paragraph 16(1) of the Act, and that Mr McCullough QC was correct in saying that it relates only to the exercise of the functions of a PCT where it exercises such functions with another NHS body. It is now common ground that it does not apply.

58. In addition, the Act as now in force, and section 2 of the Health Act 2009, now require NHS bodies to have regard to the NHS Constitution, but Mr Readhead QC accepted in his supplemental skeleton filed before trial that in 2008 PCTs were not required to do so. He submits instead that the Constitution codified and embodied the existing principles of the NHS, including that NHS structures were to be an integrated system, working across organisational boundaries. He described those existing principles as *"part of the relevant legislative context to section 83(1) of the Act"*. He also asks the Court to note that between 2010 when PCTs were required to have regard to the NHS Constitution and 2012 when PCTs ceased to exist, the duty imposed upon a PCT to *"provide"* or to *"secure* [the] *provision of"* co-existed alongside the NHS Constitution, and submits that there was no fundamental difference of approach before that time. I have no evidence about that, nor about whether the Constitution codified and embodied the existing principles of the NHS or whether they expanded or changed them. There is nothing about this in the agreed facts. Accordingly since it is now common ground that PCTs were not required to have regard to the NHS Constitution in 2008, I will not consider it further.

59. Stripping out references to para 16 of Schedule 3 to the Act and to the NHS Constitution, then, the Claimant's case is now:

    i) In 2008 PCTs including SB PCT were under a statutory duty by virtue of section 83(1) of the Act to exercise its powers so as to provide primary medical services or secure their provision within the area of South Birmingham. The language imposing that duty is mandatory and the scope or content of that duty is defined by section 83(1);

    ii) That duty had been delegated to PCTs by the Secretary of State, and it was imposed on no other NHS body except for PCTs;

    iii) Although Section 83(2) provides that a PCT may either provide primary medical services itself or make such arrangements for their provision as it considers appropriate, it is the Claimant's submission that this cannot, and does not, define the scope or content of the duty imposed upon PCTs under section 83(1), and it does not enable a PCT to outsource its responsibility and or duty for such services carried out by third parties on its behalf;

    iv) The cases of *Armes, A (A Child), Woodland* and *Myton v Woods* all related to duties to arrange, not to perform. The wording of the respective statutory provisions in those cases can be contrasted with the wording of s83(1) of the Act applicable in this case which imposes a duty on the PCT to *"provide"* or *"secure* [the] *provision of*" primary medical services. This wording is prescriptive and goes further than a mere duty to arrange and/or facilitate those services. It is a duty to perform, whether by itself or through others as permitted by s83(2), and not merely a duty to arrange;

    v) By D3's submissions, it is confusing the *duty* of a PCT such as SB PCT to provide or secure the provision of services with its *power* to outsource the provision of those services.

60. I have been taken to a number of provisions in the 2006 Contract. Mr Readhead QC accepted in oral submissions that the contractual arrangements entered into between

the SB PCT and D2 could not have any effect on the legal question of whether the statutory framework imposed a non-delegable duty of care.

61. Finally, Mr Readhead QC for the Claimant describes as "a startling proposition" D3's case that the Claimant, although an NHS patient whose grandmother contacted, at the first instance, her NHS GP surgery for advice, was effectively seen, assessed and advised at the BMC not as an NHS patient but as a private patient, without her knowledge or consent. He submits that if Mrs Hopkins had not sought advice in the first instance from her GP surgery and had instead taken the Claimant to A&E at the hospital where she would have been seen as an NHS patient, there could be no suggestion that the NHS would not be responsible for any breach of duty of care, as there are authorities which provide powerful guidance that a patient at an NHS hospital is owed a non-delegable duty of care by the NHS irrespective of who provides the care services. He describes this difference as being inconsistent with the public's understanding of the NHS and as inconsistent with what the NHS purports to do as set out in the NHS Constitution.

D3's submissions

62. D3 denies that at the relevant time SB PCT was under a statutory duty that could only be discharged by the provision itself of primary medical services to NHS patients in the South Birmingham area. It submits that:

    i) There is no doubt that section 83(1) of the Act at that time in force imposed on SB PCT a statutory duty in mandatory terms. However the statutory duty was either to *"provide"* such services or to "*secure* [the] *provision*" of those services within its area. It expressly vested a PCT with the discretion to "*make such arrangements… as it considers appropriate*" for primary medical services to be provided by others, including by making contractual arrangements with others;

    ii) The Claimant's interpretation of the duty on the PCTs as being only a duty to perform imports no meaning to the words *"or secure* [the] *provision"* of such services in section 83(1);

    iii) The duty imposed upon SB PCT by section 83(1) of the 2006 Act to *"secure* [the] *provision*" of services was in truth no more than a duty to arrange for those services to be provided, and once those arrangements had been made, liability for the quality and manner of that service provision was with the service provider.

63. If the Claimant's position is well founded, Mr McCullough QC suggests for D3 that it is surprising that it has not been raised before the courts before, at least so far as Counsel are aware. Mr McCullough QC submits that it is sadly far from unprecedented that there are insurance shortfalls and gaps in indemnities in relation to tortious claims made relating to the provision of medical services by third party contractors and so it would be surprising if, when those situations have arisen in the past, the NHS had not previously been recognised to have liability. He described the Claimant's position as *"fundamentally altering the previously universally-understood position that liability sits with such third parties"*. Mr McCullough QC was careful, however, to accept that the fact that the Claimant's position was at odds with the

previously understood position was not to say that it was wrong. He merely offers the possibility that the point may be novel before the courts because it is not well founded. Whether or not the Claimant's position is well-founded is the very matter I must determine and so I do not think this submission takes me any further.

64. Mr McCullough QC further submits that although the facts of this case relate to a child seeing an out of hours private practice, if the Claimant is correct that a PCT had a non-delegable duty of care, then the conclusion would also apply to medical services generally, including GP services, and also a wider range of care providers through whom the Secretary of State discharges his functions, including dentists and ophthalmologists. As such, he submits, there would be a hitherto unappreciated impact on those commissioning medical dental and ophthalmology services and the finding would effectively be that in relation to all such services the NHS is an insurer of last resort. I appreciate that this would be the result, and this may be of relevance to an analysis of the common law position under the Woodland criteria, but as Mr Readhead QC counsels me, I will be careful to ensure that it does not affect the exercise of statutory interpretation that I will carry out first.

Discussion and Determination

65. In my judgment the statutory framework did not, in December 2008, impose upon PCTs a non-delegable duty of care in the provision of primary medical services, for the following reasons.

66. As I believe both parties accept, the duty upon a PCT is that contained in s83(1) of the Act: to provide primary medical services or secure their provision in its area. This is mandatory and is limited only in that it must provide such services *"to the extent it considers necessary to meet all reasonable requirements*". The power that it has to do so is that contained in section 83(2): it may (a) provide primary medical services itself or (b) make such arrangements for their provision as it considers appropriate, which includes entering into contractual arrangements.

67. If there is any doubt that s83(1) is where the relevant statutory duty is to be found, it is dispelled by considering section 1 and section 2 of the Act, in which the headings expressly make clear relate to the Secretary of State's duty (section 1) and the Secretary of State's general power (section 2). Section 1 of the Act provides an overarching duty in mandatory terms: he must provide or secure the provision of services. This, as the hearing makes clear, is his duty. Mr McCullough points out this is the same statutory formulation as is to be found in section 83(1) of the Act. The Secretary of State's general power in section 2 is to choose whether to provide the services himself or to make arrangements for the provision by third parties. Again, this tracks the wording of section 83(2) of the Act. That is not surprising, as PCTs exercise the functions of the Secretary of State as he directs pursuant to section 7 of the Act, and they can therefore have no greater duties and powers than that of the Secretary of State from whom their duties and powers emanate.

68. Although the statutory duty is mandatory, I am satisfied that it is expressed in the alternative in section 83(1) and so it can be discharged in one of these two alternative ways: by the PCT providing primary medical services, or by the PCT securing the provision of primary medical services.

69. I do not accept the Claimant's submission that this analysis confuses a duty to perform with a mere duty to arrange. In my judgment, any argument that Parliament intended that the duty on PCTs should be only a duty to perform, whether they did so themselves or through a third party, is inconsistent with Parliament's inclusion of the words "or secure [the] provision within its area" in section 83(1). If that is what Parliament intended, it could have excised or not included those words, and that would leave PCTs with a mandatory duty to provide primary medical services within its area, which it would have the power to discharge in accordance with section 83(2), i.e. by providing such services itself or by making arrangements for their provision. Following the authorities, that would leave PCTs with a non-delegable duty of care: per Lord Denning in *Myton*, approved by the Supreme Court in *Woodland* and *Armes*, *"The rule is that he is not liable for the negligence of an independent contractor in the ordinary way:* ***except he delegates to the contractor the very duty which he himself has to fulfil****. If it is his own duty which is not fulfilled, he cannot escape responsibility for negligence by saying that it was delegated to a contractor"*. In such a case, the very duty which was not fulfilled would be the very duty imposed on the PCT, namely the duty to provide services.

70. However, Parliament has not done so: it has expressly worded the duty contained in section 83(1) in the alternative: to permit of its discharge by the PCT providing services (a duty to perform) or securing their provision (alternatively, a duty to arrange). By contracting with a third party, the PCT does not delegate the very duty which it itself has to fulfil, as that duty is the alternative duty to secure the provision of services.

71. In my judgment therefore, and as the D3 submits, the effect of the statutory scheme is that if a PCT elects to discharge its section 83(1) duty by providing primary medical services itself (for example by directly employing healthcare professionals such as GPs), it is electing to discharge the duty to perform. It will take on the responsibility for doing so and will be liable for breach in accordance with ordinary principles.

72. If, however, a PCT elects to discharge its section 83(1) duty by securing the provision of primary medical services from others, it is electing to discharge its alternative duty which can properly be characterised as a duty to make arrangements for the provision of services. Section 83(2) gives it the power to do by means of entering into contractual arrangements with others. In this case, following *Myton* and *Armes*, subject to exercising reasonable care in selecting the contractor, and although the PCT retains overall responsibility to administer and arrange such arrangements pursuant to section 22 of the Act, the PCT retains no residual responsibility in relation to the manner in which the contractor performs the service. In particular it retains no responsibility to ensure that those providing that care do it safely.

73. To address Mr Readhead QC's submission set out at paragraph 61 above that this is "a startling proposition", I respectfully disagree that my analysis means that the Claimant, although an NHS patient in respect of whom Mrs Hopkins contacted, at the first instance, her NHS GP surgery for advice, was effectively seen, assessed and advised at the BMC not as an NHS patient but as a private patient, without her knowledge or consent. She was not seen as a private patient, but as an NHS patient at an OOH facility arranged by the NHS with her care provided free at the point of use. I accept Mr McCullough QC's submission for D3 that the position would be no different had she instead been seen during the day at a GP surgery if that was, as

many of them are, run as a private partnership from which its GP partners provided services to the NHS pursuant to a contract. If that GP, or the surgery, did not hold the insurance that it was then required to do by contractual or regulatory provision, the Claimant would be in the same position that she is now. It is important that Mrs Hopkins understands that she did not by her actions unwittingly remove the Claimant from the NHS – she did not.

74. The question then remains whether it is necessary to go on to consider whether a common law duty of care is imposed, by application of the *Woodland* criteria. I find that it is not. For the reasons given, I consider that Parliament by the Act explicitly has provided for a statutory delegable duty to secure the provision of primary medical services from others, which the common law cannot override.

75. It follows that the answer to the preliminary issue is that D3 as successor to relevant liabilities of the SB PCT does not owe a non-delegable duty of care to the Claimant. Accordingly, it is not liable in respect of any negligent acts or omissions of those providing medical care at the BMC, in particular D1 (where such negligence may be established).

76. I know this is a difficult and disappointing conclusion for Mrs Hopkins and the Claimant's family to hear, and I am sorry that I have had to reach it. I wish them all the very best for the future.