Supreme Court closes another vicarious liability loophole: Woodland V Swimming Teachers Association

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Published version

DICKINSON, Jill and NICHOLSON, Alex (2015). Supreme Court closes another vicarious liability loophole: Woodland V Swimming Teachers Association. European Journal of Current Legal Issues, 21 (2).

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Supreme Court Closes Another Vicarious Liability Loophole: Woodland v Swimming Teachers Association

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ABSTRACT

On 23 October 2013 the Supreme Court closed another vicarious liability loophole[2] when it handed down its judgment in *Woodland*. The respondent education authority was set to escape any potential liability for a negligently conducted swimming lesson simply because the lesson had been carried out by an independent contractor, rather than an employee. For this reason, both parties agreed that the respondent could not be vicariously liable, yet to deny the claimant any possibility of seeking compensation from the authority for the incident on that basis would have been unpalatable.

Accordingly, the court kept the education authority in the frame by endorsing and expounding a concept little-used in English law but supported by some powerful *dicta*: the non-delegable duty of care. In contrast to vicarious liability, the non-delegable duty is a personal one, which requires a defendant not merely to take reasonable care, but to ensure that reasonable care is taken; a task may be delegated to an independent contractor, but the duty may not.

The Supreme Court explained that a non-delegable duty would arise where: (1) the claimant is especially vulnerable or dependent on the defendant's protection against risk of injury; (2) there is an antecedent relationship between the two which puts the claimant in the defendant's custody, charge or care and from which it is possible to say that the defendant has assumed a duty to ensure care is taken; (3) the claimant has no control over how the defendant chooses to perform its obligations; (4) the defendant has delegated a function which is an integral part of the positive duty it assumed, such that the delegate now exercises custody, charge or care over the claimant on the defendant's behalf; and (5) the defendant has delegated its duty to a third party, who has performed it negligently.

Reversing the decision of the lower courts and remitting the case for trial, the Supreme Court unanimously decided that the education authority owed the claimant a non-delegable duty, which could give rise to liability for any negligence in this case. Following *Woodland*, it is now clear that, when exercising their core functions, schools, hospitals and other similar organisations will owe personal, non-delegable duties towards those persons entrusted into their custody, charge or care. In such cases, claimants who suffer loss by reason of the negligent performance of the defendant's core functions will be entitled to seek redress from the defendant by an alternative route, where they cannot establish vicarious liability.

Against the backdrop of a climate where outsourcing is now common place, this judgment is a particularly pertinent one and its practical implications will need to be factored into

operational decision-making. However, any objections from potential defendants are easily outweighed by the policy justifications for closing this particular loophole.

1. BACKGROUND

As Baroness Hale DPSC remarked, "…so far as possible, [it is important that legal principles] make sense to ordinary people."[3] The doctrine of vicarious liability satisfies this criterion. In essence, its effect is to impose strict liability upon a potentially innocent employer for the torts of its employee, where those torts are committed during the course of employment.[4] The law imposes such liability by virtue of the employment relationship *per se*. Liability is: "founded on the responsibility of an enterprise for those it uses as helpers to carry out its activities."[5] The principle of vicarious liability is justified on numerous policy grounds. In *Various Claimants v Catholic Child Welfare Society and others*,[6] Lord Phillips concisely summarised these as:

"(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."

However, as vicarious liability necessarily applies only to torts committed by employees, inevitably situations do arise which fall outside the scope of the doctrine (because the nature of the relationship is not strictly speaking one of employment) but which nevertheless appear to attract most, if not all, of the same policy justifications for the imposition of liability. If the "employer" could escape liability in such circumstances that would be highly unsatisfactory and could scarcely be understood by so-called "ordinary people".

When such vicarious liability loopholes have arisen in the case law, the courts have rightly endeavoured to close them, either directly (by extending the scope of the doctrine to cover a broader range of relationships)[7] or indirectly (by instead searching for a breach of a personal duty owed by the "employer")[8].

Analysing each of these approaches in turn, it appears that the former approach is constrained by the need to maintain credible and practical boundaries for the doctrine. Recognising such tensions, Glassbrook questions whether the boundaries of vicarious liability can in fact be "stretched further"[9] and Barron, on advising employers to take a prudent approach to their insurance cover, reasons that: "how far vicarious liability will ultimately extend is open to debate, but [suggests that] in the meantime, it is surely better [for employers] to be safe than to be sorry".[10]

However, the latter approach provides the courts with greater flexibility to ensure that liability is imposed where, to use the language of *Caparo*,[11] it would be fair, just and reasonable.

Where the damage suffered may equally be attributed to some obvious fault on the part of the "employer" then little searching is needed to find the necessary personal duty and breach. For instance, Clerk and Lindsell[12] cite examples of an employer held personally liable in negligence for: choosing an incompetent contractor or employing an insufficient number of people[13] or interfering with the manner in which the work is conducted.[14]

However, in cases where finding fault with the "employer" would require an unsatisfactorily artificial analysis, demonstrating that a personal duty of care has been breached is more difficult yet such situations do arise in which the policy justifications for vicarious liability still apply.[15]

One way that English law has attempted to deal with this further conundrum is to recognise, in some limited circumstances, what has been somewhat confusingly named the "non-delegable duty". This duty has been described as a duty owed by an individual or organisation not just to take reasonable care itself, but to ensure that reasonable care is taken.[16] For example, it is well established that an employer owes a non-delegable duty to ensure a safe working environment for its employees.[17] The effect of this duty is that, even if an employer engages an independent contractor to maintain the safety of its employees, it cannot escape liability in the event that its contractor is negligent. The employer may indeed escape *vicarious* liability, but the loophole is closed by the imposition of a more burdensome *personal* duty of care.

Numerous such duties have been created by statute.[18] However, a non-delegable duty is clearly a very onerous one and so, unlike some of their counterparts, [19] historically the English courts have been cautious when attempts have been made in the common law to introduce new categories of relationships within which such a duty will arise,[20] preferring instead to conservatively confine such duties to employer/employee situations.[21] This conservative and incremental approach resulted in a lack of clear principles and it was often difficult to know whether a common law non-delegable duty would exist in a particular case.[22] Established common law non-delegable duties did exist, but in only a small number of very specific situations.

Prior to *Woodland*, the existence of a non-delegable duty of care owed by a school (or more accurately an education authority) to its pupils lacked any real authority in English law. However, there was a growing collection of *dicta* from both the English and Australian courts[23] in support of imposing such a duty in certain circumstances.

In this case, the Supreme Court was given an opportunity to close another vicarious liability loophole by finding that a non-delegable duty was owed to the claimant by the education authority and setting out clear criteria that could be used to establish when such a duty will arise in the future. That opportunity was seized unanimously.

2. FACTS

The claimant, 10 year-old Annie Woodland, attended a school which was owned and controlled by Essex County Council (the "Education Authority"). On 5 July 2000, she was taken by the school to a swimming lesson at a nearby public swimming pool, run by Basildon Council.

In accordance with what has become widespread practice, the swimming lesson was conducted by the school's independent contractor, namely, Beryl Stopford trading as Direct Swimming Services. In fact, Ms Stopford did not personally teach the lesson, but had employed a swimming teacher and a lifeguard to do so.

During the swimming lesson, the children were divided into ability groups, of which the claimant was in the highest ability. The claimant's group was instructed to dive in at the deep end, swim to the shallow end, exit the pool and walk back along the side of the pool to begin the exercise again. During this activity, somebody (although precisely who was a fact in dispute) observed that the claimant was no longer swimming, but was hanging vertically in the water. Despite being resuscitated, the claimant suffered severe hypoxic brain injuries.

A negligence claim was brought in the High Court, initially against the professional body, the "Swimming Teachers Association" ("STA"), presumably on the understanding that the negligent parties would, as members, have insurance cover through the STA. However, following doubts about the insurance position, the claimant was granted permission to join Ms Stopford, the lifeguard, the Education Authority and Basildon Council as defendants to the proceedings. The claimant's primary objective in seeking permission was presumably to ensure that any award of damages would be against a defendant or defendants with the means to pay. Liability was denied by all five defendants.

As against the Education Authority, the amended Particulars of Claim alleged *inter alia* that it owed a "non-delegable" duty of care to the claimant and was therefore personally liable for the damage caused by its independent contractor.

On application by the Education Authority, Langstaff J struck out the words "non-delegable". This decision of the Supreme Court concerned the claimant's appeal on this preliminary issue only.

3. THE COURT OF APPEAL

Although it was undoubtedly a vicarious liability loophole that prompted the appeal, in the Court of Appeal it became clear that the liability contended for was not vicarious. In fact, Langstaff J had also struck out separate wording alleging vicarious liability, but the claimant did not seek to appeal the order on that point. Instead, the claimant argued that the Education Authority owed a personal duty to ensure that reasonable care was taken; a duty which it could not delegate to its contractor.

Laws LJ was minded to allow the appeal. He concluded that, by virtue *inter alia* of the enhanced proximity of the neighbour relationship, it was fair, just and reasonable to impose a non-delegable duty in these circumstances. He relied on the fact that a non-delegable duty had already been established in a number of contexts and that there was in this case, as there would be in the context of a hospital and patient, "an acceptance of responsibility to take care of a group of persons who are particularly vulnerable or dependent".[24]

Recognising the importance of limiting such a duty, Laws LJ advocated the following test:

> "A school or hospital owes a non-delegable duty to see that care is taken for the safety of a child or patient who (a) is generally in its care, and (b) is receiving a service which is part of the institution's mainstream function of education or tending to the sick."[25]

However, Tomlinson LJ and Kitchin LJ disagreed. It was their view that the non-delegable duty contended for could neither be justified on the existing authorities, nor on policy grounds. In particular, Tomlinson LJ relied upon the Court of Appeal's own decision less than a decade earlier in *A (A Child) v Ministry of Defence and Another*[26]. In that case it was said that "hitherto a non-delegable duty has only been found in a situation where the claimant suffers an injury while in an environment over which the defendant is in control".[27] Tomlinson LJ also felt that the imposition of such a duty would be likely to have a "chilling effect on the willingness of education authorities to provide valuable educational experiences for their pupils".[28]

Thus, by a majority of 2 to 1 the Court of Appeal dismissed the appeal, allowing the Education Authority to escape any liability as a matter of law.

4. THE SUPREME COURT

Delivering the leading judgment, Lord Sumption JSC was keen to reiterate that the appeal "had nothing to do with vicarious liability",[29] although by adding "except in the sense that it arises only because there is none",[30] he arguably acknowledged that the key policy decision before the court was whether the facts of this case gave rise to a vicarious liability loophole that the court was able and willing to close by expounding the concept of the non-delegable duty.

In support of the Court of Appeal's stance, Lord Sumption JSC commented that:

> "English law has long recognised that non-delegable duties exist, but it does not have a single theory to explain when or why".[31]

He also recognised that the concept of vicarious liability "has never extended to the negligence of those who are truly independent contractors".[32] As such, it was necessary to consider whether this was indeed a case where liability should be imposed and, if so, whether a non-delegable duty was the correct way to do so.

Careful consideration was given to the *obiter* comments of Lord Greene MR in *Gold v Essex County Council*[33] and of Denning LJ in *Cassidy v Ministry of Health*[34] which, although not ever having been adopted as the *ratio* of any English case, provided compelling policy justifications for the imposition of a non-delegable duty of care in hospital/patient and, by analogy, school/pupil cases. Similar consideration was given to the body of recent Australian jurisprudence on the issue,[35] which again supported the imposition of such a duty.

Lord Sumption JSC said that:

> "In my view, the time has come to recognise that Lord Greene MR in Gold's case…and Denning LJ in Cassidy's case…were correct in identifying the underlying principle, and while I would not necessarily subscribe to every dictum in the Australian cases, in my opinion they are broadly correct in their analysis of the factors that have given rise to non-delegable duties of care."[36]

The Supreme Court did not set out a test as such, but in justifying the imposition of a duty, Lord Sumption JSC stated that, highway and hazard cases excluded, the defining features of the so-called non-delegable duty were that: (1) the claimant is especially vulnerable or dependent on the defendant's protection against risk of injury; (2) there is an antecedent relationship between the two which puts the claimant in the defendant's custody, charge or care and from which it is possible to say that the defendant has assumed a duty to ensure care is taken; (3) the claimant has no control over how the defendant chooses to perform its obligations; (4) the defendant has delegated a function which is an integral part of the positive duty it assumed, such that the delegate now exercises custody, charge or care over the claimant on the defendant's behalf; and (5) the defendant has delegated its duty to a third party, who has performed it negligently.[37]

Using these criteria, the Supreme Court held that a non-delegable duty existed in this case, setting out six reasons as follows: (1) there is a general policy of the law to protect the vulnerable and schools should be required to ensure that care is taken by any contractors carrying out functions on the school's behalf; (2) a school's decision to delegate its functions and to whom is one over which parents have no control; (3) the duty is limited to functions for which the school has assumed a duty to perform itself; (4) the trend for outsourcing such functions is a recent one and therefore previously any negligence in the performance of these functions would have given rise to vicarious liability; (5) a private school will owe a contractual non-delegable duty and there is no justification for denying liability simply because no contract exists in a state school context; and (6) although a non-delegable duty places greater responsibility upon schools than parents, this is justified as schools are staffed by professionals and in any event this approach is reflective of the law's reluctance to recognise legally enforceable duties owed by parents.[38]

Baroness Hale DPSC, agreeing with Lord Sumption JSC, delivered a supplementary judgment which made express the primary policy justification for the decision. She explained that, if a non-delegable duty did not arise on the present facts, the unsatisfactory and inconsistent effect would be that private schools (contractually) and schools using their own

employees (vicariously) would both be liable for a negligently conducted swimming lesson, but a school employing an independent contractor would not[39]; in that sense, the decision would not "make sense to ordinary people".

Unanimously, the Supreme Court reversed the decisions of the lower courts, allowed the appeal, struck out the order of Langstaff J and remitted the case to the High Court for trial. In the process, the Supreme Court has indirectly closed what would otherwise have been a vicarious liability loophole, void of any credible policy justification.

5. IMPACT ON EDUCATION AUTHORITIES AND BEYOND

Following the decision in *Woodland*, where all five of Lord Sumption JSC's defining features are present, schools, hospitals and similar organisations will not be able to escape liability simply by pointing the finger at an independent contractor. It will still be possible to escape *vicarious* liability in such circumstances, but a non-delegable duty will impose *personal* liability in an equivalent sum. Although it remains permissible (and in many cases encouraged) for certain *tasks* to be delegated by such organisations to specialist contractors, *Woodland* will act as a safety net to ensure that *legal responsibility* for the careful performance of core functions cannot be delegated. This decision ensures that liability is not avoided by reason of a mere technicality and that the aforementioned institutions cannot structure their operations in such a way as to abdicate all responsibility for careful performance of the very functions that they have agreed to perform.

Self-evidently this does result in a widening of the scope of potential liability to which schools, hospitals and other organisations may be exposed and, given the nature of such organisations, the tax payer is likely to see the greatest increase in exposure. However, as Lord Sumption JSC himself highlighted,[40] this is not so much an increase in potential exposure for these parties as it is a reinstatement of the exposure that was applicable to such parties several years ago, prior to the recent trend for outsourcing. When considered from this perspective, any argument about the increased burden placed upon public institutions or indeed the tax payer loses most of its force.

In any event, it is likely that the main impact will not be an increase in the quantum of compensation payable by such parties, or even an increase in their insurance premiums. Rather, as has been experienced following the imposition of non-delegable duties in other contexts (e.g. health and safety at work), it seems likely that the main impact of this decision will be to persuade organisations with non-delegable duties to take more proactive steps to ensure that their duty is complied with. In this context it may mean carrying out more stringent checks on those to whom core functions are delegated, but this has to be a positive impact.

Although schools and hospitals received the most attention in *Woodland*, it is easy to see how the criteria could soon be employed to extend the ambit of the non-delegable duty further.

Indeed Lord Sumption JSC recognised *obiter* that "other examples are likely to be prisoners and residents in care homes" and this *dicta* is already being applied in subsequent case law.[41]

As is the case when any new principle or doctrine is established, one may be concerned that the effect of *Woodland* will be to open the floodgates for new liability. However, Lord Sumption JSC has set clear limitations on the concept as he was keen, in his own words, "to prevent the exception from eating up the rule". In *Andrew Risk v Rose Burford College*,[42] a 21 year-old student at the defendant drama college sustained catastrophic injuries as a result of jumping face and chest down into an inflatable pool and striking his head during an event organised by other students. The claimant argued that the defendant owed a non-delegable duty of care, however, the court considered *Woodland* and concluded that a protective duty of care only arises where 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. The relationship between college and student does not meet this test so a protective duty of care did not arise.

As to the concern of Tomlinson LJ in the Court of Appeal that the non-delegable duty of care will deter schools from employing independent contractors to provide "valuable educational experiences for their pupils", it is doubtful that this is the case. Schools can very easily ensure that any specialist contractors are appropriately insured, such that an indemnity can be claimed if necessary.

6. CONCLUSIONS

As a matter of theory, it is clear that *Woodland* does not vary or extend the doctrine of vicarious liability in any way; such liability was neither contended for nor imposed in the case and it remains a well-established principle that the torts of independent contractors will not give rise to vicarious liability. However, the doctrine provides essential context for the decision. Indeed, it is only because the negligent party was an independent contractor rather than an employee that this case made its way to the Supreme Court at all. The court found itself faced with a vicarious liability loophole: a fact pattern which undoubtedly fell outside of the vicarious liability doctrine, but by reason only of a technicality; the policy justifications for the imposition of liability remained strong. As Baroness Hale DPSC explained so elegantly, to deny liability in this case would have created an anomalous result which (if the contractor was indeed uninsured) could potentially leave the claimant without any remedy whatsoever; an outcome which would make little sense to "ordinary people".

What the Supreme Court has introduced here, in line with *Caparo*, is a new duty of care. Put simply, there is now a duty upon hospitals, schools and other institutions entrusted with the custody, charge or care of vulnerable people, not merely *to take* reasonable care when delegating the performance of its core functions to independent contractors, but to ensure that reasonable care *is taken* by those contractors.

Lord Sumption JSC's criteria provide guidance as to when such a duty will be owed and these criteria have their basis in what he himself described as "powerful *dicta"*.[43] However,

irrespective of the prior authorities, the policy justification for this extension of the law is beyond question. In the interests of certainty and fairness, the law should be predictable and consistent. Furthermore, the degree of proximity between the parties to the present appeal creates an expectation of and a justification for legal responsibility on the part of the Education Authority.

Whilst the non-delegable duty of care does inevitably carry a time and financial cost, it is difficult to see how this can be considered unfair. After all, it is typically only the institution or organisation with the non-delegable duty which has the discretion to determine: (1) how it will perform its core functions; (2) to which contractors (if any) it will delegate; and (3) the rigour with which the solvency and insurance position of any contractor will be investigated.

In this case, the loophole could have been closed in a number of different ways, but the Supreme Court opted to recognise the high degree of proximity between the parties. Where a school or hospital unilaterally delegates the very functions for which it has assumed responsibility, would ordinary people really expect the child or patient to bear the risk?

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[1] [Institution].

[2] For example, in *Cassidy v Ministry of Health* [1951] 2 KB 343 at 362-363, Lord Denning noted the particular vicarious liability to be imposed on hospitals when he stated that: "where the doctor or surgeon, be he a consultant or not, is employed and paid, not by the patient, but by the hospital authorities… the hospital authorities are liable for his negligence in treating the patient. It does not depend on whether the contract under which he was employed was a contract of service or a contract for services."

[3] *Woodland v Swimming Teachers Association* [2013] UKSC 66 [29] (Hale B).

[4] Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (7th edn, OUP 2013) 554.

[5] John Bell, 'The basis of vicarious liability', (2013) CLJ 17, 17.

[6] [2012] UKSC 56 [35] (Phillips LJ).

[7] For example, in *E v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938, the Court of Appeal was prepared to extend vicarious liability where a relationship was "akin to employment".

[8] For example, in *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906 and the extension of the employer's general health and safety duties to ensure that any working systems implemented were properly operated as noted in Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (7th edn, OUP 2013) 585.

[9] Alex Glasbrook, 'You're only supposed to blow the bloody doors off! - employers' vicarious liability for the torts of violent employees' (2005) 3 JPIL 240, 246.

[10] Alan Barron, 'Vicarious liability for employees and agents', (2004) Scots Law Times 91, 95.

[11] *Caparo Industries Plc v Dickman and Others* [1990] 2 W.L.R. 358.

[12] Michael Jones and Anthony Dugdale, *Clerk & Lindsell on Torts* (3rd supp, 20th edn, Sweet & Maxwell 2013) 6-56.

[13] *Pinn v Rew* (1916) 32 T.L.R. 451.

[14] *McLaughlin v Pryor* (1842) 4 M. G. 48; *Burgess v Gray* (1845) 1 C.B. 578.

[15] In referring to cases including *Waters v Commissioner of Police of the Metrpolis* [2000] IRLR 70 and *Maga v Archdiocese of Birmingham* [2010] 1 WLR 44, Deakin, Johnston and Markenesis(2013, 588) point out that: "the very same policy factors, involving an assessment of the deterrent effects of liability, risk-shifting through insurance, and the danger of adverse 'defensive' practices, apply in both sets of cases" ie. those based on the employer's personal duty of care and those founded on vicarious liability principles. They also note a general move towards a more open debate about the various policy factors which underpin vicarious liability principles in cases concerning employers.

[16] *The Pass of Ballater* [1942] P. 112, 117 (Langton J).

[17] *Wilson's and Clyde Coal Co v English* [1938] AC 57.

[18] Michael Jones and Anthony Dugdale, *Clerk & Lindsell on Torts* (3rd supp, 20th edn, Sweet & Maxwell 2013) 6-58.

[19] Simon Deakin, Angus Johnston and Basil Markenesis *Markenisis and Deakin's Tort Law* (Oxford University Press, 2014) 585 cite Germany as one example and, by reference to the case of *Kondis v State Transport Authority* (1984) 154 CLR 672, 687, Australia as another.

[20] As Hayne J stated in the case of Leichhardt Municipal Council v Montgomery [2007] HCA 6, 233 ALR 200, 155, "the doctrinal roots of non-delegable duties are anything but deep or well-established" as cited in Rogers, W, *'Winfield & Jolowicz Tort'* (18th ed, Sweet and Maxwell 2010), 20-22.

[21] Simon Deakin, Angus Johnston and Basil Markenesis *Markenisis and Deakin's Tort Law* (Oxford University Press, 2014) 585 referring to the case of Watts v Lowcur Ltd (1998) Lexis as cited in Ewan McKendrick, 'Vicarious Liability and Independent Contractors: A Re-examination' (1990) 53 MLR 770.

[22] Ibid, 6-60. For a complete overview of the common law non-delegable duties existing prior to *Woodland*, see Ibid, 6-60 to 6-71.

[23] E.g. *Gold v Essex County Council* [1942] 2 KB 293 and *Cassidy v Ministry of Health* [1951] 2 KB 343.

[24] (n1) [25] (Laws LJ).

[25] (n1) [30] (Laws LJ).

[26] [2004] EWCA Civ 641.

[27] Ibid 201 (Phillips LJ).

[28] (n1) 563 [57] (Tomlinson LJ).

[29] (n1) 572 [4] (Sumption JSC).

[30] Ibid.

[31] (n1) 573 [6] (Laws LJ).

[32] (n1) 572 [3] (Laws LJ).

[33] [1942] 2 KB 293.

[34] [1951] 2 KB 343.

[35] Alex Glasbrook, 'You're only supposed to blow the bloody doors off!" - employers' vicarious liability for the torts of violent employees' (2005) 3 JPIL 240, 246.

[36] (n1) 583 [23] (Sumption JSC).

[37] Ibid.

[38] (n1) 584 [25] (Sumption JSC).

[39] (n1) 587 [30] (Hale B).

[40] (n1) 585 [25] (Sumption JSC).

[41] *Amadou Nyang (A protected party by his Litigation Friend, Ibraham Nyang) v G4S Care & Justice Services Ltd, Dr. Geraint Thomas, Gwyn Ashworth-Pratt, Dr. Jarek Pytel* [2013] EWHC 3946 (QB).

[42] [2013] EWHC 3869 (QB).

[43] (n1) 579 [16] (Sumption JSC).