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Newsletter | July 2020
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July 2020
An Update from Complete Counsel

Claire Labio Practice Director

So the world is slowly moving towards a new 'normal'. I have to say I'm relieved, not least because it means I get to eat out again now and can have a weekly release from cooking for the children which can be quite demanding with hungry teenagers.

As a business we are entering what is classically our quiet period. July and August are typically months where most of our readership take time off with their families so we inevitably see a drop off in work.

It will be interesting to see what happens this year to the work flow. Whether people are postponing their holiday time or not. We have been lucky not to have been affected by the lockdown period. I have you all to thank for that. Thanks for remaining loyal to our business. Thanks for the repeated instructions and ensuring our Barristers are kept busy and out of trouble. It means a lot as I know there are some other Chambers who have not been so fortunate.

We have also been using lockdown to sharpen up our knowledge and skills. Charles Austin in particular should be given credit for this as he has been busy drafting each month to ensure you all have something to read.

Our training website pro-vide-law.co.uk contains some of the most recent articles including Paul -v- The Royal Wolverhampton NHS Trust – A new hope for secondary victims.

In this month's edition, Ana Samuel, Deputy Coroner for Birmingham and Samuel Irving our paralegal discuss Ana's case of Maguire and the impact for Coroners. I have seen a few pieces on this so far but its always best to hear it from the horses mouth so to speak.

Lastly, thanks for the feedback I receive monthly about the newsletter. I appreciate it as it means we're doing something right.

Claire

Section 28 of the Limitation Act 1980: A trap for the unwary?

Charles Feeny Barrister

Karl Llewellyn, the great American legal academic and exponent of legal realism, initiated his students into the study of law by requiring them to stand up and chant in unison: *"Never paraphrase a statute."*

Any personal injury or clinical negligence practitioner will tell you that limitation does not run when a person is under a disability. If you ask for authority for this proposition, you will be referred to Section 28 of the Limitation Act 1980. However, this is a paraphrase of the section and does not reflect its actual wording.

> "(1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired."

By virtue of subsection (5) in the case of a personal injury action, the period of six years is shortened to three years.

Section 28 therefore only applies where the Claimant was under a disability at the date of the accrual of the cause of action.

This issue arose recently in a claim where I was instructed for the Defendants. The Claimant was seeking to amend the Particulars of Claim in a clinical negligence action. The new allegations amounted to a new cause of action. If the application to amend was made beyond the end of the limitation period, then CPR 17.4 applied, which was restrictive of the power to amend. The Claimant's case was that there was no issue as to limitation because the Claimant was under a disability having suffered a cerebral injury secondary to septicaemia. This was a correct assertion at the date of the application, but analysis of the medical evidence showed that the development of the cerebral injury had been insidious and that the Claimant had suffered material injury prior to losing capacity. On this basis, Section 28 had no application. Therefore the new cause of action had accrued more than three years prior to the date of the application. As the case could not be brought within the restrictive circumstances of CPR 17.4, the amendment was disallowed.

I would like to credit this success to my encyclopaedic knowledge of the Limitation Act. However, I have to admit that my awareness of this point was somewhat fortuitous. A few years ago, I was instructed by a Claimant in a professional negligence action against his previous solicitors who had conducted a clinical negligence claim on his behalf. The clinical negligence claim related to orthopaedic management and the Claimant had full capacity at the date of the accrual of this cause of action. However, shortly after the claim for clinical negligence emerging, the Claimant was subject to a serious assault which resulted in a cerebral injury and loss of capacity. His solicitors assumed that in these circumstances, by virtue of Section 28, limitation was not running. They therefore delayed issue of the clinical negligence claim for a number of years whilst it was investigated. On issue, the claim was struck out as it was significantly out of time.

Whilst you are carefully reading the Limitation Act, you will notice Section 28(3):

> "When a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another under a disability, no further extension of time shall be allowed by reason of

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the disability of the second person."

Whilst this subsection reflects the somewhat cumbersome drafting of the Limitation Act, nonetheless it is reasonable to understand that the effect of it is that the protection of Section 28 will only apply to an initial Claimant and not some other person who inherits the claim or who has a separate claim arising out of the death of the initial Claimant. This might be relevant in a claim involving an elderly Claimant who has lost capacity and where the claim is inherited by a partner who has also lost capacity.

It is also worth looking at the definition of disability in Section 38 of the Act. The Limitation Act 1980 of course pre-dated the Mental Capacity Act 2005 and was amended in consequence of the 2005 Act. Prior to 2005, capacity was essentially a binary question to be resolved by the Court on the balance of probabilities. The 2005 Act, however, made capacity 'decision-specific' and created a presumption in favour of capacity. That capacity is 'decision-specific' is reflected in the definition in Section 38:

> "For the purposes of this Act a person shall be treated as under a disability while he is an infant or lacks capacity within the meaning of the Mental Capacity Act to conduct legal proceedings."

It is quite common now to see reports on capacity suggesting that a Claimant has capacity in some respects, not others ; in particular that the Claimant has capacity to conduct legal proceedings, but not to be involved in the administration of a large sum of money. On this basis a Claimant could reasonably be a protected party, but nonetheless Section 28 would not apply because the Claimant has sufficient capacity to conduct legal proceedings. The question would be addressed on the basis of a presumption of capacity thereby making more likely that Section 28 would not apply.

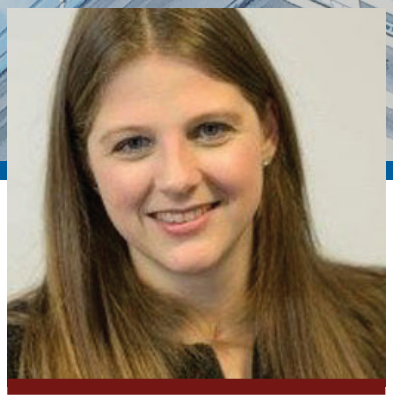
The net effect of this is that a Claimant's solicitor would always be well advised to issue proceedings within three years of the relevant event unless it is quite clear that the Claimant lacked capacity at the time of the occurrence of the event or in immediate consequence of it.

Remembering this, however, will not be difficult if you associate it with Karl Llewellyn who was, on any view, a memorable person. Born in Seattle, he initially studied law at Yale, but in 1914 was continuing his studies at the Sorbonne in Paris when World Ward I broke out. Because of his ancestry, he was sympathetic to the German cause and attempted to enlist in the German Army. He was not allowed to enlist, but allowed to fight with the 78th Prussian Infantry Regiment, and was injured at the first battle of Ypres. However, having recovered from his injuries, he was still not entitled to enlist and returned to the United States. In 1917, the United States declared war on Germany. At this stage Karl Llewellyn attempted to enlist in the American Army. This was refused on the basis that he had already fought for the Germans during the course of the same conflict. This interesting fact shows that the concept of being cup-tied does not only apply to sporting competitions, but apparently also to major global conflicts. Karl Lewellyn, however, had the consolation of having been awarded the Iron Cross for his actions at the first battle of Ypres and is apparently the only non-German ever to be awarded this honour.

Further reading:

Medical accidents: A Socratic resolution?

Click here



Maguire – Impact for Coroners

Ana Samuel Barrister

"Rowing back from Rabone? Part 1 Ana Samuel and Sam Irving discuss the decision of Court of Appeal in Maguire case which has limited the application of Article 2 ECHR in clinical negligence cases."

The inquest into the death of Jackie Maguire, a 52 year old female with Down's Syndrome and moderate learning difficulties, who resided in a state funded care home and was the subject of a deprivation of liberty order, came before the Blackpool Coroner's Court.

HMC for Blackpool had agreed with the family that Article 2 was arguably engaged but a number of days prior to the substantive hearing the judgment of R(Parkinson) v HM Senior Coroner for Kent was handed down, which gave guidance on the circumstances in which Article 2 is arguably engaged in relation to healthcare deaths. Accordingly, it was accepted by all IPs at the commencement of the inquest that Article 2 needed to be re-visited prior to the Jury receiving direction.

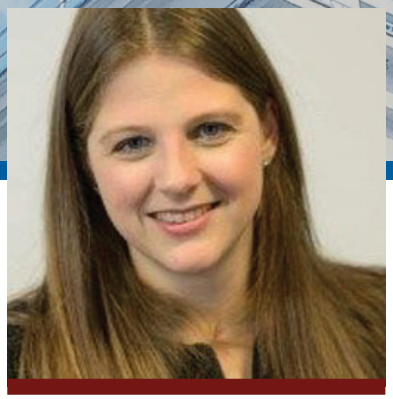
If Article 2 is engaged a wider investigation is mandated and a jury is able to express a view on the 'circumstances' of the death, which in Jackie's case could have included any purported failures on behalf of medical professionals. Applications to engage Article 2 became more commonplace after the decision of the Supreme Court in Rabone which extended the application of Article 2 to voluntary psychiatric patients.

At the conclusion of the evidence the family argued that Article 2 was still engaged on the basis that, Parkinson being accepted as applicable authority, either a) there were systemic failures or b) that the case fell within the 'exceptional case' category set out in Parkinson and/ or c) that Rabone was engaged in that there was a real and immediate risk to life. Further, the family argued that neglect should be left to the jury either in respect of individual failures made by different organisations or alternatively on a cumulative basis, in essence totting up potential failures made by different organisations involved in providing care to Jackie (including the care home, Jackie's GP, the out of hours GP and paramedics). The other IPs argued that (a) any failures were individual failures, there being appropriate overarching systems in place and that, (b) based on the information available at the time to those involved in the provision of care and/ or medical treatment to Jackie, there was not a real and immediate risk to life; rather Jackie, whilst poorly, was not showing any red flag signs, and (c) that the facts of the case did not fall within the Parkinson 'exceptional category.' HMC ruled that the allegations against Jackie's carers and healthcare providers amounted to allegations of individual negligence, which Parkinson had clarified as falling outside the state's obligations under article 2 such that Article 2 was not engaged and that it was Galbraith unsafe to leave neglect to the Jury, there being insufficient evidence to do so.

Divisional Court

The family applied to Judicially Review the Coroner's decision in respect of both Article 2 and neglect. By the time of the hearing their arguments in respect of Article 2 (having shifted) were that a) Parkinson was not applicable on the basis that Jackie's death could not be classed as a healthcare death; and b) Jackie fell into a class of vulnerable individuals who were in the care of the state such that Article 2 was triggered, albeit it was accepted that it was not clear from the European case law as to what test should be applied to ascertain who fell into this class. The key issues were a) was there a class of vulnerable individuals in the care of the state that triggered Article 2? And, if so, what legal test should be applied to the same; b) could actions/inactions across a number of agencies be aggregated to substantiate neglect in the event that the individual actions/inactions in themselves could not amount to neglect.

In a 23-page Judgment the Divisional Court set out the State's duties under Article 2 and noted that case law had expanded the positive duty to include death from egregious lack of medical treatment on the basis that the deceased had been vulnerable and unable to escape from the dangers posed by detention. Further, this reasoning had been extended to, for example, cases concerning persons not detained but in respect of whom the State had taken control, such as suicide of conscripts and transfer of



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elderly persons from one care home to another. However, Parkinson was authority for the proposition that healthcare deaths concerning errors of judgment and negligent coordination amongst healthcare professionals will not ordinarily trigger article 2. Moreover, the duty under Article 2 will not always be engaged by the death of a detainee or of a person in the care of the state.

The Court found the following principles to have emerged:
(a) Article 2

(1) First, in the absence of systemic or regulatory dysfunction, article 2 may be engaged by an individual's death if the state had assumed responsibility for the individual's welfare of safety.
(2) Secondly, in deciding whether the State has assumed responsibility for an individual's safety, the Court will consider how close was its control over the individual.
(3) The touchstone is whether the circumstances of the case are such to call a state to account. In the absence of either systemic dysfunction arising from a regulatory failure or a relevant assumption of responsibility the state will not be held accountable under article 2.
(4) Where the state has assumed some degree of responsibility for the welfare of an individual who is subject to a DOLS but not imprisoned or placed in detention the line between state responsibility and individual actions will sometimes be a fine one. However, it is the function of the Coroner to draw it. This Court will not interfere save on grounds of irrationality or other error of law.

In this case such failings as there may have been were not capable of demonstrating systemic failure or dysfunction, rather they were attributable to individual actions and do not require the state to be called into account; each case turns on its facts.

On the facts of this case it was open to the Coroner to conclude that this was a medical case and that a jury could not safely find that Jackie died as a result of any actions or omissions for which the state would be responsible.

(b) Neglect
(1) The approach taken by the Coroner to the evidence could not be faulted. He considered all the relevant evidence that may point to neglect as individual acts as well as considering the potential for the cumulative effect of each of the individual acts;
(2) The Coroner concluded that there was no individual failing that could safely be said to be gross and the Court agreed with that assessment of the evidence.

Court of Appeal

The family sought and were granted leave to appeal to the Court of appeal in respect of the following issues:

Ground 1: by parity of reasoning with Rabone the circumstances of Jackie's death dictated that the procedural obligation applied. It was not a medical case as per Parkinson.

Ground 2: if Parkinson applied there was systemic failure in that there was no system in place for admitting Jackie to hospital.

Ground 3: the wider context of premature deaths of people with learning difficulties should have been taken into consideration.

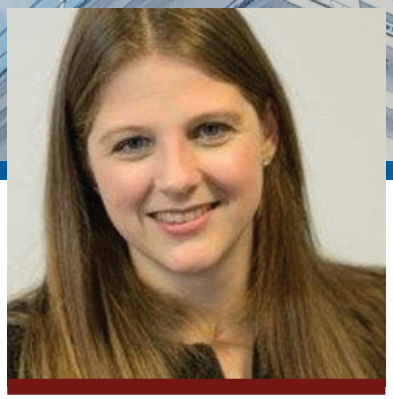
The Court of Appeal undertook a detailed analysis of the case law pertaining to the procedural obligation under Article 2 ECHR before reaching the following decision and dismissing the appeal:

Ground 1 and 3:

a) There is no decision of the Strasbourg Court which suggests that the operational duty is owed to those in an analogous position to Jackie in connection with seeking ordinary medical treatment. Jackie's circumstances were not analogous with a psychiatric patient who is in hospital to guard against the risk of suicide. She was not in the care home for medical treatment and her position would not have been different had she been able to continue to live with her family;

b) It was unnecessary to decide whether the medical professionals knew or ought to have known that Jackie faced a real and immediate risk of death (Osman) but in the event that the question was to be determined a relatively light touch approach as per Fernandez de Olivera would apply)compared with those detained by the state in prison or involuntary psychiatric patients);

c) Reports from the learning disability review do not



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provide weight to the argument that an operational duty was owed to Jackie

Ground 2:

a) The criticisms of the paramedics or out of hours GP do not come closed to satisfying the first limb of Lopes de Sousa, namely that Jackie's life was knowingly put in danger by denial of access to life saving treatment;

b) There was nothing that suggested that there was a widespread difficulty in taking individuals with learning difficulties to hospital when it is in their interests to do so. The families criticisms fall short of the sort of systemic regulatory failing that Strasbourg had in mind as underpinning the very exceptional circumstances in which a breach of the operational duty may be found in a medical case.

Commentary – Ramifications for Coroners in medical cases

Maguire in conjunction with Lopes de Sousa and Parkinson provides a Coroner with an arsenal of decisions to support, in the majority of cases, a ruling that the substantive limb of Article 2 ECHR is unlikely to be engaged in 'medical cases,' in particular those involving patients with a vulnerability and/or subject to a Deprivation of Liberty order. In order to find that article 2 is arguably engaged a Court would have to be satisfied that there is prima facie evidence or grounds to suspect that a) a patient's life is knowingly put in danger by denial of access to life-saving emergency treatment (Lopes ground 1) or b) there was a systemic or structural dysfunction resulting in a patient being deprived of access to life-saving treatment which authorities knew or ought to have known about and failed to take measures to prevent (Lopes ground 2) or c) knowledge of neglect/abuse and a failure to remedy the same (as per Nencheva and Campeanu applying Osman) or d) the facts of the case suggest that an operational duty is owed (for example Watts v United Kingdom applying Osman).

Whilst the Court of Appeal did not specifically refer back to the Divisional Court ruling the tenor of the previous decision, namely that the engagement of Article 2 will turn on circumstances of the case, was echoed by the Court of Appeal:

'The question of whether an operational duty under article 2 was owed is not an abstract one which delivers a 'yes' or 'no' answer in all circumstances', 'the article 2 operational duty is owed to vulnerable people under the care of the state for some purposes', 'it is necessary to consider the scope of any operational duty'.

The reference to the number of DOLS applications having increased exponentially hints at a policy decision to restrict article 2 inquests given the previous problem (resolved in 2017 by The Policing and Crime Act) of having to inquest any DOLS death and the strain this placed on the coronial service. The upshot being that there will need to be something more than vulnerability and/or DOLS to elevate the inquest to article 2 territory.

Whilst clear and much needed guidance has been provided by the Court of Appeal in relation to vulnerable patients in a medical treatment context the Judgment does raise some questions that Coroners will no doubt still have to grapple with:

a) Given that Jackie's case was distinguished on the basis that she was not in the care home for medical treatment would a resident at a nursing home, where medical treatment is provided in house under a DOLS, arguably fall under the remit of Article 2 as being more analogous to the prison custody medical treatment cases?
b) Will vulnerable patients (in particular elderly in care or nursing homes) who are refused life-saving treatment under the Covid 19 prioritisation measures fall under the remit of Article 2 (Lopes ground no 1 or 2 or under an operational duty)?

Article 2 continues to throw up thorny issues. This is likely to continue despite this much welcome clarity.

In our next newsletter Ana and Sam will discuss in Rowing back from Rabone Part 2 whether there is tension between Rabone and the subsequent Grand Chamber decision in "Fernandes de Oliveira v Portugal"


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