



Case No: 1UC06940

IN THE CAMBRIDGE COUNTY COURT

197, East Road, Cambridge

Date: 27/02/2012

**Before:**

**HH JUDGE YELTON**

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**Between:**

**MALCOLM BUCK**

**Claimant**

**- and -**

**NORFOLK AND WAVENEY MENTAL  
HEALTH NHS FOUNDATION TRUST**

**Defendant**

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**GUY SIMS (instructed by Ward Gethin, King's Lynn) for the Claimant.  
ANGUS MOON QC (instructed by Kennedys Law LLP, Cambridge)  
for the Defendant.**

Hearing date: 9<sup>th</sup> February 2012  
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## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE YELTON

**HH Judge Yelton:**

1. I have before me the trial of a preliminary issue, which was argued without the calling of any oral evidence. The issue was set out in an order of District Judge Rogers dated 19<sup>th</sup> July 2011 thus: whether on the facts pleaded in the particulars of claim the defendant owed the claimant a duty of care.
2. The salient facts as pleaded are set out below.
3. The claimant, Mr. M. Buck, was a bus driver employed by First Eastern Ltd. On 24<sup>th</sup> September 2008 he drove into the grounds of the Norfolk & Norwich Hospital in Norwich in order to pick up passengers on a stage carriage service. As he was moving away from the bus stop Mr. M. Gaffney put himself under the back wheels of the bus in such a way that he was run over and died instantly.
4. It is not suggested that Mr. Buck could have avoided the accident, which occurred when he was moving very slowly.
5. As a result of what occurred, Mr. Buck has suffered from severe post traumatic stress disorder.
6. On 19<sup>th</sup> September 2008 Mr. Gaffney had been admitted to Hellesdon Hospital, also in Norwich, in a state of confusion. That hospital is run by the defendants, Norfolk and Waveney Mental Health NHS Foundation Trust. He was detained under s2 of the Mental Health Act 1983 for assessment: it is a precondition for the operation of that section that a patient needs to be held “in the interests of his own health and safety or with a view to the protection of other persons”.
7. Early on 24<sup>th</sup> September 2008 Mr. Gaffney had what appeared to be an epileptic fit.
8. Mr. Gaffney was then conveyed to the Norfolk & Norwich Hospital, which is run by a different Trust, in an ambulance, for assessment and possible treatment. By s17 of the Act of 1983 leave of absence may be given to a patient detained under s2 subject to such conditions if any as are thought necessary.
9. No escort was provided for Mr. Gaffney: that is the essence of the claimant’s allegations of negligence.
10. After being seen at the Norfolk & Norwich, but before transport arrived to take him back to Hellesdon, Mr. Gaffney wandered out and then threw himself under the bus.
11. The claimant asserts that Mr. Gaffney had a predisposition to violence.

12. The defendant alleges that the claimant cannot on those facts establish that he was owed a duty of care by the Trust: further it alleges that he cannot recover damages for psychiatric illness, on the basis that he was a secondary rather than a primary victim, as those expressions have been developed in the authorities.
13. In any event, if the claimant succeeds on the preliminary issue, the defendant asserts that it is not in breach of any duty of care and a trial would be required in that instance to determine that issue.
14. There is a surprising dearth of cases on the duty owed by D, a custodian of a mental patient, to C, whom the mental patient attacks or the like after escaping from detention.
15. In Holgate v Lancashire Mental Hospitals Board [1937] 4 All ER the defendants allowed the release on “holiday licence” of a compulsorily detained man with a propensity for violence without making any checks in relation to his supervision while out. He attacked the claimant, who succeeded before a jury. The report sets out the Judge’s direction to the jury, which appears to have been on the basis that a duty of care existed. The case has some similarities with the present facts, but the problem with Holgate is that it has been doubted at a high level, and in particular in Palmer v Tees Health Authority [1999] Lloyd’s Reports Medical 351 the Court of Appeal were very critical of it. Stuart-Smith LJ said at paragraph 28 in that judgment that: “The case occurred at a time when the essential elements of a duty of care were much less clearly defined than is the position today. In my judgment the case cannot be reconciled with Hill on the question of proximity”. The reference to Hill is to the decision of the House of Lords in Hill v Chief Constable of West Yorkshire [1989] AC 53.
16. In Palmer, the patient in question had been admitted to hospital, but was released in June 1993. Thereafter he was seen as an out patient. In June 1994 he murdered a small girl who lived near to him and mutilated her body. Her mother brought proceedings against the Health Authority on behalf of the estate of her daughter and on her own account, alleging that they had failed to diagnose that there was a real risk of the patient committing serious sexual offences against children and further failed to treat him properly.
17. Gage J. struck out the claim and the claimant’s appeal against that decision was dismissed by the Court of Appeal. Stuart-Smith LJ said that “the critical decision” was that in Hill. He cited the speech of Lord Keith of Kinkel in that case and the emphasis which he had placed on the narrower judgment of Lord Diplock in Home Office v Dorset Yacht Company Ltd. [1970] AC 1004. In that case the House of Lords had held that the officers of a Borstal institution had owed to the plaintiff a duty to take such care as was reasonable in the circumstances with a view to preventing the boys under their control from causing damage to the plaintiff’s property if that was a happening of which there was a

manifest risk if they neglected that duty. In that case, it was alleged that the defendants knew of the criminal records of the boys and of their attempts to escape on earlier occasions and also alleged that the boats which were damaged were offshore of Brownsea Island, where the boys had been working, and in close proximity to them.

18. In Hill Lord Keith concluded that in the view of Lord Diplock in Dorset Yacht no liability would rest upon the prison authorities for allowing an escapee to get away if the person who absconded resumed his ordinary career as a burglar, as opposed to damaging property of “persons at special risk”. Stuart-Smith LJ concluded in Palmer at paragraph 27 that although the factual situation in Hill was different (it concerned the failure of the police to detect the Yorkshire Ripper before he killed a particular woman) “the crucial point is that there is no relationship between the defendant and the victim”.
19. Mr. Sims on behalf of the claimant relies on broader statements of principle by Lords Reid and Morris of Borth-y-Gest in the Dorset Yacht case. However, I have to take account of developments in the law since that time and in particular the decisions in Hill and Palmer.
20. Further support for the argument advanced by Mr. Moon QC on behalf of the defendants is found in the decision of the House of Lords in Mitchell v Glasgow City Council [2009] 1 AC, in which it was held that in the absence of any indication to show that the defendant local authority had made itself responsible for protecting the claimant from the criminal acts of another of its tenants (who lived next door), the claimant could not succeed. Although this is a Scottish appeal, the law in both countries appears to be the same. Lord Hope of Craighead said at paragraph 15 that there were three important points, namely (1) foreseeability of harm was not of itself enough for the imposition of a duty of care (2) the law does not normally impose a positive duty on a person to protect others and (3) the common law does not impose a duty to prevent a person from being harmed by the criminal act of a third party based simply on foreseeability.
21. It seems to me that the claimant cannot succeed in this case unless he can show that there was “a relationship” between himself and the defendant in the sense that that expression was used by Stuart-Smith LJ in Palmer. Mr. Sims argued that there was in this case, because the defendant knew of Mr. Gaffney’s propensity for violence and because the claimant was within the grounds of the hospital at the time of the incident in question: the bus stop is within the cartilage of the hospital although obviously outside the main buildings.
22. Mr. Moon QC laid stress on the fact that there was no known history of absconding by Mr. Gaffney and that in any event this incident did not occur as part of an escape, but rather as an incidental to him wandering around the hospital grounds. He asserted that the claimant was outwith any group of people with whom the defendant had a

relationship in that the incident occurred some miles away from the defendant's property and in any event the claimant was a casual albeit regular visitor to the premises rather than an employee of the hospital.

23. There is in my judgment no evidence in this case that the defendant assumed any responsibility for the claimant as was considered necessary in Mitchell.
24. I have concluded that on the authorities as they now stand the claimant cannot succeed, on the pleading put forward, that the defendant owed him a duty of care. In my judgment, the editors of Clerk & Lindsell (20<sup>th</sup> Edition) have correctly set out the law in summarising the Palmer case in paragraph 14-43 thus: "a custody authority responsible for the negligent release of a patient did not owe a duty to a victim unless that victim had been identifiable".
25. I put it in that cautious way as I am told that the Court of Appeal has reserved judgment in the case of Selwood v Durham County Council, an appeal from HHJ Walton, in respect of which I have read the judgment at first instance but I disregard it because of the awaited judgment on appeal. It may be that the Court of Appeal will restate the law on this subject in that appeal, although Judge Walton appears to have followed the same principles as have been set out.
26. The defendant further submitted that in any event the claim was bound to fail because the claimant was a secondary rather than a primary victim. In Page v Smith [1996] 1 AC 155 Lord Lloyd of Berwick discussed earlier cases which had come before the House and which involved nervous shock. He made the point that they had all involved claimants who were "secondary victims" of negligence, because they were spectators or bystanders. Mr. Page, on the other hand, was a primary victim because he was a direct participant in a road traffic accident, as a result of which he suffered psychiatric damage.
27. I do not accept the argument for the defendant on this aspect of the case. If Mr. Buck were within the category of those to be protected, because responsibility had been assumed by the defendant for him, then he was a primary victim and the fact that he suffered psychiatric rather than physical injuries is not in point. However since he was not, it matters not. The potential secondary victims in this case were those members of the public who saw the accident.
28. It follows from that which I have set out earlier however that I determine the issue in favour of the defendant and that therefore the claim should be dismissed.