Case No: 4MA91022

Neutral Citation Number: [2005] EWHC 2866 (QB)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Queen Elizabeth 11 Law Courts
Derby Square
Liverpool L2 1XA

Wednesday 14th December 2005

Before :

THE HONOURABLE MR JUSTICE ROYCE

- -

Between :

WEST BROMWICH ALBION FOOTBALL CLUB LIMITED	**Claimant**
- and -	
MR M.M. EL-SAFTY	**Defendant**

- -
- -

Mr Jeremy Stuart-Smith QC and Mr David Turner (instructed by **Nexus**) for the **Claimant**
Mr Stephen Miller QC and Miss Mary O'Rourke (instructed by **Medical Protection Society**) for the **Defendant**

Hearing dates: 12th and 13th October 2005

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Judgment

Mr Justice Royce :

INTRODUCTION

1. The Claimant (WBA) is a well known professional football club currently in the Premier Division. It signed Mr Michael Appleton on 18th January 2000 on a 3½ year contract. In November 2001 he suffered an injury to his right posterior cruciate ligament.

2. Mr El-Safty, the Defendant, is a consultant surgeon. He advised that reconstructive surgery should be carried out. He performed the operation but it was unsuccessful. Mr Appleton never fully recovered and has had to retire from professional football.

3. It is common ground that the advice that the knee should be reconstructed was negligent. It should, at least initially, have been treated conservatively. If that course had been taken Mr Appleton would have probably have been fit again within about 4 months.

WBA claims damages from the Defendant for the losses which it alleges it has suffered in consequence of the Defendant's negligence. The action is brought both in contract

and in tort. The Defendant denies there was a contract with WBA and denies he owed any duty to WBA in tort.

4. This is the trial of a preliminary issue as to the existence of a duty owed by the Defendant to the Claimant in contract or in tort.

Witnesses

5. I heard evidence from the following witnesses:-

On behalf of the Claimant:

(1) Dr John Evans who was WBA's secretary.

(2) Nicholas Worth, WBA's senior physiotherapist

(3) Michael Appleton, the injured player

Mr El-Safty gave evidence on his own behalf

BACKGROUND

Mr M M El-Safty

6. He was appointed a consultant orthopaedic surgeon at Sandwell and West Birmingham Hospital NHS Trust in 1982. He retired in November 2004. He also had a private practice and had consulting rooms at his home. By 2001 he said he was seeing about 60 private patients a week.

7. He had a particular interest in arthroscopic surgical work and sports injuries. From about 1984 he used to have referrals from two local doctors, Dr Rimmer and Dr Bottomley, who were also medical officers of WBA. That led to them referring some of the club players to him. He also received referrals from physiotherapists of the club.

8. He accepted that he had treated about 34 patients from WBA over the 5 years up to 2002. There were other clubs including Aston Villa, Kidderminster, Rushden & Diamonds and Walsall whose players he treated. The football clubs would generally send their physiotherapists with the player when he came for a consultation or treatment.

9. So far as the organisation and financial side of his practice was concerned, he said that that was left to his wife. He contended that he had never seen an invoice that went out for private treatment and neither had he ever seen a BUPA provider statement such as existed in the case of Mr Appleton. He accepted that he was aware that BUPA as a health insurer had established tariffs for particular procedures, but he himself did not know in any particular instance of arrangements that were made for payment of his fees.

10. According to the Defendant there was a period of a few years from about 1987 when he refused to see WBA players because he considered that the club was seeking to

get him to treat the player in a way which might have been in the club's interest but not the player's interest. However that changed when there was a change of manager.

Mr Appleton And WBA

11. When Mr Appleton joined WBA in January 2001 he signed a contract that appears to be a standard form FA Premier League and Football League contract. Under clause 1 the contract was to remain in force until 30th June 2004 unless previously terminated by substitution of a revised agreement or otherwise. Under clause 5 Mr Appleton was required to observe the rules of the club. Clause 8 included provisions that:-

> "The player shall submit promptly to such medical … examinations as the Club may reasonably require and shall undergo, at no expense to himself, such treatment as may be prescribed by the medical … advisers of the Club in order to restore the player to fitness. The Club shall arrange promptly such prescribed treatment and shall ensure that such treatment is undertaken and completed without expense to the player …"

12. The Club rules stipulated that:-

> "Any injuries, however slight, must be reported immediately to the Physiotherapist who is responsible for diagnosing injuries. Under no circumstances shall a player seek treatment for injuries sustained whilst working for West Bromwich Albion FC by any other physiotherapist or doctor without express permission of the Club Physiotherapist."
>
> "Appointments made for players by the Physiotherapist with other members of the medical team, i.e. consultants, masseur, podiatrist, etc. MUST be attended."

The Treatment Of WBA Players In General

13. If a player was injured he was required to submit to examinations reasonably required by WBA and undergo treatment prescribed by the medical advisers of the club to restore the player to fitness. WBA was obliged to arrange treatment and to ensure that it was undertaken and completed without expense to the player.

14. Mr Worth started employment with WBA in June 1998. If a player was injured he would examine him and if it fell within his expertise would treat him himself. If it was more serious, particularly if it was a knee injury, Mr El-Safty was his first choice orthopaedic consultant. He used to arrange for the Defendant to see the player and would accompany the player when the Defendant examined him. He would discuss the treatment options. As far as he was concerned it was necessary to consider what was in the patient's best interests.

Invoices And Payment

15. After treatment or a consultation an invoice would be sent, generally on the Defendant's headed notepaper, to the Secretary of WBA. Available records go back to 1998 and the first one is dated 21.1.98, addressed to the Secretary WBA. It reads

> "To professional services

re: [Mr X]

Carried forward Consultation 22.10.97 £70 Review 13.1.98 £40

Total £110

This is not a copy invoice. Please forward to you Insurance Company if applicable.

Please make cheques payable to M El-Safty and return to Chelfont, 20 Woodlands Avenue, Walsall quoting your account number."

16. There are in total 41 invoices relating to various professional footballers, the last one being dated 21st July 2003. They follow the same form.

17. If the invoice was unpaid, a "chaser" would be sent to WBA. There are 5 instances of that taking place.

A further letter was discovered after the hearing and was submitted to me by agreement of the parties. It was dated 27 January 2001 and read " The enclosed account for [Mr Y] has been unpaid by BUPA and I wonder if I can now pass this on to the Club for payment." It was addressed to the Secretary. It is accepted that this letter was sent by Mrs El Safty on behalf of the Defendant and would not have been seen by him.

18. WBA had a healthcare insurance group policy with BUPA which covered most of the treatment a player would need. It did not for example cover the cost of MRI or CT scans. According to Dr Evans, until about February 1998 WBA used to discharge the Defendant's invoices direct and BUPA would indemnify WBA. If an item was not covered by the BUPA policy, WBA would pay the Defendant's invoice directly.

19. According to Dr Evans there was a time in about 1989 when the League had overlooked the provision of insurance cover, when WBA paid invoices directly.

<u>Mr Appleton, WBA And Mr El-Safty</u>

20. On the 19th November 2001 whilst training, Mr Appleton suffered an injury to his right knee. He was examined by Mr Worth who arranged for him to have an MRI scan the following day. Mr Worth told Mr Appleton that he needed to see a surgeon as soon as possible. He told him that WBA used the Defendant for this type of injury.

21. Mr Appleton's evidence was that he considered that he was obliged to go along with WBA's choice of surgeon but in any event he was content to see Mr El-Safty. It was, he said, Mr Worth who had arranged the appointment to see the Defendant. He and Mr Worth went to see the Defendant at his home and he was recommended by the Defendant to undergo reconstructive surgery. He and Mr Worth discussed that and agreed to proceed on the Defendant's recommendation. Mr Worth asked the Defendant to make the appropriate arrangements and Mr Appleton was admitted to hospital to undergo the surgery on 7th December. Mr Appleton said that he did not consider that he

had any contractual arrangement with the Defendant at all. He had to sign the consent form for the surgery.

22. According to Mr Worth, it was he who telephoned the Defendant and arranged for himself and Mr Appleton to see him for an examination of the knee and consideration of the result of the MRI scan. In his witness statement he had said that he "instructed" the Defendant on behalf of the Claimant to investigate Mr Appleton's injury and to advise WBA as to the best way to manage and treat the injury. He accepted when cross-examined that "instructed" was not his expression. He agreed he was referring the patient to Mr El-Safty and going to discuss the pros and cons of what Mr El-Safty advised. In re-examination the following evidence was given which is of importance:-

" Q. On whose behalf were you there?

A. From that point of view I was there on behalf of Mr Appleton to make sure I could do the best job for him.

Q. And when you say advice was given to you?

A. Yes

Q. You were there when the surgeon gave advice?

A. Yes

Q. What was your purpose in receiving such advice?

A. To be able to help Mr Appleton return to full fitness as soon as reasonably or safely possible.

Q. What would you do if you disagreed?

A The first thing would be to discuss with Michael. If we decided we disagreed then we had the option of getting a second opinion. I might speak to my colleagues.

Q. When you say "we", who's we?

A. "We" is the medical team at West Brom. From my point of view as an independent physio the medical team and Michael have the option to disagree and to follow a different course of action.

Q. Were you aware of the club rules?

A. I was not aware of the terms of the players contracts as such but I was very much aware of the club rules. I was part of writing the rules we are speaking about.

Q. In your statement you use the word "instructed". What do you mean by "instructed"?

A. I asked for assistance. I asked Mr El-Safty to assess Michael Appleton and advise on an appropriate course of action.

Q. And then what?

A. And then between ourselves, the three of us, to decide the best course of action to take.

Q. Who physically said to Mr El-Safty what would happen?

A. Because of consent it has to rest on Michael Appleton.

Q. But who actually says the words: "We're going to have to go ahead with reconstruction"?

A. I would, yeah.

Q. If you weren't happy to accept Mr El-Safty's advice, what would you have said?

A. Probably that we take time to think about it. That we'd take some time out of the consulting room.

Q. When you were there, you have explained how you were there as a healthcare professional with a continuing interest. Were you in any sense there on behalf of West Brom?

A. In that way, Yes, because they were and are my employer and I was, by being able to do the best I could for Michael inherently I was also being able to do the best I could for the Club as well. "

23. Mr El-Safty said that his wife acted as his receptionist and secretary in respect of his private practice. She dealt with the administration including invoicing. He emphasised that he left that to her and focused only on his clinical care of the patients.

24. According to him, when a referral was effected to him by one of the medical officers of the club or by one of the club's physiotherapists, he accepted the referral as that of a primary healthcare professional and, as with any other referred patient, responded by offering an appointment to see the patient so that he could take a full history, conduct an examination, arrange any appropriate investigations, report as appropriate to the referrer and advise on treatment.

25. In Mr Appleton's case, Mr Worth when he rang up would have spoken to his wife who acted as his secretary. The appointment would have been arranged through her. He regarded the presence of the club physiotherapist as a matter of the player's choice. He said that at the consultation he gave advice to Mr Appleton in the presence of Mr Worth. He was emphatic that he did not enter into legal relations with WBA and would not have done so. He pointed out that there was a potential conflict of interest where the club might want to get the player playing again in the shortest possible time whereas he would have to consider what the long term effects might be and advise accordingly.

The invoices for payment in Mr Appleton's case were sent by his wife. They were addressed to the Secretary WBA for transmission to the Insurance Company. He sent a report letter to Dr Rimmer the WBA medical officer.

THE CLAIM IN CONTRACT AS PLEADED

26. It is asserted in the pleadings that:-

> "In or about November 2001, the Claimant's senior physiotherapist and agent, Mr Nick Worth, orally instructed the Defendant for reward to:-
>
> (a) investigate Mr Appleton's injury and
>
> (b) make appropriate recommendations as to the future management and/or treatment of the injury.
>
> Thereafter, pursuant to his retainer as aforesaid, the Defendant:-
>
> (a) on 24th November 2001 investigates Mr Appleton's injury by means of arthroscopy and identified that Mr Appleton had sustained a three-quarter rupture of his right posterior cruciate ligament ("right PCL");
>
> (b) thereafter advised that surgical reconstruction of the right PCL should be performed;
>
> (c) on 7th December 2001 performed an operation to reconstruct Mr Appleton's right PCL;
>
> (d) on 10th January 2002 discharged Mr Appleton from follow-up."

27. It is argued on behalf of WBA that the basis of the contract is clear:- acting on behalf of WBA, Mr Worth engaged and instructed the Defendant to treat Mr Appleton for reward. As before, WBA undertook to pay and did pay the Defendant's fees. Mr Stuart-Smith argues that "given that the first contact may have been with the Defendant's wife, it is probable that the contract was formed when she agreed that Mr Worth should bring in Mr Appleton." He maintains that Mr Worth was in effect acting in a dual capacity, in part on behalf of WBA and in part looking after the interests of his patient, Mr Appleton. He argues that the Defendant was advising both Mr Appleton and WBA.

28. He points to the history of dealing between the parties and in particular to how the invoices were addressed and dealt with. He argues that it is apparent that the Defendant looked to WBA and no one else for payment of his fees and that where they remained unpaid, the Defendant chased WBA for payment. He suggests that if the fees had remained unpaid, the Defendant would have sued WBA. The fact that the Defendant's wife prepared the invoices is irrelevant as she was acting as his agent and with his authority. So far as Mr Appleton was concerned, there was no consideration flowing from him. He merely presented himself and received advice and treatment from the Defendant and there was no contractual relationship between them.

29. In determining whether there was a contract between WBA and the Defendant, he points to the approach summarised by Mance LJ in **Baird Textile Holdings v Marks & Spencer plc** [2001] EWCA Civ 274 where he said at paras 59-61:-

> "For a contract to come into existence, there must be both (a) an agreement on essentials with sufficient certainty to be enforceable and (b) an intention to create legal relations.
>
> Both requirements are normally judged objectively. Absence of the former may involve or be explained by the latter. But this is not always so. A sufficiently certain agreement may be reached, but there may be either expressly (i.e. by express agreement) or impliedly (e.g. in some family situations) no intention to create legal relations.
>
> An intention to create legal relations is normally presumed in the case of an express or apparent agreement satisfying the first requirement: see *Chitty on Contracts* (28th edition) vol 1, para 2 – 146. It is otherwise, when the case is that an implied contract falls to be inferred from a party's conduct: *Chitty*, para 2 – 147. It is then for the party asserting such a contract to show the necessity for implying it. As Morison J said in his paragraph 12(1), if the parties would or might have acted as they did without any such contract, there is no necessity to imply any contract. It is merely putting the same point another way to say that no intention to make any such contract will then be inferred."

30. It is contended that the contract was partly express and partly by conduct, entered into with WBA through Mr Worth instructing the Defendant and the Defendant acting pursuant to those instructions. Viewed objectively it is said there is no basis for finding that there was no intention to create legal relations.

On behalf of the Defendant, Mr Miller contends that the Claimant's own witness effectively destroyed the Claimant's case. In relation to Mr Worth's evidence he points out:-

(i) he did not any time during the consultation with the Defendant discuss any financial matters or issues in respect of payment; he assumed the Defendant knew there was BUPA cover;

(ii) at the consultation he considered Mr Appleton to be his "patient" and also the Defendant's "patient";

(iii) he was present with Mr Appleton as a referring professional – on behalf of Mr Appleton - to ensure the Defendant got given all the relevant facts and to obtain details of rehabilitation.

31. He points out that the contract is not pleaded on the basis of any course of previous dealings or any previous retainer or agreement. The pleaded case is a stand-alone fresh contract, an individual retainer in the specific case. He argues that far from the basis of the contract being clear it is anything but. By way of illustration he pointed to Dr Evans' evidence. Dr Evans was to say that there was a contractual arrangement between WBA and the Defendant which had commenced sometime before he joined the

club in 1989. However he could not say how it was entered into, or what its terms were. His evidence was that "under the terms of our agreement with a consultant they would be liable for the loss of asset value of a player if he was negligently injured by them".

CONCLUSIONS ON THE CONTRACTUAL CLAIM

32.1 Mr Worth was clearly an important witness. I found him refreshingly frank. Words such as "instructed" or "engaged" in the witness statement drafted for him while convenient for the Claimant's case did not reflect his oral evidence.

He considered Mr Appleton to be his "patient" and also the Defendant's "patient". He did not discuss any financial matters with the Defendant – he assumed he was aware there was BUPA cover.

I am satisfied that he did not consider he was "instructing the Defendant for reward"; he did not consider he was, as agent for WBA, entering into a contract with the Defendant; he did consider his role was that of a referring health professional.

32.2. Mr El-Safty appeared to be a man with strongly held views. He was emphatic that he did not enter and would not have entered into a contract with WBA. He pointed to the potential conflict of interest. I accept that there could well be such a conflict.

I accept that he firmly believed that his duty was to the patient and not to WBA. I accept his evidence that he had no intention of entering into a contract with WBA.

32.3 The previous dealings.

While I consider it likely that Mr El-Safty knew rather more about the financial workings of his practice than he suggested, I accept that he left that side of his practice to his wife. It was she who despatched the invoices and the chasing letters. She was of course doing so as the Defendant's agent.

I do not accept that there should be spelled out from this an intention to enter into contractual relations with WBA. It was a convenient mechanism to collect the fees. Generally, they would be paid by the Insurers. Alternatively, WBA would provide the money.

I am satisfied that Mr El-Safty, however, regarded the patient as having the primary liability to pay. The arrangement between a player and WBA was that fees would be discharged by WBA generally through BUPA.

32.4 Standing back and looking at all the evidence objectively, I am satisfied that there was not a contract between WBA and the Defendant in relation to Mr Appleton. I find that Mr Worth did not "instruct the Defendant for reward". He was referring Mr Appleton to the Defendant as a health professional. I find that there was no intention to create legal relations on the part of the Defendant. Neither did Mr Worth have any intention to create legal relations as agent of WBA.

32.5 It is unnecessary for the purposes of my finding in this action to determine whether there was a contract between the Defendant and Mr Appleton.

THE CLAIM IN TORT

33. It is alleged that the Defendant owed a duty in advising and treating Mr Appleton not to do so in such a way as to cause economic loss to WBA. The amount of that loss would have to be determined but it is potentially several million pounds. The claim is pleaded as follows:-

(a) the Claimant had regularly referred players to the Defendant for treatment since in or about 1990. No fewer than 31 players have been referred by the Claimant to the Defendant since 1997

(b) invoices in respect of such treatment were rendered by the Defendant to the Claimant and were paid by the Claimant;

<u>The Principles To Be Applied</u>

34. There are a substantial number of authorities since **Hedley Byrne v Heller & Partners** [1964] AC 465 dealing with the proper approach to determination of the existence of a duty of care.

35. In **Caparo v Dickman** [1990] 2 AC 605 the House of Lords gave authoritative guidance. Lord Bridge identified the necessary ingredients in a situation giving rise to a duty of care as follows:-

(i) the loss should be reasonably foreseeable;

(ii) there should be sufficient proximity between the parties to the claim;

(iii) it is fair, just and reasonable to impose the duty of care.

36. He also cited with approval the dissenting judgment of Denning LJ in **Candler v Crane Christmas & Co** [1951] 2 KB 164, 179, 180-181, 182-184 in the following passages:-

> "Let me now be constructive and suggest the circumstance in which I say that a duty to use care in statement does exist apart from a contract in that behalf. First, what person's are under such duty? My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people - other than their clients - rely in the ordinary course of business."

> "Secondly to whom do these professional people owe this duty? I will take accountants but the same reasoning applies to the others. They owe the duty, of course to their employer or clients; and also I think to any third

person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer they not, as a rule, responsible for what he does with them without their knowledge or consent. The test of proximity in these cases is, did the accountants know that the accounts were required for submission to the plaintiff and use by him?"

"Thirdly, to what transactions does the duty of care extend? It extends, I think, only to those transactions for which the accountants knew their accounts were required."

37. In **James McNaughton v Hicks Anderson& Co** [1991] 2 QB 113, Neill LJ set out certain core factors which were likely to be important in most cases in determining whether or not a duty existed. There were he said six headings but they had a substantial measure of overlap:-

(1) the purpose for which the statement was made

(2) the purpose for which the statement was communicated

(3) the relationship between the advisor, the advisee and any relevant third party

(4) the size of any class to which the advisee belongs

(5) the state of knowledge of the advisor

(6) reliance by the advisee

38. In **BCCI v Price Waterhouse** [1998] PNLR 564, Sir Brian Neill (as he by then was) reiterated his list in slightly different terms with the addition of a further factor of whether the advisor had any opportunity of issuing a disclaimer.

39. **Spring v Guardian Assurance** [1995] 2 AC 296 and **Henderson v Merrett** [1995] 2 AC 145 established that the principles are not confined to the provision of information or advice but include the provision of other services. The Claimant also relies on the speeches of Lord Goff in those authorities in support of the proposition that in general where a Claimant has entrusted his affairs to the Defendant, the Defendant may be held to have assumed responsibility to the Claimant and the Claimant to have relied on the Defendant to exercise due skill and care in respect of such conduct.

40. The Defendant relies on a number of further authorities. In **Powell v Boladz** [1998] Lloyd's Rep Med 116, a boy of 10 died of Addison's Disease which had not been diagnosed. An action against the Health Authority was settled. However the parents brought an action against 5 doctors in relation to matters that had taken place post death. In considering whether a duty of care existed Stuart-Smith LJ said at page 123,

> " I propose to consider first whether a sufficient relationship of proximity existed. It must be appreciated that prior to April 17th 1990 although the Plaintiffs were patients of the Defendants in the sense that they were on their register, the only patient who was seeking medical advice and treatment was Robert. It was to him that the Defendants owed a duty of care. The discharge of that duty in the case of a young child will often involve giving advice and instruction to the parents so that they can administer the appropriate medication, observe relevant symptoms and seek further medical assistance if need be. In giving such advice, the Doctor obviously owes a duty to be careful. But the duty is owed to the child not to the parents. As Lord Diplock said in **Sidaway v Governors of Bethlem Royal Hospital** [1985] AC 871 at 890 a "doctor's duty of care, whether he be a general practitioner or consulting surgeon or physician is owed to that patient and none other, idiosyncrasies and all."
>
> He concluded no duty of care existed.

41. Mr Stuart-Smith contended that that approach was too narrow if it was to be interpreted as meaning that a doctor can never owe a duty to a person with whom he is not in a doctor/patient relationship. Furthermore he contended it could not survive **Phelps v Hillingdon LBC** [2001] 2 AC 619. That case was concerned with advice given by an educational psychologist employed by the Defendant to advise the Defendant about the educational needs of children. Mr Stuart-Smith relies on the speech of Lord Slynn at page 653:-

> "As to the first question, it is long and well established, now elementary, that persons exercising a particular skill or profession may owe a duty of care in the performance to people who it can be foreseen will be injured if due skill and care are not exercised, and if injury or damage can be shown to have been caused by the lack of care. Such duty does not depend on the existence of any contractual relationship between the person causing and the person suffering the damage. A doctor, an accountant and an engineer are plainly such a person. So in my view is an educational psychologist or psychiatrist and a teacher including a teacher in a specialised area, such as a teacher concerned with children having special educational needs. So may be an education officer performing the functions of a local educational authority in regard to children with special educational needs. There is no more justification for a blanket immunity in their cases than there was in **Capital and Counties plc v Hampshire County Council** [1997] QB 1004.
>
> I fully agree with what was said by Lord Browne Wilkinson in the **X (Minors)** case [1995] 2 AC 633 that a head teacher owes "a duty of care to exercise the reasonable skills of a headmaster in relation to such educational needs" and a special advisory teacher brought in to advise on educational needs for a specific pupil, particularly if he knows that his advice will be communicated to the pupil's parents, "owes a duty to the child to exercise the skill and care of a reasonable advisory teacher." A similar duty on specific facts may arise for others engaged in the educational process, e.g. an educational psychologist being part of the local authority's team to provide the necessary services. The fact that the educational psychologist owes a duty to the authority to exercise skill and care in the performance of

his contract of employment does not mean that no duty of care can be or is owed to the child. Nor does the fact that the educational psychologist is called in in pursuance of the performance of the local authority's statutory duties mean that no duty of care is owed by him, if in exercising his profession he would otherwise have a duty of care. That however is only the beginning of the enquiry. It must still be shown that the educational psychologist is acting in relation to a particular child in a situation where the law recognises a duty of care."

42. Lord Clyde at p671 pointed out that

> "whether a duty can exist and whether a duty does exist are different kinds of questions and it seems to me that the law gives different kinds of answers to them. The former may be resolved by considerations of policy, and in particular whether it is fair, just and reasonable to admit such a duty. The latter requires a consideration of the facts of the case and may be susceptible to different answers in different circumstances."

43. I accept Mr Stuart-Smith's proposition that a doctor can owe a duty to a person with whom he is not in a doctor/patient relationship, but the circumstances of the case will determine whether or not a duty of care does exist.

44. In the **London Borough of Islington v University College London Hospital NHS Trust** [2005] EWCA Civ 596, the Council's case was that the Trust negligently failed to advise a patient to resume taking warfarin when her operation was postponed, with the result that she suffered a stroke, which rendered her incapable of looking after herself and required institutional care funded by her local authority. It was alleged that the duty owed by the Trust was a duty not to treat or fail to treat the patient in such a way that she would foreseeably suffer injury, which would cause financial loss to the council in the provision and the care it was obliged to provide. The Court of Appeal held that such loss was reasonably foreseeable, but (by a majority) there was not a sufficient degree of proximity between the parties to found the duty of care and it was not fair, just and reasonable to impose such a duty on the Trust.

45. Ousely J. (with whom Clarke LJ agreed) said at paragraphs 50 and 51 of his judgment:

> "50. Here it is said on behalf of Islington that a duty of care is owed to it because it was reasonably foreseeable that a breach of duty of care to [the patient], through causing her injury and consequent need for care, would thereby cause it loss. The loss is reasonably foreseeable but occurs as a consequence of [the patient's] injury. I do not see that as materially different from the loss which may be suffered by voluntary carers who have no cause of action or the equally foreseeable losses which may be suffered by a business deprived of the services of a negligently treated patient or of a negligently injured road user. I would see the limit which the law has imposed on the existence of a duty of care towards a person who suffers loss as a result of an injury to another as an aspect of proximity.

51. There is material in all the cases to support either analysis but I found persuasive what Lord Oliver of Aylmerton said in **Alcock v Chief Constable of South Yorkshire Police** [1992] 1A.C. 310 at 410:

> "The failure of the law in general to compensate for injuries sustained by persons unconnected with the event precipitated by the Defendant's negligence must necessarily import the lack of any legal duty owed by the defendant to such persons. That cannot, I think, be attributable to some arbitrary but unenunciated rule of 'policy' which draws a line as the outer boundary of the duty. Nor can it rationally be made to rest upon such inquiry being within the area of reasonable foreseeability. It must, it seems to me to be attributable simply to the fact that such persons are not, in contemplation of law, in a relationship of sufficient proximity or directness with the tortfeasor as to give rise to a duty of care, though no doubt 'policy', if that is the right word, or perhaps more properly the impracticability or unreasonableness of entertaining claims to the ultimate consequences of human activity, necessarily plays a part in the court's perception of what is sufficiently proximate."

Are There Any Analogous Cases?

46 Mr Miller contended that the circumstances of the present case differ markedly from the small number of cases in which liability has been imposed on professionals for economic loss suffered by third parties. He pointed to three principle classes of case, none of which was similar to the instant case:-

(a) Where a statement was prepared for the express purpose of it being communicated to the advisee. For example, in **Hedley Byrne & Co Ltd v Heller & Partners Ltd** [1964] AC 465 where the Bank responded to a request to supply information about its customer's creditworthiness and the clear purpose was to enable the person to whom it was directed to advance credit to the customer.

(b) Where the object of the duty undertaken to the client is to confer a benefit on the third party, a duty may be owed concurrently to that person so as to allow him to recover for any unexpected loss of benefit. For example:-

(i) **White v Jones** [1995] 2 AC 207 where a solicitor who was instructed to prepare a will delayed carrying out the instructions was found to owe a duty of care to the intended beneficiary.

(ii) **Gorham v British Telecommunications plc** [2000] 1 WLR 2129 where the **White v Jones** principle was applied to disappointed beneficiaries under an insurance policy, where knowing the customer intended to make provision for his wife and children, the insurance company's negligence resulted in loss of benefits to them after the customer's death.

(iii) **The Commissioner of Police of the Metropolis v Lennon** [2004] 2 All ER 266 where it was held that the Commissioner's staff owed the claimant, a serving police officer, a duty to provide advice as to the preservation of his housing allowance entitlement when making arrangements for his transfer to another force.

(c) Cases where the subject matter of the advice may suffer harm even if the advice is prepared for and given to a third party carrying out its statutory duties. Examples of this category can be found in **X (Minors) v Bedfordshire County Council** [1995] 2 AC 633; **Phelps v Hillingdon London Borough Council** [2001] 619 and **JD v Berkshire County Council** [2005] 2 AC 373.

47 I was also referred to **Goodwill v British Pregnancy Advisory Service** [1996] 1 WLR 1397 and to **Kapfunde v Abbey National and Dr D Daniel** [1999] Lloyd's Rep Med 48.

48 All these authorities whilst interesting appear to me to turn very much on their own particular facts and none is truly analogous. Mr Miller contended that the absence of an analogous case supported his argument that liability should not exist in these circumstances. Mr Stuart-Smith contended that there had to be a first time and liability should be found here

How Are These Principles To Be Applied In This Case?

Was The Loss Reasonably Foreseeable?

49 Mr El-Safty accepted that he knew that footballers were bought and sold sometimes for very high sums of money. He agreed he knew that if a player was injured he might have to be replaced. He said he was unaware of the **Bosman** Ruling and the reduction in asset value of a footballer towards the end of his contract. He knew that a footballer could be on a free transfer.

50 In my judgement, it is clear that it was reasonably foreseeable that WBA might suffer some loss if Mr Appleton was negligently treated so that he was unable to return to play football. Mr Miller did not in reality contend otherwise but pointed out that such foreseeability would exist in relation to any employer whose employee was incapacitated.

Was There Sufficient Proximity Between The Parties?

51 I consider the headings suggested in **McNaughton v Hicks Anderson & Co**.

1) The purpose for which the statement was made

Mr El-Safty said he was advising Mr Appleton. His purpose was to recommend to him as a patient what he considered to be the best course of action. Mr Worth said the advice had to be given to Mr Appleton. Had he disagreed with it he would have discussed it with Appleton and would have considered whether to get a second opinion.

2) The purpose for which the statement was communicated

It was communicated to Mr Worth because he was there as the physiotherapist who had referred Mr Appleton to the Defendant. Mr Worth said that his purpose in receiving the advice was to help Appleton to return to full fitness as soon as possible.

3) The relationship between the adviser, the advisee and any other relevant third party.

52 Mr El-Safty had treated over 30 WBA players according to the records between 1997 and 2002. He had also treated an unknown number of their players over the years prior to that. He had also treated players from other clubs. To put the matter in perspective, it should be remembered that he was treating about 60 private patients a week which would be about 3000 per annum. The number of WBA players advised or treated is therefore a tiny percentage of those advised or treated privately.

53 His relationship with Mr Appleton was that of consultant and patient. I have already made reference to the role of Mr Worth when considering the contractual position. He was there at the consultations when his principle interest was the welfare of his patient. He was of course the WBA physiotherapist, and "in that sense" was there on behalf of WBA.

54 4) The size of the class to which WBA belonged

WBA as Mr Appleton's employer was in a class of one.

5) Mr El-Safty's state of knowledge including whether he knew that WBA would rely on his evidence without obtaining independent advice and

6) Reliance by WBA.

I consider these together.

55 Mr El-Safty regarded himself as giving advice to his patient Mr Appleton. It is obvious that he must have been aware that Mr Worth would hear it and take it into account. But again the question arises as to whether Mr Worth was acting as the referring healthcare professional or as agent for WBA. I consider he was acting, if not entirely then to a very large extent, as referring healthcare professional.

56 He said if he had disagreed with Mr El-Safty's advice he would have discussed it with Mr Appleton and considered getting a second opinion. In this case he did not disagree with the advice.

57 There is no suggestion that Mr El-Safty's advice was communicated to others at WBA for example the Secretary or the Board for their consideration. There was not in that sense consideration by WBA of it and a decision whether or not to act in reliance on it. WBA could be said to have acted in reliance on it in so far as Mr Worth, if he was acting as agent of WBA accepted it and did not consider it necessary to advise Mr Appleton to get a second opinion. What WBA was really relying on was Mr El-Safty's good reputation and the fact that over the course of years he had advised and treated players successfully.

58 Having considered this matter under the suggested headings in the **McNaughton** case, I return to the elements in **Caparo** which are very much in issue:-

(i) Is there sufficient proximity and

(ii) Is it fair, just and reasonable to impose the duty of care?

59 The Claimant argues that the answer to both questions is Yes and points to the following features:-

(i) The role of Mr Worth in "engaging, attending and instructing" the Defendant.

(ii) The regularity with which WBA instructed the Defendant as a specialist in knee injuries suffered by its players

(iii) The Defendant's reporting to WBA

(iv) The fact that the Defendant invoiced WBA and was paid by them

(v) The Defendant's knowledge of the financial importance of the player to WBA

60 I have already indicated that I do not accept that Mr Worth engaged or instructed the Defendant nor do I accept that WBA instructed him. What happened was that players were referred to him by the relevant health professional. That may have been Mr Worth or it may have been one of the Club's doctors. The Defendant did report back to the relevant health professionals. It is right that the Defendant's wife sent invoices to WBA for onward transmission to the Insurer if appropriate. While Mr El-Safty would know that a player had a value to a Club, he would not know what that value was nor would he know how long the player's contract had to run (which would affect the value).

61 While I bear in mind the features relied on by Mr Stuart-Smith, I also bear in mind that the WBA players Mr El-Safty treated amounted to only a tiny percentage of his patients. The fact that they were WBA players was entirely incidental.

His evidence was that he had a rather closer association with Aston Villa whose ground he had visited and whose Chairman he had met. He had treated some of that Club's players. He had never visited WBA. He had never met its Board or Secretary.

62 Was the situation here in reality materially different from the situation where there is a reasonably foreseeable loss to a company through the negligent treatment of its managing director? A substantial company may well have a group employees health insurance policy and may well, on a regular basis, send its employees for treatment to a particular consultant. In the normal way, the consultant would not owe a duty of care to the company. I do not consider the present case is materially different.

63 Having considered all the evidence and the competing arguments, I have reached the conclusion that there was in this case not sufficient proximity between the Claimant and the Defendant.

64 If I am wrong about that, I must consider whether it would be fair, just and equitable to find that there was a duty of care. I consider first the general position. Should a consultant for example advising a Rooney or a Beckham or a Flintoff have a potential tortious liability to their club/county or England for negligent treatment – a liability running to many millions of pounds?

What about negligent treatment of a resident conductor of an orchestra or a leading player in a rock band or the managing director of a major company? The consultant would probably know each patient was a valuable asset.

Should the consultant take steps to ascertain their value so as to evaluate his potential liability? Should he seek to put in hand a disclaimer or limitation of his liability? How would he do this? How would insurance premiums be affected?

65 In my judgement, one only has to pose these questions to conclude that it would not be fair, just and equitable for there to be liability in such cases.

66 I do not consider the particular features of this case upon which the Claimant relies lead to a different conclusion here.

67 I am unpersuaded by the argument on behalf of the Claimant that because Mr El-Safty has been negligent, it is fair, just and equitable that he should be found to owe a duty to WBA. There is no doubt that he owed a duty to Mr Appleton and will have to compensate him for his losses. But in my judgement to hold that he owed a duty to WBA would be several steps too far.

68 In spite of the best endeavours of Counsel no reported case has been found where a duty of care has been held to exist in these circumstances. That comes as no great surprise.

69 This case has been admirably argued by Mr Stuart-Smith and Mr Miller. In reaching the conclusions I have, I have not made specific reference to every single argument advanced by the parties but have had all their arguments in mind.

70 I find that the Defendant did not owe a duty to the Claimant either in contract or in tort.