DARNLEY v CROYDON HEALTH SERVICES NHS TRUST
CA (Civ Div) (Jackson LJ, McCombe LJ, Sales LJ) 23/03/2017
[2017] EWCA Civ 151

LIABILITY: NEGLIGENCE: ACCIDENT AND EMERGENCY DEPARTMENTS: CAUSATION: DUTY OF CARE: BREACH OF DUTY; HOSPITALS: WAITING TIME: TRIAGE

On Monday 17 May 2010, the claimant, Mr Michael Darnley, was unlawfully attacked and struck on the head by unknown assailants. After a time, he began to feel unwell. A friend drove him to the Accident and Emergency Department of the Mayday University Hospital, Croydon.[1]

Mr Darnley was booked in at the hospital A&E reception at 8:26pm. The receptionist told him that he would be seen in four or five hours, but she should have told him that he would be seen by a triage nurse within 30 minutes. Had Mr Darnley realised that he would be seen by a triage nurse, he would have stayed in A&E. Instead he left the hospital after 19 minutes without having been seen by a clinician.

Having returned home, Mr Darnley's condition deteriorated. An ambulance was called at about 9:42pm. He was taken to the defendant's hospital. A CT scan showed the presence of an extradural haematoma. Mr Darnley was then transferred to St George's Hospital for neurosurgery to remove the haematoma. He suffered a left hemiplegia causing long-term disabilities. That condition would have been prevented had Mr Darnley received prompt treatment.

Clinical guidelines stated that a patient with a head injury should be assessed by a clinician within 15 minutes of arrival. Experts agreed that a slightly longer period of 30 minutes would also be appropriate. At trial, HHJ Robinson concluded that the defendant health authority, which was responsible for the Mayday University Hospital, had not breached its duty of care by failing to examine Mr Darnley within 15 minutes and by failing to give accurate information to him about waiting times. The judge concluded that information about waiting times was a courtesy rather than a legal obligation.

Mr Darnley appealed submitting that the defendant's failure to triage him within 15 minutes was a breach of duty, and his presentation on arrival was such as to merit priority triage. He also submitted that HHJ Robinson erred in assessing the scope of the duty owed by reception staff and in his application of the "fair, just and reasonable" test under *Caparo Industries Plc v Dickman*.[2]

The Court of Appeal held that HHJ Robinson had provided logical reasons for deciding that Mr Darnley had not merited priority triage. It was not open to it to interfere with that decision. Further, two experts were of the opinion that on a busy night, such as the night in question, it might not be possible to triage all head injury patients within the target time of 15 minutes. HHJ Robinson had been entitled to conclude that a longstop position of 30 minutes was appropriate and that there had

[1] Now known as the Croydon University Hospital.
[2] [1990] 2 A.C. 605

been no breach of the duty of care by the defendant's failure to examine the appellant within 15 or 19 minutes.

The Court confirmed that in order for a duty of care to arise there must be proximity between the parties, and the situation should be one in which it was "fair, just and reasonable" for a duty to be imposed.[3] It was not a binary question that admitted of a "yes" or "no" answer. It was necessary to consider the scope of the suggested duty and the range of consequences for which the defendant was to be held responsible.[4]

In *Kent v Griffiths (No. 3)*,[5] a duty of care had been imposed on the ambulance service after errors had been made by telephone staff. However, the Court pointed out an important distinction between an ambulance service telephonist and an A&E receptionist. An ambulance service telephonist often passed information to paramedics or patients on which the paramedics or patients would in turn act. Patients waiting for ambulances needed to decide whether to stay where they were or arrange their own transport to hospital. The law therefore imposed on the ambulance service a duty to take reasonable care to pass on correct information.

In *Darnley*, the Court held that the position of receptionists in A&E departments was different. Their function was to record the details of new arrivals, tell them where to wait and pass on details to the triage nurses. It was not their function to give any wider advice or information.[6] There was no general duty on receptionists to keep patients informed about likely waiting times. Neither was it fair, just and reasonable to impose a duty not to provide inaccurate information about waiting times.

Even if a duty to provide the information had existed, the Court concluded that the scope of that duty did not extend to liability for the consequences of a patient walking out without telling the staff that he was about to leave. There was therefore no causal link between the breach of any duty and Mr Darnley's injury. The appeal was dismissed.

Dissenting, McCombe LJ found on the very particular facts of this case the defendant was in breach of its duty to Mr Darnley, and that that breach had caused his injury. In his opinion, when given information about waiting times, patients needed to know that in true emergencies the hospital could act quickly, and that initial assessments would occur sooner than the average waiting time for treatment. The functions of a hospital could not be divided up into those of receptionists and medical staff. If the hospital had a duty not to misinform patients, the duty was not removed by interposing non-medical reception staff as a first point of contact. In his opinion, the failure to inform Mr Darnley of the triage system was a breach of duty.

Comment

The majority reasons in *Darnley* concentrated on whether a duty of care was owed by the defendant trust to Mr Darnley. However, it is surprising that this was the

[3] *Caparo* followed.
[4] *Rahman v Arearose Ltd* [2001] Q.B. 351 followed.
[5] [2001] Q.B. 36.
[6] *Kent* distinguished.

Court's focus given that it is, of course, very well established that hospitals owe a duty of care to their patients (which Mr Darnley was, or was closely analogous to, on account of his having presented himself at the A&E department for treatment despite his not having been admitted). The fact of the matter is that *Darnley* is not a duty of care case at all and the Court of Appeal erred in analysing it as such. There should not even have been any serious dispute between the parties as to whether a duty of care was owed considering that the case fell within a recognised duty category. *Darnley*, properly understood, is in fact a case concerned with the breach element of the action in negligence.

The error that the Court of Appeal committed in *Darnley* is, unfortunately, far from an isolated mistake. Judges not infrequently treat breach cases as though they were duty cases. Judges who commit that error typically say things like: "there was no duty of care owed by the defendant in the present case to do X because the reasonable person in the defendant's position would not have done X." However, the structure of this phrase reveals immediately that the duty of care element is not, in fact, in play at all. The very fact that the court is discussing what the reasonable person in the defendant's position would have done indicates that the dispute is actually about the breach element, that being the only element of the action in negligence that addresses the satisfactoriness of what the defendant did.

The late Tony Weir rightly decried in his *An Introduction to Tort Law* the tendency to elide the breach and duty elements of the tort of negligence. Weir described a case – *Sam v Atkins*[7] – in which the Court of Appeal held that a motorist owed no duty of care to a pedestrian. Weir wrote:[8]

> "In a quite simple case where the defendant motorist collided with a pedestrian who suddenly stepped out from behind a parked vehicle which blocked the defendant's vision, the trial judge held that though the defendant was negligent in driving too fast, her negligence did not cause the injury. The Court of Appeal correctly dismissed the claimant's appeal, but held that the trial judge had given the wrong reason: the right reason, forsooth, was that the motorist owed the pedestrian no duty! In fact, the trial judge was quite correct. Although the defendant was driving faster than was safe in the circumstances, the accident could only have been avoided if she had been driving much more slowly than proper care required; accordingly, her excess speed did not contribute to the injury, for it would have occurred had she been driving quite properly. To decide the case on the ground of 'no duty' rather than, as the trial judge did, on causation, is decidedly peculiar".

Weir properly described the Court of Appeal's decision in *Sam* as "decidedly peculiar". He was right to do so because motorist/pedestrian is an established duty category.

That *Darnley* was a breach case emerges particularly clearly from the fact that all of the judges were overwhelmingly concerned with what the reasonable person in the position of the defendant trust would have done. Sales LJ, for example, referred to

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[7] [2005] EWCA Civ 1452.
[8] Tony Weir, *An Introduction to Tort Law* (2nd ed, OUP, Oxford, 2006) 33 (footnote omitted).

the fact that patients who present at A&E departments cannot expect perfectly accurate information regarding waiting times (at [87]). Similarly, Jackson LJ referred to the fact that waiting areas in A&E departments are "not always havens of tranquillity" and that staff often have to operate under difficult conditions (at [54]). Matters such as these, of course, classically pertain to the breach element of the action in negligence.

The Court of Appeal should have analysed the appeal in *Darnley* as follows. Any suggestion that no duty of care was owed to Mr Darnley should have been given short shrift. That is because the parties stood within an established duty category. In these circumstances, it is straightforward that a duty of care was owed to Mr Darnley. The only question in *Darnley*, relevantly, was whether reasonable care was exercised with respect to Mr Darnley. That question was one for the trial judge, and it required him to apply the familiar negligence calculus pursuant to which the risk and magnitude of the injury to which Mr Darnley was exposed had to be weighed against the cost of taking precautions that would have avoided the risk and the utility of the defendant's conduct.

Moving beyond the error in classification that the Court of Appeal committed in *Darnley*, it is worth noting that many of the reasons given by the Court of Appeal are not, in any event, free from difficulty. Jackson LJ said, for example, that "the position of the A & E staff … is to record the details of new arrivals, to tell them where to wait and to pass on relevant details to the triage nurses. It is not their function or their duty to give any wider advice or information to patients" (at [51]). The problem here is that Jackson LJ has merely cited the consequence of holding that there was no duty of care as though it were a reason for concluding that there was no duty. Jackson LJ has not explained *why* no duty of care should be recognised. At [53], Jackson LJ also said: "Nor do I think it is fair, just and reasonable to impose upon the receptionist (or the defendant acting by the receptionist) a duty not to provide inaccurate information about waiting times. This would add a new layer of responsibility to clerical staff and a new head of liability for NHS health trusts". Again, this is, with respect, unconvincing since Jackson LJ has stated only that to impose a duty would be to impose a duty and, therefore, it would be wrong to impose a duty.

Practice points

- Where the parties are in an established duty relationship, precedent dictates that no question regarding the duty of care element of the action in negligence can arise.
- If the claimant's complaint is that the defendant took insufficient care of his or her interests, the complaint pertains to the breach element of the action in negligence.