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Content update: March 2023

Highlights:

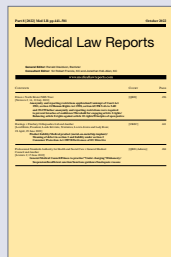
- ▶ *Inquests – R (Morahan) v His Majesty's Assistant Coroner for West London*
- ▶ *Clinical negligence – O'Brien v Guy's and St Thomas' NHS Trust*
- ▶ *Brain damage – CNZ (Suing by Her Father and Litigation Friend, MNZ) v Royal Bath Hospitals NHS Foundation Trust*
- ▶ *Personal Injury Compensation highlights*

Medical on i-law.com

Written by experts in medical law and clinical negligence, Medical on i-law.com is the leading provider of legal know-how on major medico-legal cases.

Medical on i-law.com features *Medical Law Reports*, our exclusive series of reports which focus on the most influential appellate and ground-breaking first instance court decisions.

Recently published in *Medical Law Reports*



R (Morahan) v His Majesty's Assistant Coroner for West London, Central and North West London NHS Foundation Trust and The Commissioner of Police of The Metropolis (Interested Parties)

[2023] Med LR 1; [2022] EWCA Civ 1410

Inquests - Article 2 ECHR - Death of patient with psychiatric illness - Whether procedural duty to hold inquest compliant with article 2 ECHR engaged - Whether operational duty owed to patient receiving voluntary treatment - Provision of legal aid for inquests.

On the facts of this case, the court ultimately concluded that the coroner was right to rule that the circumstances of Ms Morahan's death did not engage the operational duty under article 2 ECHR. Accordingly, the parasitic requirement to hold a procedural article 2-compliant inquest did not arise and the appeal was dismissed. This case is an example of how the extremely restrictive legal aid regime at inquests leads to continued challenges on coroner's article 2 rulings. The fact that legal aid only becomes available to families at an inquest if article 2 is engaged means that very significant emphasis is placed on article 2 ruling.

www.i-law.com/ilaw/doc/view.htm?id=432426

Also covered in *Personal Injury Compensation*: www.i-law.com/ilaw/doc/view.htm?id=431789

O'Brien (Administratrix of The Estate of Berry (Deceased)) v Guy's and St Thomas' NHS Trust

[2023] Med LR 12; [2022] EWHC 2735 (KB)

Clinical negligence - Administration of ototoxic antibiotic to patient on intensive care unit - Whether higher dose of antibiotic responsible for patient's balance problems and hearing loss - Relevance of national and local clinical guidelines to the issue of negligence.

The case provides some useful guidance on the management of experts in terms of their impartiality and how they frame their joint statement. However, it is particularly useful as an analysis of the law on the relevance of national and local clinical guidelines to the issue of breach of duty – a matter which arises frequently in clinical negligence cases.

www.i-law.com/ilaw/doc/view.htm?id=432425

Also covered in *Personal Injury Compensation*: www.i-law.com/ilaw/doc/view.htm?id=433230

Re X (Catastrophic Injury: Collection and Storage of Sperm) V and W v X (By His Litigation Friend, The Official Solicitor), and King's College Hospital NHS Foundation Trust

[2023] Med LR 51; [2022] EWCOP 48

Adult patient lacking capacity - Application by parents to collect and store patient's sperm - Whether in best interests of patient - Consent required by Human Fertilisation and Embryology Act - ECHR, article 8 right to private life.

V and W brought an urgent application for a declaration that it would be lawful for a doctor to retrieve and store X's gametes (sperm) and an order that V could provide the necessary consents required by Schedule 3 of the Human Fertilisation and Embryology Act 1990. Although no order was sought in relation to the subsequent use of X's sperm, the intention of V and W was for it to be used in the future conception and birth of a child or children. The Human Fertilisation and Embryology Authority provided a letter setting out its opposition to the application. The Official Solicitor (for X) supported the HFEA's position, and the Trust adopted a neutral position on whether the declarations and orders sought were in X's best interests.

www.i-law.com/ilaw/doc/view.htm?id=432427

Also covered in *Personal Injury Compensation*: www.i-law.com/ilaw/doc/view.htm?id=431786

CNZ (Suing by Her Father and Litigation Friend, MNZ) v Royal Bath Hospitals NHS Foundation Trust

[2023] Med LR 59; [2023] EWHC 19 (KB)

Brain damage - Elective caesarean section - Informed consent - Application of Montgomery - Acute profound hypoxic ischaemic insult - Divisibility - Apportionment - Impossibility or difficulty - Aliquots - Material contribution.

This is an important judgment for claimants and defendants alike. The judge had to consider several of the more contentious issues in clinical negligence claims, such as how retrospective is the effect of *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] Med LR 149, and in claims involving acute profound hypoxic ischaemic brain damage, does material contribution allow a claimant to succeed in full where delivery could have been achieved as little as one to two minutes sooner?

www.i-law.com/ilaw/doc/view.htm?id=433247

Also covered in *Personal Injury Compensation*: www.i-law.com/ilaw/doc/view.htm?id=432389

Robinson v Liverpool University Hospitals NHS Trust

[2023] Med LR 122; [2023] EWHC 21 (KB)

Personal injury - Dental negligence - Expert evidence - Non-party costs order - Threshold for adverse costs orders against expert.

This is an example of a case raising the vexed question of what should happen when an expert is considered to have acted in such a way as to cause unmeritorious litigation to be advanced. A balance needs to be struck between ensuring that experts do not act with flagrant disregard for their duty whilst at the same time not causing a chilling effect on the availability of experts, without which clinical negligence litigation would not be possible.

www.i-law.com/ilaw/doc/view.htm?id=433248

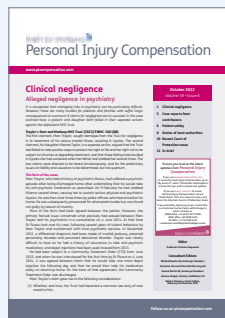
1,321

Number of cases published in *Medical Law Reports*

Figure accurate at 28 March 2023

Product focus: Personal Injury Compensation

In each content update we focus on new articles available in our medical case law resource, *Personal Injury Compensation*.



The right to life and developments in article 2 inquests R (Morahan) v His Majesty's Assistant Coroner for West London [2023] Med LR 1; [2022] EWCA Civ 1410

This was an appeal from the decision of the Divisional Court upholding the ruling of a coroner who had concluded that the circumstances of the death of Tanya Morahan shortly after 3 July 2018 did not call for an inquest compliant with the procedural obligation imposed by art 2 of the European Convention on Human Rights. That ruling was given on 23 September 2019 by the coroner who indicated that she would keep the matter under review. The consequence was that if the evidence available were to develop in a way which supports the contrary conclusion, she would revisit the issue. www.i-law.com/ilaw/doc/view.htm?id=431789

Application to remove gametes from brain-dead patient V and W v X (By His Litigation Friend, the Official Solicitor) and King's College Hospital NHS Foundation Trust [2023] Med LR 51; [2022] EWCOP 48

In this application to the Court of Protection, the parents of a man, X, who was very close to being diagnosed as brain dead, sought a declaration from the Court of Protection that it would be lawful to remove gametes from their son. www.i-law.com/ilaw/doc/view.htm?id=431786

Historic clinical negligence claim

CNZ (Suing by Her Father and Litigation Friend, MNZ) v Royal Bath Hospitals NHS Foundation Trust [2023] Med LR 59; [2023] EWHC 19 (KB)

This was a claim for damages alleging clinical negligence resulting in a serious brain injury causing long-term

disabilities. The claim was brought by CNZ against the first defendant, the Royal United Hospital, Bath, and the second defendant, the Secretary of State for Health, who is responsible for the antenatal care provided by the midwives in this case.

www.i-law.com/ilaw/doc/view.htm?id=432389

Use of guidelines in clinical negligence cases O'Brien (Administratrix of The Estate of Berry (Deceased)) v Guy's & St Thomas' NHS Trust [2022] EWHC 2735 (KB)

For many years, reference has been made during clinical negligence litigation to guidelines from various authoritative organisations, and much has been written on the subject. Guidelines can be particularly useful when the key focus is on the alleged failure of a clinician to meet the required standard of care under the criteria established in *Bolam v Friern Hospital Management Committee*, as modified by the House of Lords in *Bolitho v City and Hackney Health Authority*. In this case the court considered the significance of a Trust's guidelines issued in respect of ICU care, where the local guidelines were not in every respect aligned with national clinical guidelines.

www.i-law.com/ilaw/doc/view.htm?id=433230

Quantum in clinical negligence cases

Benford (a Child Represented by Her Mother (as Litigation Friend)) v East and North Hertfordshire NHS Trust [2022] EWHC 3263 (KB)

The claimant in this case had suffered brain damage at or around the time of her birth, for which the defendant had admitted liability, so quantum was the only issue still under consideration.

www.i-law.com/ilaw/doc/view.htm?id=432386

Personal Injury Compensation includes carefully chosen material edited by Professor Vivienne Harpwood, Emerita Professor of Law at Cardiff University. It focuses on key personal injury and clinical negligence cases from the courts of England and Wales, and brings you timely, authoritative commentaries on the latest sector developments. It specialises in coverage of medical law developments, and brings coverage of case law of interest to medical law professionals, associations, regulatory bodies and insurance companies. Access it on i-law.com and at www.picompensation.com

Special feature: MLR highlights 2022

The following are key judgments reported in Medical Law Reports in 2022.

Paul and Another v The Royal Wolverhampton NHS Trust and Polmear and Another v Royal Cornwall Hospital NHS Trust and Purchase v Ahmed [2022] Med LR 59; [2022] EWCA Civ 12
Psychiatric injury – Secondary victims – Legal proximity – Relevant event – Interval between negligence and relevant event. www.i-law.com/ilaw/doc/view.htm?id=427174

Radia v Marks [2022] Med LR 210; [2022] EWHC 145 (QB)
Medical experts – Joint experts – Duty of care – Scope of duty – Breach of duty – Credibility. www.i-law.com/ilaw/doc/view.htm?id=428308

Hull University Teaching Hospitals NHS Trust v Colley [2022] Med LR 273; [2022] EWHC 854 (QB)
Contempt of court – False statements – Documents supported by a statement of truth – Honest belief in truth of statements – Litigation friend – Committal application – CPR Part 32.14. www.i-law.com/ilaw/doc/view.htm?id=428872

Pickering v Cambridge University Hospitals NHS Foundation Trust [2022] Med LR 344; [2022] EWHC 1171 (QB)
Clinical negligence – Embolus from atrial fibrillation causing leg ischaemia – Claimant discharged from emergency department without heparinisation – Subsequent embolus causing a stroke – Whether stroke would have been avoided by earlier heparinisation – Assessment of expert evidence – Consideration of scientific literature. www.i-law.com/ilaw/doc/view.htm?id=429093

R (Taggart) v The Royal College of Surgeons of England (Oxford University Hospitals NHS Trust, The General Medical Council and The Society of Cardiothoracic Surgeons, Interested Parties) [2022] Med LR 366; [2022] EWHC 1141 (Admin)
Judicial review – Preliminary issue – Whether invited review mechanism of royal college amendable to judicial review – Distinction between public and private law function. www.i-law.com/ilaw/doc/view.htm?id=429092

Barts Health NHS Trust v Hollie Dance and Others [2022] Med LR 422; [2022] EWHC 1435 (Fam)
Diagnosis of death – Brain stem death – Impossibility of brain stem testing – Withdrawal of medical treatment – Best interests – Children. www.i-law.com/ilaw/doc/view.htm?id=430029

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Collaborative approach reduces volume of litigated clinical negligence claims

The volume of clinical negligence claims that have become litigated has significantly reduced thanks to the collaborative approach taken by NHS Resolution, Action against Medical Accidents and the Society of Clinical Injury Lawyers in designing and operating the Covid-19 Clinical Negligence Claims Protocol. www.i-law.com/ilaw/doc/view.htm?id=432446

Johnson & Johnson class action: how the UK and the EU get ready
J&J is facing more than 40,000 lawsuits in the US which allege that some of its baby powder would have been contaminated with asbestos, causing ovarian cancer or mesothelioma. www.i-law.com/ilaw/doc/view.htm?id=432036

Opioid prescriptions in England fall as NHS launches action plan
GPs and pharmacists have helped cut opioid prescriptions in England by 450,000 in under four years, which is estimated to have saved nearly 350 lives and prevented more than 2,100 incidents of patient harm. www.i-law.com/ilaw/doc/view.htm?id=433069

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