Neutral Citation Number: [2017] EWCA Civ 151

Case No: B3/2015/3107

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM High Court, Queen's Bench Division
HHJ Robinson
HQ13X02555

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2017

Before :

LORD JUSTICE JACKSON
LORD JUSTICE McCOMBE
and
LORD JUSTICE SALES

- -

Between :

Michael Mark Junior Darnley	**Appellant / Claimant**
- and -	
Croydon Health Services NHS Trust	**Respondent / Defendant**

- -
- -

Simeon Maskrey QC & Jeremy Pendlebury (instructed by **Russell-Cooke LLP**) for the **Appellant**
Philip Havers QC & Bradley Martin (instructed by **Capsticks LLP**) for the **Respondent**

Hearing date: Thursday 16th February 2017

- -

Approved Judgment

Lord Justice Jackson :

1. This judgment is in seven parts, namely:

Part 1 – Introduction	Paragraphs 2 - 9
Part 2 – The facts	Paragraphs 10 - 16
Part 3 – The present proceedings	Paragraphs 17 - 24
Part 4 – The appeal to the Court of Appeal	Paragraphs 25 – 29
Part 5 – Grounds 1 and 2: Failure to triage the claimant within 15 minutes	Paragraphs 30 – 38
Part 6 – Grounds 3 and 4: Was there any breach of duty by the receptionist and, if so, did it cause the claimant's injury?	Paragraphs 39 – 58
Part 7 – Executive summary and conclusion	Paragraphs 59 – 63

Part 1 – Introduction

2. This is a claimant's appeal in personal injury litigation based upon alleged negligence by the receptionist in a hospital's accident and emergency department. The principal issue in the appeal is whether the receptionist (or the health trust acting by the receptionist) owed any tortious duty to provide accurate information to the claimant about waiting times.

3. There are about 450,000 visits to accident and emergency departments across England every week. (I do not know the figures for Wales.) Therefore the issues in this appeal are of some importance.

4. The hospital involved in this case was at the material time Mayday University Hospital, Croydon. It is now known as Croydon University Hospital. I shall refer to it as Mayday Hospital.

5. The claimant, Michael Darnley, was born on 17th May 1984. He was aged 26 at the relevant time. The defendant is the NHS Trust responsible for Mayday Hospital.

6. I shall use the abbreviation "A & E" for accident and emergency. The trial judge used the term "civilian receptionist" to mean a receptionist without clinical qualifications. I shall use the phrase in that sense.

7. Apparently some hospitals have triage nurses at the reception desk of their A & E departments. The Mayday Hospital, however, like many other hospitals, has civilian receptionists in its A & E department. The triage nurses are at a separate but nearby location. A receptionist takes down the details of each new arrival on a document referred to as an "A & E card". That A & E card is then transferred to the triage nurses for appropriate action.

8. In September 2007 the National Institute for Health and Clinical Excellence published Clinical Guideline 56 entitled "Head Injury. Triage, Assessment, Investigation and Early Management of Head Injury in Infants, Children and Adults". This document has now been superseded, but it was current at the time of the events in issue. I shall refer to it as "the NICE Guideline". Paragraph 1.4.1.6 of the NICE Guideline states:

> "1.4.1.6 All patients presenting to an emergency department with a head injury should be assessed by a trained member of staff within a maximum of 15 minutes of arrival at hospital. Part of this assessment should establish whether they are high risk or low risk for clinically important brain injury and/or cervical spine injury, using the guidance on patient selection and urgency for imaging (head and neck cervical spine)."

9. After these introductory remarks, I must now turn to the facts.

Part 2 – The facts

10. On the evening of Monday 17th May 2010, the claimant was the victim of an assault. He received a violent blow to the head. A friend, Robert Tubman, drove the claimant to the A & E department of Mayday Hospital.

11. The claimant and Mr Tubman duly went to the reception section. A receptionist took down the claimant's details and filled in an A & E card. She recorded the claimant's name, address, occupation, mode of arrival, name of GP and similar matters. She noted that his complaint was a head injury with a duration of 1 hour and 26 minutes. She recorded the time as 8.26 pm.

12. The claimant told the receptionist that he was in considerable pain. The receptionist told the claimant to wait in the waiting area. She added that it would be up to 4 or 5 hours before he was seen.

13. The information which the receptionist gave to the claimant was incorrect. In fact the system was that a triage nurse would examine the claimant within 30 minutes of arrival. That nurse would decide how soon he needed to see a doctor. The volume of work that night was such that many patients had to wait 4 or 5 hours before treatment. But it by no means followed that a patient with a serious head injury would have to wait that long.

14. The claimant and Mr Tubman duly settled down in the waiting area. After 19 minutes the claimant, who was in pain, decided to go home and take paracetamol. At 8.45 pm the claimant and Mr Tubman got up and left, without notifying the reception staff of their decision. A short time later the triage nurse came to look for the claimant, but by then he had gone.

15. Mr Tubman drove the claimant to his mother's home. She arrived shortly after 9 pm. Unfortunately the claimant's condition deteriorated. At 9.42 pm his family called an ambulance. The ambulance took the claimant back to Mayday Hospital. A CT scan of his head revealed the presence of an extradural haematoma. The claimant was transferred to St George's Hospital in London for neurosurgery to remove the haematoma. By then, however, it was too late to prevent permanent injury. The claimant sustained left hemiplegia and long term disabilities.

16. The claimant took the view that the reception staff of Mayday Hospital had been negligent and that such negligence was the cause of his injuries. Accordingly he commenced the present proceedings.

Part 3 – The present proceedings

17. By a claim form issued in the Queen's Bench Division of the High Court on 30th April 2013 the claimant claimed damages against Croydon Health Services NHS Trust for injuries caused by negligence of staff at Mayday Hospital. The essence of the claimant's claim was that the staff had delayed too long before assessing him and had given incorrect information about waiting time.

18. The defendant served a defence denying breach of duty, but admitting that if the claimant had been present when called for triage, his treatment would have been prioritised. The defendant subsequently admitted that if the claimant had received that prioritised treatment he would have made a full recovery.

19. Both parties instructed expert witnesses. The claimant's expert was Mr J. Heyworth, a consultant in emergency medicine. The defendant's expert was Dr G. Campbell-Hewson, another consultant in emergency medicine. The two experts conferred and produced a helpful joint statement dated 10th April 2015.

20. The experts' joint statement included the following paragraphs:

> "1. The experts agreed that the NICE Guidance CG 56 represented the appropriate guidance for a patient with a head injury in 2010."
>
> "2. The experts agreed that the Guidance should apply to all head injured patients, whether or not there had been reported loss of consciousness.
>
> The experts recognised that the standard of 15 minutes to triage may not always be achievable, being influenced by the level of activity in the Emergency Department and other clinical priorities."

> "4.3 The experts agreed that Monday evening is typically a busy evening of the week in an Emergency Department. It appears that there was a high volume of clinical workload in terms of numbers and acuity at the time of Mr Darnley's presentation. In all Emergency Departments there are finite numbers of nursing staff available for triage and it may not always be possible to triage all patients presenting with a head injury within the target time of 15 minutes."

> "5. The experts agreed that notwithstanding the potential confounders of activity and workforce, Mr Darnley should have been triaged within 30 minutes of arrival at the Emergency Department."

21. The action came on for trial before HH Judge Robinson, sitting as a judge of the High Court, in April 2015. The witnesses on the claimant's side were the claimant, Mr Tubman, three members of the claimant's family and Mr Heyworth. The defendant's witnesses were Mrs Battie (the receptionist on late duty, who was present when the claimant returned by ambulance), Ms Ashley and Ms Reeves-Bristow (the two receptionists on duty earlier in the evening) and Dr Campbell-Hewson. It must have been either Ms Ashley or Ms Reeves-Bristow who dealt with the claimant when he first came to the A & E department, but neither of those witnesses had any recollection of the events in question. They could only say what was their usual practice.

22. The judge handed down his reserved judgment on 31st July 2015, dismissing the claimant's claim. I would summarise his reasoning as follows:

    i) The claimant's condition on arrival was not such that the non-clinician reception staff should have realised that he needed priority triage.

    ii) Given the pressures on the A & E department that night, the failure to triage the claimant within 15 minutes was not a breach of duty.

    iii) There would have been a duty to triage the claimant within 30 minutes, but he left the hospital before that period expired.

    iv) It was not part of the reception staff's duty to give information about waiting times. They were not in breach of duty to the claimant (a) by failing to provide accurate information or (b) by providing inaccurate information to him in respect of waiting times.

    v) It was not "fair, just and reasonable" to impose such a duty of care upon the reception staff.

    vi) Alternatively, even if the reception staff were in breach of duty, the inaccurate information which they provided did not cause the claimant's injury. The claimant took the decision to leave and he must take responsibility for that decision.

23. In relation to the finding that it would not be "fair, just and reasonable" to impose the suggested duty of care upon the reception staff, the judge gave the following reasons at paragraph 91 of his judgment:

> "(1) The primary function of a civilian receptionist in an A&E department is to complete the relevant registration form so that clinical decisions can be taken by health care professionals. There is, of course, a duty to complete this task competently since clinical decision making relies upon accurate information being provided.
>
> (2) The provision of information concerning waiting times is a courtesy that is rightly afforded to patients, and long may that courtesy continue. However, it is going too far to impose liability in damages either for failure to provide the information or to provide information that is inaccurate. Ultimately, the waiting time for a patient is a matter for clinical judgment to be made by a health care professional.
>
> (3) The imposition of such liability carries with it a risk, the magnitude of which I consider to be significant, that civilian reception staff, certainly in A&E departments and perhaps elsewhere, will simply be instructed not to do anything other than complete the registration forms. It will be far simpler and safer for health care providers such as the Defendant in this case to instruct their reception staff to reply to any enquiry "I am not able to answer that query". That would be a regrettable state of affairs since the natural inclination of reception staff is, I am sure, to be helpful and informative."

24. The claimant was aggrieved by the judge's decision. Accordingly, he appealed to the Court of Appeal.

Part 4 – The appeal to the Court of Appeal

25. By an appellant's notice filed on 22nd September 2015, the claimant appealed to the Court of Appeal on four grounds. I would summarise those grounds as follows:

    i) The defendant's failure to triage the claimant within 15 minutes was a breach of duty, even if he was not assessed as priority.

    ii) Contrary to the judge's finding, the claimant's presentation on arrival was such as to merit priority triage.

    iii) The judge erred in assessing the scope of the duty owed by the reception staff.

    iv) The judge erred in his application of the "fair, just and reasonable" test.

26. This appeal came on for hearing on 16th February 2017. Mr Simeon Maskrey QC, leading Mr Jeremy Pendlebury, appeared for the appellant/claimant. Mr Philip Havers QC, leading Mr Bradley Martin, appeared for the respondent/defendant.

27. Mr Maskrey concentrated most of his arguments on grounds 3 and 4, which he dealt with compendiously without differentiating between those two grounds. He dealt with grounds 1 and 2 at the end of his submissions much more briefly, perhaps recognising the difficulty of overturning findings of fact in the Court of Appeal.

28. Mr Havers dealt with the four grounds in the same manner. I am grateful to all counsel for their assistance. They pressed on courteously despite many interventions from the bench.

29. I must now address the four grounds of appeal. Following the lead of counsel, I will take those grounds in pairs and I will deal with grounds 1 and 2 more briefly than the later two grounds.

Part 5 – Grounds 1 and 2: Failure to triage the claimant within 15 minutes

30. Logically, the first issue to consider is whether the claimant merited priority triage. Mr Maskrey contends that he did. In support of this submission he relies upon passages in the witness statements of the claimant and Mr Tubman, as to the seriousness of the claimant's condition. He also relies upon passages in the receptionists' statements concerning normal practice. He also points to evidence that the receptionists were concerned after the claimant and Mr Tubman had departed.

31. I do not accept Mr Maskrey's argument. The judge provided perfectly logical reasons for his decision. First, the claimant gave numerous personal details to the receptionist which appeared on the A & E card. Mr Tubman was in no position to give those details. So clearly the claimant was coherent and able to respond to questions. Secondly, the judge accepted the evidence of Dr Campbell-Hewson as to the significance of the claimant's presentation.

32. The judge heard the oral evidence from the witnesses upon whom Mr Maskrey relies. We have not heard that oral evidence. In my view it is not open to this court to interfere with the judge's decision on the issue of priority triage.

33. Accepting, therefore, that the claimant was not a priority case, the next question is whether the triage nurses should have attended to him during the 19 minutes when he was present. The judge held that the nurses' failure to do so was not a breach of duty.

34. Mr Maskrey contends that the judge fell into error. Triage nurses ought to have examined the claimant within 15 minutes in accordance with paragraph 1.4.1.6 of the NICE Guideline. He submits that the defendant has all the relevant information. Therefore it is for the defendant to establish that there was a good explanation for missing the 15 minute target.

35. As Sales LJ pointed out in argument, the defendant has disclosed its records concerning events in the A & E department on the evening of 17th May 2010. The experts on both sides have commented on the significance of those records. This is not a case in which the burden of proof has shifted. Nor, I would add, is this one of those rare cases where the burden of proof is decisive.

36. Both experts were of the opinion that on a busy night, such as Monday 17th May 2010 at the Mayday Hospital, it may not be possible to triage all head injury patients within

the target time of 15 minutes. See paragraph 4.3 of the joint statement. Counsel have taken us to the key parts of the oral evidence dealing with this issue. I do not accept the submission that the experts were proceeding on a misunderstanding of the facts.

37. The judge found that a detailed analysis of the A & E records did not establish either party's case. His overall conclusion was as follows:

> "What I am prepared to find is that it seems to me to be extremely unlikely that the triage nurses were not fully engaged that night. The alleged breach of duty is a failure to meet a tight target of 15 minutes by a factor of 4 minutes. I am not prepared to find that this amounts to a breach of a clinical duty of care. It is right that there must be a longstop, or the target becomes meaningless. The consensus of opinion amongst the experts is that the longstop position is 30 minutes. That seems entirely appropriate."

38. In my view the judge was entitled to reach that conclusion on the evidence. In the result, therefore, I would dismiss the first and second grounds of appeal.

Part 6 – Grounds 3 and 4: Was there any breach of duty by the receptionist and, if so, did it cause the claimant's injury?

39. In relation to these grounds of appeal, the claimant relies upon the following findings of fact made by the judge:

   i) The receptionist told the claimant and Mr Tubman that the claimant would have to wait for up to four or five hours before being seen.

   ii) Although it was normal practice to tell patients that a triage nurse would see them within 30 minutes, the receptionist did not say anything like that to the claimant on this occasion.

   iii) If the claimant had been told that a triage nurse would see him within 30 minutes, he would have waited.

   iv) "It is reasonably foreseeable that a person who believes it may be four or five hours before they will be seen by a doctor may decide to leave, in circumstances where that person would have stayed if they believed they would be seen much sooner by a triage nurse."

40. The last of those four findings was based in part upon the medical literature. This shows that in the UK 3-8% of patients leave emergency departments without being seen, the precise percentage varying between NHS trusts.

41. On the basis of those factual findings Mr Maskrey submits that it was the duty of the receptionist, or of the defendant acting by its reception staff, to take reasonable care to give accurate information, or at least not to give inaccurate information, to incoming patients about the likely waiting time.

42. The judge rejected that proposition. He held that the function of a civilian receptionist in an A & E department is to complete the relevant registration form, so that clinical

decisions can be taken by healthcare professionals. The provision of information concerning waiting times is a courtesy. It is not the performance of a legal obligation. There is no liability if the receptionist fails to provide accurate information or provides inaccurate information to the patient. Mr Havers, on behalf of the defendant, supports that analysis.

43. Let me now turn to the authorities cited in the skeleton arguments and oral submissions. Both counsel take as their starting point the House of Lords decision in *Caparo Industries PLC v Dickman & Ors* [1990] 2 AC 605. In that case the plaintiffs, having taken over a public limited company (F), alleged that the audited accounts on which they had relied were inaccurate and misleading. They brought proceedings against two directors for fraud and against the auditors for negligence in certifying that the accounts showed a true and fair view of F's position on the stated date. On a preliminary issue the House of Lords held that the auditors owed no duty to the plaintiffs, either as potential investors or as existing shareholders considering the purchase of further shares. Three principal speeches were delivered by Lord Bridge, Lord Oliver and Lord Jauncey. In the general part of his speech Lord Bridge said that the quest for a single general principle to determine the existence and scope of the duty of care in any situation had failed. He continued:

> "What emerges [from recent decisions] is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope."

44. The courts have approved that approach to duty of care issues on many subsequent occasions. See, for example, *Spring v Guardian Assurance plc* [1995] 2 AC 296. On occasions the "fair, just and reasonable" test has been satisfied because D has voluntarily taken it upon himself to supply information to P which he knows P is likely to rely upon. *Lennon v Commissioner of Police of the Metropolis* [2004] EWCA Civ 130; [2004] 1 WLR 259 (an authority on which both counsel have relied for different purposes) illustrates this principle. In *Lennon* a senior personnel executive employed by the Metropolitan Police Service gave incorrect advice about housing allowances to a police officer. She encouraged him to rely on that advice and he did so with disastrous consequences. The county court judge held that the

Metropolitan Police were liable for the officer's losses and the Court of Appeal upheld that decision.

45. The question whether the law of tort imposes a duty of care in any given situation is not a binary question admitting of a simple yes or no answer. It is necessary also to consider the scope of the suggested duty and the range of consequences for which the defendant is assuming responsibility or is to be held responsible. Laws LJ stated this principle in *Rahman v Arearose* [2001] QB 351, an authority upon which the judge relied in the present case. The issue in *Rahman* was the allocation of responsibility between successive tortfeasors in a personal injury case. At [33] Laws LJ stated:

> "So in all these cases the real question is, what is the damage for which the defendant under consideration should be held *responsible*. The nature of his duty (here, the common law duty of care) is relevant; causation, certainly, will be relevant – but it will fall to be viewed, and in truth can only be understood, in light of the answer to the question: from what kind of harm was it the defendant's duty to guard the claimant?"

46. In support of his case for imposing liability upon the receptionist (or the defendant acting by the receptionist) for the claimant's injuries, Mr Maskrey relies upon *Kent v Griffiths* [2001] QB 36 and *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] AC 1732. In *Kent*, K suffered an asthma attack. Her doctor telephoned 999 and asked for an ambulance to take her to hospital. The ambulance was late and K suffered permanent brain damage. Turner J held the ambulance service liable. The Court of Appeal upheld that decision, holding that it was fair, just and reasonable to impose such a duty upon the ambulance service after they had accepted the 999 call. At paragraph 45 Lord Woolf MR, with whom Aldous and Laws LJJ agreed, said:

> "The ambulance service is part of the health service. Its care function includes transporting patients to and from hospital when the use of an ambulance for this purpose is desirable. It is therefore appropriate to regard the LAS as providing services of the category provided by hospitals and not as providing services equivalent to those rendered by the police and fire service. Situations could arise where there is a conflict between the interests of a particular individual and the public at large. But, in the case of the ambulance service in this particular case, the only member of the public who could be adversely affected was the claimant. It was the claimant alone for whom the ambulance had been called."

47. In *Michael* M made an emergency call to the police saying that her former partner had attacked her and would be returning to attack again. The call handler notified the Gwent police, who graded the call as requiring a 5 minute response. The Gwent police notified the South Wales police, who graded the matter as requiring a 1 hour response. By the time the South Wales police arrived, the former partner had murdered M. The Court of Appeal summarily dismissed an action against the South Wales police brought by M's estate and dependants. The Supreme Court by a majority upheld that decision. Lord Toulson, delivering a judgment on behalf of the majority, approved the

Court of Appeal's decision in *Kent*. He commented on that decision as follows at paragraph 81:

> "The position of the ambulance service was considered by the Court of Appeal in Kent v Griffiths [2001] QB 36. A doctor attended the home of a patient suffering from an asthma attack and called for an ambulance to take her immediately to hospital. The control replied "Okay doctor." After 13 minutes the ambulance had not arrived and the patient's husband made a further call. He was told that an ambulance was well on the way and should arrive in seven or eight minutes. For unexplained reasons it did not arrive until 40 minutes after the first call. The patient suffered a respiratory arrest which would have been prevented if the ambulance had arrived in a reasonable time. The patient's doctor gave evidence that if she had been told that it would take the ambulance service 40 minutes to come, she would have advised the patient's husband to drive her to hospital and would have gone with them. The Court of Appeal upheld the trial judge's finding of liability against the ambulance service. It would have been sufficient to hold that the acceptance of the doctor's request for an ambulance to come immediately gave rise to a duty of care but Lord Woolf MR (with whom the other members of the court agreed) went further. He held that the ambulance service, as part of the health service, should be regarded as providing services equivalent to those provided by hospitals, and not as providing services equivalent to those rendered by the police and fire services. Accordingly, the staff of the ambulance service owed a similar duty of care to that owed by doctors and nurses operating in the health service (para 45)."

48. Mr Maskrey submits that there is an analogy between the ambulance service and the reception staff in an A & E department. He also points out that errors made by telephone staff in the ambulance service can give rise to liability for personal injury.

49. Mr Havers submits that both *Kent* and the reinterpretation of *Kent* in *Michael* should be distinguished. He takes his stand firmly on the reasoning of the judge. The reception staff in the A & E department of the Mayday Hospital were there to perform a clerical function, namely to take down details of new arrivals and pass them on to the triage nurses. Giving information about waiting times was not part of their function.

50. Mr Havers points out that A & E departments in major hospitals are busy places, with staff often operating under great pressure. Waiting times vary according to ever changing circumstances. That is correct. I am quite satisfied that there is no general duty upon civilian receptionists to keep patients informed about likely waiting times.

51. In my view there is an important distinction between a telephonist in the ambulance service and an A & E receptionist. The telephonist in the ambulance service often passes information to paramedics or patients, in order that people can act on that information. Ambulance drivers need to know where to go. Patients waiting for

ambulances may need to decide whether to stay where they are or to arrange their own transport to hospital (a scenario discussed by Lord Toulson in *Michael*). Therefore the law imposes on the ambulance service, by its telephone staff, a duty to take reasonable care to pass on correct information. The position of the A & E reception staff in a hospital such as Mayday Hospital is different. Their function 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.

52. In the present case the gravamen of the claimant's complaint is not failure to inform. It is the giving of incorrect information by the receptionist. I have come to the conclusion that this is not an actionable misstatement. The receptionist took down the claimant's details and, correctly, told him to wait in the waiting area. When she added that he would have to wait for up to 4 or 5 hours, she was not assuming responsibility to the claimant in the sense of accepting responsibility for the catastrophic consequences which he might suffer if he simply walked out of the hospital. Foreseeability alone is not sufficient to give rise to a duty of care.

53. Nor do I think that 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.

54. A & E department waiting areas are not always havens of tranquillity. Tempers can become frayed, as patients or their relatives are pressing for early treatment and staff are seeking to ensure the orderly management of new arrivals and the prioritising of emergencies. The scene at Mayday Hospital on the night of 17th May 2010 may be a good example. It appears that in this case some harsh words were spoken on both sides between the claimant and the receptionist.

55. I am not usually sympathetic to 'floodgates' arguments. In the present case, however, I do see force in the judge's concerns. Litigation about who said what to whom in A & E waiting rooms could become a fertile area for claimants and their representatives. Alternatively, healthcare providers could close down this area of risk altogether by instructing reception staff to say nothing to patients apart from asking for their details. That too would be unhelpful, as the judge observed.

56. If I am wrong in that conclusion, and if the receptionist (or the defendant acting by the receptionist) was in breach of duty by giving incorrect information to the claimant, the claim still cannot succeed. The scope of that duty cannot extend to liability for the consequences of a patient walking out without telling the staff that he was about to leave.

57. As the judge said, there comes a point when people must accept responsibility for their own actions. The claimant was told to wait. He chose not to do so. Without informing anyone of his decision, he simply walked out of the hospital.

58. I would therefore reject the third and fourth grounds of appeal.

Part 7 – Executive Summary and Conclusion

59. This is a tragic case. On 17th May 2010 the claimant presented himself at the Mayday Hospital's A & E department with a head injury. The receptionist told the claimant and his friend to wait. She added that the claimant would be seen in up to 4 or 5 hours. The claimant, being in pain, got fed up with waiting and left after 19 minutes. Unfortunately the receptionist had not said, and the claimant did not know, that a triage nurse would examine him within 30 minutes.

60. As a result of leaving hospital untreated, the claimant suffered serious injury. When he later returned by ambulance, it was too late to prevent the development of permanent brain damage.

61. The trial judge dismissed the claimant's claim. He held that there was no duty to triage the claimant within 19 minutes. He also held that the receptionist (or the defendant health trust acting by the receptionist) owed no tortious duty to the claimant in respect of the information that she gave about waiting time.

62. The claimant now appeals to the Court of Appeal. I would dismiss this appeal. On the evidence the judge was entitled to find that the nurses' failure to triage the claimant within 19 minutes was not a breach of duty. The claimant cannot succeed on the alternative basis of negligent misstatement by the receptionist. This is because (a) neither the receptionist nor the defendant health trust acting by the receptionist owed any duty to advise the claimant about waiting times, alternatively (b) the damage which the claimant suffered was outside the scope of any duty owed, alternatively (c) there was no causal link between any breach of duty and the claimant's injury. The claimant was told to wait, but he chose to leave the hospital.

63. Accordingly, I would dismiss this appeal.

Lord Justice McCombe :

64. I am grateful to Jackson LJ for his statement of the circumstances in which the claim in this case arose and for setting out the issues debated before us in the helpful arguments of counsel, to which I would like to pay tribute. Unfortunately, however, I find myself in disagreement with Jackson LJ on the issues which he (like counsel) groups under Grounds 3 and 4. In my judgment, on the very particular facts of this case, I consider that, on the factual findings made by the judge, the defendant was in breach of its duty to the claimant and that that breach caused the claimant's injury.

65. In reaching my conclusion on this point, I share Jackson LJ's broad assessment of what is likely to be frequently the prevailing atmosphere in A & E department waiting areas, which he describes in paragraph 54 above. I am also conscious that, in such circumstances, circumspection has to be applied before a defendant NHS Trust is held responsible for inaccurate information communicated to patients on arrival at a hospital. It is only because of what I see to be the particular facts found by the judge here that I find (sadly) that the defendant was indeed in breach of a duty owed to the claimant. My conclusions are, in the modern jargon, "fact specific". In this respect, I endeavour to apply what Lord Bridge said in *Caparo v Dickman* (supra) about "…features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a

given scope". I agree with Jackson LJ that the question of whether the law of torts imposes a duty of care in any given situation is not a binary question admitting of a simple yes or no answer.

66. To explain my reasons for differing from the judge and from my Lord on this part of the case, I think it is necessary to state a little more fully the facts found by the judge.

67. The learned judge, in his careful judgment, made what seem to me extremely important findings as to what actually happened when the claimant arrived at this hospital on the evening in question. I confine myself to the findings made in this respect, as based entirely upon the evidence of Mr Tubman which the judge described as "compelling". The material was to be found in paragraphs 6 and 7 of Mr Tubman's witness statement, recorded by the judge at paragraphs 15 and 30 of the judgment. The passages from the statements were in these terms:

> "15 … Michael tried to tell the lady at the desk that he had been involved in an incident in which somebody had hit him over the back of his head and he believed he had a head injury. He told the lady that he was feeling very unwell and his head was really hurting. The lady did not have a helpful attitude at all to Michael. She seemed more concerned as to how the injury had occurred and she asked Michael if the police had been involved. Michael tried to explain to her that he had been hit over the head and was worried that he had a head injury and needed to be seen quickly. I also tried to explain to the lady that Michael was really unwell and we were worried that he had a head injury and needed urgent attention. …
>
> 30 … The lady told Michael in a very off-hand way that he would have to go sit down and would have to wait 4-5 hours before somebody looked at him. Michael said that he could not wait that long because he felt he was about to collapse. The lady told him that if he did collapse then he would be treated as an emergency. At this point she made it clear that she was not interested in dealing with him any more and was pulling down the shutter."

Mr Tubman added in cross-examination this (as observed by the judge in paragraph 34):

> "34 … If we had been told we would be seen in 30 minutes I would have stayed with my friend for 30 minutes. I was told he would be seen up to four to five hours. I am no professional. I thought it meant he could be waiting for up to four to five hours – that might be the maximum time we might have to wait. …
>
> … I was prepared to wait for as long as necessary. If we had been told he would be seen in 30 minutes I would have made sure he waited."

68. This evidence, accepted by the judge, led me to the view that this was (as I put to Mr Havers QC in argument) “a bad case”. The effect of the information given to the claimant was that he would have to wait “up to 4 or 5 hours” before being attended by anyone and, when he said he felt that he might collapse, he was told that if that happened he would then be treated as an emergency. The information so given could only have given the claimant the impression that he would not be seen or assessed by anyone sooner, short of something like a collapse. The information given was not only uncaring in tone, as related in Mr Tubman’s evidence, it was also untrue.

69. Jackson LJ has set out the relevant NICE guideline and the modified and agreed evidence of the experts as to the realistic interaction of that guideline with the realities of a busy A & E department. The result was, as the judge records in paragraph 55, the following:

> “55 … The experts agree that the NICE Guidance for triage within 15 minutes applied in principle, although the potential confounders of the overall activity in the department at that time, including the numbers of patients and the nature of their presentation (casemix), would influence the achievable interval.
>
> The experts agreed that the expected information would be that the patient would be asked to wait in the waiting room with an expectation to be seen by the triage nurse within 30 minutes.”

It was not suggested that this hospital was generally acting otherwise than within this timescale, and indeed the claimant, on the facts as found, would have been seen by the triage nurse within this time.

70. The passage from the judgment of Lord Woolf MR in *Kent v Griffiths* (supra), as relied upon by Mr Maskrey for the claimant, has been quoted by Jackson LJ in paragraph 46. In paragraph 51 my Lord draws a distinction between an ambulance service telephonist and an A & E receptionist for present purposes. It is a distinction which I find myself unable to accept. It is said that patients waiting for ambulance services may need to decide whether to stay where they are or to arrange alternative transport. In my view, when given information about waiting times, patients need to know that in true urgency the hospital can act quickly and that initial assessment will occur sooner than the well-known average national A & E waiting times until treatment. I am not confident that it is equally well-known that hospitals do operate triage systems precisely to cater for this type of case.

71. I do not accept that the functions of the hospital can be divided up into those of receptionists and medical staff. The duty of the hospital has to be considered in the round and, if the hospital has a duty not to misinform patients, the duty is not removed by interposing non-medical reception staff as a first point of contact. I agree with Jackson LJ that it is not the function of reception staff to give wider advice or information in general to patients, but, in my judgment, it is the duty of the hospital not to provide *misinformation* to patients and that duty is not avoided by the misinformation having been provided by reception staff as opposed to medical staff. In this respect, I do not agree with what my Lord says in paragraph 51 above. Nor, with respect to him, do I accept Mr Havers’ submission, recorded at paragraph 49 above, that the function of the reception can be hived off as being merely clerical.

Indeed, their functions were clerical, but what matters is the duty of the hospital and the question is whether it owed and discharged a duty to the claimant on this occasion. I would have thought there would be no doubt that the hospital would have been liable had it been a member of medical staff that had reacted in this manner to the claimant's presentation on this occasion. I do not consider that the responsibility of the hospital can be shifted because the misinformation was provided by non-medical staff.

72. Assuming, as I think one must, that this hospital was operating within the acceptable range of triage timing agreed by the experts, it would not have been beyond the hospital's reasonable resources to tell patients such as this claimant, by way of leaflet if nothing else, that head injuries would normally be assessed initially by a trained member of medical staff within about 30 minutes.

73. The scope of a hospital's duty to patients presenting themselves at A & E was considered by Nield J in *Barnett v Chelsea and Kensington Hospital Management Committee* [1967] QB 428.

74. In that case three night-watchmen colleagues presented themselves at a hospital casualty department complaining that they had been vomiting for three hours after drinking tea. The nurse reported the matter by telephone to the duty medical casualty officer who instructed her to tell the men to go home and to call their own doctors. She did that and the men left. About 5 hours later, one of the men died from arsenic poisoning. The evidence showed that he was likely to have died from the poisoning even if he had been admitted to the hospital and had received treatment. Not surprisingly, it was held that negligence on the part of the casualty officer had not caused the man's death. However, Nield J held that the hospital had owed a duty of care to the man on his presentation to the hospital. The judge specifically noted that A & E departments are misused from time to time by the public.

75. The material passages in the judgment seem to me to be these at pp. 435 and 436 of the report. Nield J said,

> "This is not a case of a casualty department which closes its doors and says that no patients can be received. The three watchmen entered the defendants' hospital without hindrance, they made complaints to the nurse who received them and she in turn passed those complaints on to the medical casualty officer and he sent a message through the nurse purporting to advise the three men. Is there, on those facts, shown to be created a relationship between the three watchmen and the hospital staff such as gives rise to a duty of care in the defendants which they owe to the three men? …
>
> … In my judgment, there was here such a close and direct relationship between the *hospital* and the watchmen that there was imposed upon the *hospital* a duty of care which they owed to the watchmen. Thus I have no doubt that Nurse Corbett and the medical casualty officer were under a duty to the deceased to exercise that skill and care which is to be expected of persons in such positions acting reasonably, or, as it is, I think

> very helpfully, put by the learned author of Winfield on Torts, 7th ed. (1963), p.183:
>
> > 'Where anyone is engaged in a transaction in which he holds himself out as having professional skill, the law expects him to show the average amount of competence associated with the proper discharge of the duties of that profession, trade or calling, and if he falls short of that and injures someone in consequence, he is not behaving reasonably.'
>
> And the author proceeds to give a warning that the rule must be applied with some care to see that too high a degree of skill is not demanded, and he gives the example: 'a passer-by who renders emergency first-aid after an accident is not required to show the skill of a qualified surgeon'." (Italics added)

76. While clearly the receptionists here were "unskilled" in the material sense stated by Nield J, it is the hospital's overall duty that has to be assessed. It seems to me that that overall duty was that which Nield J identified in the passage that I have quoted and that that duty was the same as that owed to the claimant in this case.

77. Here the hospital told this claimant that he would receive attention in anything up to four or five hours. That was incomplete and inaccurate information and, in my judgment, imparted negligently. The risks from head injuries were well known within the hospital. Equally, the foreseeability of patients at A & E leaving before being seen (as found by the judge) should equally have been known. It seems to me, therefore, that the reality of the triage system should have been imparted to this claimant in view of his presentation on arrival. The failure to do so was, in my view, on the facts of this case a breach of duty by the hospital.

78. The learned judge found (at paragraph 36 of his judgment) as follows:

> "36. I am also satisfied, and I so find, that if the Claimant had been told he would be seen within 30 minutes, he would have waited until he was seen. For the avoidance of doubt I find that Mr Tubman would have been successful in persuading the Claimant to wait, even if the Claimant had said he wanted to go."

As the judge records (at paragraph 4) it was agreed that had the claimant remained at the hospital he would have been treated sufficiently sooner to the extent that he would have gone on to make an essentially full recovery.

79. It seems to me, therefore, that those matters make out the claimant's case that if he had been given the correct information he would not have suffered his injury. On that basis, the breach of duty, that I consider that the judge should have found (for the reasons given above), caused the injury and the claim should have succeeded. In so far as the judge said (at paragraph 92) that the connection, between the inadequacies of the information and the harm suffered, was broken because the decision to leave was that of the claimant, that is inconsistent with the judge's factual findings that I have set out above.

80. For these reasons, I would allow the appeal.

Lord Justice Sales :

81. I agree with Jackson LJ that the appeal should be dismissed for the reasons he gives. I add a short judgment of my own in relation to Grounds 3 and 4.

82. Although I do not think it affects the analysis or outcome, in my opinion this case falls more in the category of a failure to speak to explain the waiting time until the claimant might be seen by a triage nurse, rather than in the category of a positive misstatement of the position. The judge found that the receptionist told the claimant that he would have to wait for up to 4 or 5 hours to be seen. That was accurate, on the assumption that the receptionist took herself to be responding to a question about when the claimant would be seen by a doctor, since even with triage the wait for that could be that long.

83. Like me, the judge seems to have thought that the case fell into the failure to speak category: para. 90. However, he also made it clear that whether the case was one of failure to provide information or one of provision of information that was inaccurate as to the waiting time until the claimant would be seen by a triage nurse, the position would be the same, i.e. that no relevant duty of care would arise: para. 91(2). I agree with this. From the point of view of asking the question of whether it is fair, just and reasonable to identify a duty of care in the context of the present case, I do not think that the issue of liability should turn on very subtle differences in the language used on a particular occasion by a busy receptionist in a hard-pressed A & E department.

84. The position in A & E departments will typically be fluid, as the available medical staff respond to fluctuating demand for services in the course of any period. In this context, in my view, the court should be slow to find that a duty of care in law could arise on the part of a receptionist or an NHS trust to provide precise and accurate information about the length of time until a patient might be seen by a triage nurse. If such a duty were imposed, it is difficult to see why it would not extend to an obligation to correct any such information already provided to patients, as the waiting time information provided to them came to be falsified by any later sudden pressure on available A & E resources. In my opinion this tends to show that it is not fair, just or reasonable to impose the duty of care in law which is contended for. If, after the reception of some patients, there was a sudden influx of further and potentially more urgent patients (e.g. because of a road accident in the vicinity with multiple casualties), I do not consider that there is any legal duty on a receptionist to find the individuals to whom information had already been provided and tell them the waiting time information given to them had changed. That might be a courteous and helpful thing to do, but there is no legal duty sounding in damages to do it.

85. It is foreseeable that people attending A & E will use information they are given about waiting times to calculate for themselves whether they wish to stay and wait to be seen. But when considering whether a legal duty of care should be imposed governing the provision of information by a receptionist in A & E, I do not consider that it is fair, just or reasonable to impose a duty of fine-grained perfection regarding the information provided. The core function of a civilian receptionist is to admit presenting individuals into the A & E service, and it is in relation to that core function that it is reasonable to expect them to be trained by their employing NHS Trust and to

exercise proper care, so as to justify imposition of a duty of care in law. So, for example, if a receptionist told someone seeking medical assistance that the A & E department was closed, without reasonable grounds for doing so, that might well be capable of founding a claim in tort. By contrast, providing information about how long things might take to occur once an individual is admitted is peripheral to that core function.

86. Moreover, upon admission of an individual to A & E (and with due care taken by the civilian receptionist to pass on information about them to the medical team on duty), the interest of that individual in gaining access to medical treatment to secure their physical well-being will have been satisfactorily protected in the way in which, as a matter of legal duty, it is reasonable to expect. That individual will know that they are in the right place to receive medical treatment and that such treatment will be forthcoming if they are patient and wait. And if they experience a deterioration in their condition, they can approach reception again to bring that to the receptionist's attention. This distinguishes the present situation from a case where an ambulance service gives an inaccurate time for arrival of an ambulance, as discussed by Jackson LJ above, thereby negligently inducing someone to wait in the wrong place for medical assistance, at their home, rather than getting urgently to hospital by other means.

87. By contrast, it is my view that in a case like the one before us it is not as a matter of legal duty incumbent on a receptionist and the employing NHS trust to provide minute-perfect or hour-perfect information about how long the wait might be. Such information might help the presenting individual to plan how to spend their time and whether they feel it is worthwhile from their own point of view to stay to receive the medical assistance which is on offer to them, but it is not essential as a step in getting them to the right place for medical assistance to be on hand for them. The receptionist's obligation is to ensure the basic offer of provision of medical assistance is made, not to hold the presenting individual harmless against their own decision not to wait, even if that decision is informed by information provided by the receptionist about how long waiting times might be. Neither the receptionist nor their employer can be taken to have assumed legal responsibility for provision of such information as a core aspect of the service which they are in place to provide. Nor are they paid anything, such as might lead to the conclusion that they have assumed such legal responsibility.

88. In my judgment, the fair, just and reasonable view is that such information is provided as a matter of courtesy and out of a general spirit of trying to be helpful to the public, as the judge held, and that its provision is not subject to a duty of care in law such that compensation must be paid if a mistake is made. Imposition of such a duty would be likely to lead to defensive practices on the part of NHS trusts to forbid their receptionists to provide any information about likely waiting times, as the judge observed. This reflects the fact that, as noted above, provision of such information is not part of the core function performed by a receptionist. It also indicates that there would be a social cost of imposition of a duty of care, in terms of withdrawal of information which is generally helpful to the public when provided as a courtesy, which is not offset by considerations of justice as between claimant and defendant in this sort of case.