Neutral Citation Number: [2021] EWHC 2911 (QB)

Case No: QB-2020-003293

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2021

Before :

SENIOR MASTER FONTAINE

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Between :

Michelle Pryor	**Claimant**
- and -	
Liverpool Women's NHS Foundation Trust (1)	**Defendants**
Joanne Lumsden (2)	

- -
- -

Robert Sterling (instructed by **Bond Turner**) for the **Claimant**
Rupert Paines (instructed by **Clyde & Co LLP**) for the **First Defendant**
Louis Browne QC (instructed by **Manleys Solicitors**) for the **Second Defendant**

Hearing dates: 14 July 2021

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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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SENIOR MASTER FONTAINE

Senior Master Fontaine:

1. There were three applications before the court:

   i) The Claimant's application dated 11 March 2021 for a re-listed Costs and Case Management Conference and directions, and to strike out Paragraph 1 of the Second Defendant's Defence;

   ii) The First Defendant's (the "Trust") application dated 30 April 2021 to strike out and/or for summary judgment upon certain paragraphs of the Particulars of Claim("PoC") and

   iii) The Second Defendant's ("Ms Lumsden") application dated 22 April 2021 for strike out and/or for summary judgment upon the entirety of the POC.

2. Documents before the court will be referenced in this judgment by the electronic page numbering in the hearing bundle as follows: [HB 1] and authorities will be referenced by the electronic page numbering in the authorities bundle as follows: [AB 1].

3. The following witness statements/documents were before the court;

   i) For the Claimant:

      a) first witness statement of Sarah Sykes dated 11 March 2021 in support of the Claimant's application [HB 407];

      b) second witness statement of Sarah Sykes dated 7 June 2021 in response to the Second Defendant's application [HB 320];

      c) first witness statement of the Claimant dated 6 July 2021 in response to the Second Defendant's application [HB 365];

   ii) For the Trust: Letters from the Trust to Ms Lumsden dated 21 February 2018 and 4 April 2018 [HB 395-398];

   iii) For Ms Lumsden: first witness statement of Mark James Manley dated 22 April 2021 [HB 151].

4. At the hearing I heard submissions on all applications save for the Claimant's application for a re-listed Costs and Case Management Conference and directions, which is dependent upon the determination of the Defendants' applications.

Summary of factual background

5. I summarise the circumstances that led to this claim from the statements of case and the witness statements. The claim arises out of events following the Claimant giving birth by planned caesarean section in the Trust's hospital on 6 June 2017, until the discharge from hospital of mother and child on 7 June 2017. The father of the child and the Claimant's partner from about January 2016 to June 2017 was Gary Hayden ("GH"). One of the midwives treating the Claimant on 7 June 2017 was Ms Lumsden.

6. The Claimant began a serious relationship with GH in January 2016, whom she had known for 5 months. On 4 October 2016 the Claimant learnt that she was pregnant following several months when she and GH were trying to conceive.

7. Ms Lumsden's defence states that she met GH on holiday in Benidorm in September 2016, who told her that he was single, and had been from March 2016, and on her return from holiday she met with him at his request on a friendly basis on a few occasions for coffee and a visit to the cinema in October 2016. This developed into a physical relationship for a very brief period in November 2016, but neither considered that they were boyfriend and girlfriend. Contact between them ended on 29 November 2016 when GH told Ms Lumsden that he was going to attempt to resume a relationship with a woman with whom he said he had had a "*one night stand*" and who had become pregnant as a result of that encounter. It subsequently became known that the woman referred to was the Claimant. During the short period when GH and Ms Lumsden were in a sexual relationship GH continued his sexual relationship with the Claimant.

8. Ms Lumsden's case is that the relationship between her and GH ended on an amicable basis. GH asked Ms Lumsden to remain friends with him on Snapchat but she did not wish to do so in the circumstances of his attempting to resume his relationship with the woman who was pregnant when he was about to become a father, and deleted his contact details. The Claimant's case is that GH regarded the relationship with Ms Lumsden as casual but that she regarded it as more serious. This is denied by Ms Lumsden.

9. The circumstances of how Ms Lumsden knew that the Claimant was the woman who was having GH's child, and how she knew that she was in the hospital where Ms Lumsden worked as a midwife is in dispute, but are not relevant to the issues on the application.

10. The Claimant gave birth by caesarean section on 6 June 2017 and in the evening she was transferred to the ante- and post-natal ward of the hospital, Mat Base (Bed 33). The ward is divided into 9 private rooms and 9 bays of 3 - 5 beds in each, in separate cubicles divided by curtains, with a nurses' station at the back of each bay. The Claimant was in a cubicle in one of the bays. GH came to visit the Claimant for the first time since the birth in the evening of 6 June 2017, after the Claimant had texted him the ward information and bed number.

11. There is a dispute as to when and how Ms Lumsden knew that the Claimant was the mother of GH's child, although Ms Lumsden accepts that on 5 June 2017, GH informed her that the Claimant was giving birth in the Trust's maternity unit on 6 June 2017, and indicated that he might visit to meet the baby. However, in this communication, the Claimant was not identified by name and/or physical, description.

12. It is not in dispute that Ms Lumsden was on duty in Mat Base on 7 June 2017 and that she attended to the Claimant and her baby on a number of occasions during the course of her duties. On one of those occasions GH visited. Ms Lumsden dealt with the discharge of the Claimant from hospital completed at 5.17pm on that day. The interactions between the Claimant, Ms Lumsden and GH on that day are in dispute. In summary, the Claimant's case is that that Ms Lumsden knew that she was Mr Hayden's partner, took an unusual interest in her, asked intrusive questions about her history,

former relationships, and partner, made clear on GH's arrival that she knew him, and generally sought to make the Claimant and GH feel uncomfortable. Further, that after GH had left the hospital, Ms Lumsden informed the Claimant that she and GH had met in Benidorm and "*spent some time together*", strongly hinting that they had been intimate. Ms Lumsden denies this and essentially asserts that she acted professionally throughout.

13. On 16 June 2017 the Claimant was visited at home by a Community midwife, Claire Maher, employed by the Trust. The Claimant, who was upset about the events in the hospital on 7 June 2017, and her consequent suspicion of the relationship between GH and Ms Lumsden, agreed to Ms Maher's suggestion that Ms Maher would speak to Ms Lumsden. Ms Maher accordingly spoke to Ms Lumsden and reported back to the Claimant on the same day. The Claimant then asked Ms Maher to ask Ms Lumsden to telephone her, which Ms Lumsden did, later on the same day. The contents of that telephone discussion are in dispute, but it is not in dispute that in response to the Claimant's question Ms Lumsden confirmed that she and GH had slept together.

14. Ms Lumsden was dismissed by the Trust on 21 February 2018 for breach of the Nursing and Midwifery Council Professional Code of Conduct ("the NMC Code") and for gross misconduct. The basis for that dismissal was that Ms Lumsden should not have provided care to the Claimant given her relationship with Mr Hayden, and should not have contacted her to explain that relationship. Ms Lumsden appealed, which appeal was dismissed; see correspondence between the Trust and Ms Lumsden [HB 395-398].

The Claim against the Trust and Ms Lumsden

15. The events of 7 June 2017, and the telephone conversations on 16 June 2017 form the factual basis for the Claimant's claim. The brief details on the Claim Form are: "*Claim for damages arising out of breach of privacy rights and breach of duty.*" The PoC at paragraphs 47 and 48 rely on Ms Maher's actions as being "*in breach of the Claimant's privacy rights*.". At paragraph 51 and similarly in the Particulars at paragraph 52, the Claimant relies on the actions of Ms Lumsden as being in breach of "*the Claimant's rights of privacy and the duty not to act in conflict of duty*". No further explanation is given of the legal basis of the claims in the Claim Form or PoC, although paragraph 3 of the Reply to the Second Defendant's Defence states:

> "Interference with the Claimant's right of privacy is a tort for which the Second Defendant is answerable. Misuse of the Claimant's confidential information is an obligation in equity, for which, again, the Second Defendant is answerable."

16. Ms Sykes' second witness statement at paragraph 16 states: "*The Claimant is simply focusing her claim on the main causes of action which are best pursued, namely breach of privacy and misuse of private information….*" And the Claimant's skeleton argument similarly attempts to expand upon the claims as expressed in the statements of case. The Claimant claims damages, including damages for psychiatric injury, and aggravated damages.

The basis of the applications

17. The application of Ms Lumsden proceeds on the basis that the claim fails to plead any legally coherent cause of action, and that even if the claim were re-pleaded to include any of the claims referred to in the Claimant's skeleton argument, the undisputed facts do not support such claims, so that the claim should be struck out under CPR 3.4 (2)(a) as showing no reasonable grounds for being made, and/or that the claim has no real prospect of success and that summary judgment should be granted in Ms Lumsden's favour under CPR 24.2.

18. The application of the Trust proceeds on much the same basis, save that it does not seek to strike out allegations in paragraphs 21(2), 24(2) and 24(3) whether pursued as claims for misuse of private information or breach of confidence. Those allegations essentially claim that Ms Lumsden misused the Claimant's clinical records so as to ensure that Ms Lumsden was on duty at the time and location where the Claimant would be treated; and so as to embarrass her. The Trust's position is that whilst there are significant legal and factual problems with those allegations, it did not ask the Court to rule on those allegations at the hearing.

19. The application of the Claimant seeks to strike out paragraph 1 of Ms Lumsden's Defence, which argues that because the actions complained of occurred during Ms Lumsden's employment by the Trust, the Trust has vicarious liability for her actions and Ms Lumsden has no liability in law in respect of the claim. The Claimant says that such assertion is wrong in law and should be struck out as showing no reasonable grounds for being made.

The Legal Test for Strike out and Summary Judgment

20. By CPR 3.4(2):

> "(2) The court may strike out a statement of case if it appears to the court–
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
> (c) that there has been a failure to comply with a rule, practice direction or court order."

21. Practice Direction 3A sets out examples of situations in which strike out will be appropriate at paragraph 1.4, including:

> "(2) those which are incoherent and make no sense,
>
> (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant."

22. The test was summarised by Warby J. (as he then was) in *Duchess of Sussex v Associated Newspapers Ltd* [2020] EMLR 21 **[AB 26]** at [33(2)]:

> "(2) An application under CPR r.3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials it should "grasp the nettle": *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 , but it should not strike out under this sub-rule unless it is "certain" that the statement of case, or the part under attack discloses no reasonable grounds of claim: *Richards (t/a Colin Richards & Co) v Hughes* [2004] EWCA Civ 266; [2004] P.N.L.R. 35 [22]. Even then, the Court has a discretion; it should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment."

23. The test on an application under CPR 24 is set out in CPR 24.2:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

24. The principles on the application of that test are well-known and conveniently summarised in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) **[AB 13]** at [15]:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the

question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

Discussion

Claim for breach of privacy rights / intrusion into physical privacy

25. The primary legal issue between the parties is whether there is a freestanding legal cause of action for "breach of privacy rights", as claimed in the Claim Form and PoC. The Claimant's skeleton argument at paragraphs 14-33 expands upon this, perhaps recognising that the claim is, in my view, unclear and inadequately pleaded. This identifies what claims are said to be made in particular paragraphs of the PoC, identifying some paragraphs as alleging a claim of misuse of confidential or private information, and some as intrusions into physical privacy, and some as alleging both, although none of the paragraphs identified as alleging a claim of misuse of confidential or private information expressly plead such a claim. Secondly, the skeleton argument seeks to support by reference to authority a tort of "intrusion into physical privacy". In the alternative it is submitted that even if there is not such a tort, or a tort of breach of privacy, there is nothing to stop the law developing such an actionable tort, so that neither strike out nor summary judgment is warranted.

26. I accept submissions on behalf of both Defendants that a tort of "invasion of privacy" or "breach of privacy rights" or "breach of physical privacy" is not a tort recognised in English law: see *Campbell v MGN Ltd* [2004] UKHL 22 at [132] [AB 277]; *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73 [AB 389] per Buxton LJ at [8] [AB 396]; *Wainwright v The Home Office* [2003]] UKHL 53; [2004] 2 AC 406 [AB 246] at [18]-[19] and [23], [AB 259-261], [AB [31] -[35] [AB 263-264], [43] [AB 84] and [62] [AB 269].

27. The Claimant relies on the extracts from the judgment with regard to the damages awarded in the phone hacking cases of Arden LJ in *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch);[2016] F.S.R. 12 [AB 581] and [2015] EWCA Civ 1291 at [16], [45] [AB 736 and 744] and [48] [AB 745]. Mann J. at first instance awarded damages both for the information derived from the phone hacking that was used for publication, and that which was listened to but not publicised. I note also that in Toulson and Phipps *Confidentiality* 4th edn. At 7-066, it is stated: "*In NTI v Google LLC [2018] EWHC 799 (QB)344 at [225] Warby J after brief consideration rejected a submission that proof of misuse was a separate and independent requirement of the tort of misuse of private information*.". Those authorities could not form a basis for establishing a new tort of invasion of privacy, as both cases were claims for misuse of confidential information/ breach of Art 8. It is expressly stated in [16] and [45] of the Court of Appeal judgments in *Gulati* that the damages were awarded for invasion of privacy related to the claim for misappropriating or misusing private information. In other words, breach or invasion of privacy is an overarching term for a number of torts, including misuse of private information. That applies also to the comments at [48] in Gulati. In *Wainwright* Lord Hoffman also made this clear at [31]-[35] [AB 423-424], and (at [34]) suggested that "…*the coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill the gaps in the existing remedies*." See also *Campbell v MGN* per Lord Hoffman at [43] [AB 284].

28. It is also worth noting that Practice Direction 53B relating to Media and Communications claims, does not include breach of privacy as a claim which can be brought in that specialist list. The claims listed are defamation, misuse of private or confidential information, data protection and harassment. Further CPR 53.1(3) states:

> "A High Court claim must be issued in the media and communications list includes a claim for defamation, or is or includes –
>
> (a) a claim for misuse of private information;
>
> (b) a claim in data protection law; or
>
> (c) a claim for harassment by publication."

If a freestanding claim for breach of privacy rights exists, it is unlikely that it would not have been included in that list.

29. The Claimant relies on passages in *The Law of Privacy and the Media* 3rd edn. at paras 10.82 -10.98 [AB 1113] which suggest the possibility in the future of the development of a tort or breach of physical privacy, although expressly recognising that such a tort does not exist in English law.

30. The Court of Appeal in *Fearn and ors v Board of Trustees of the Tate Gallery* [2020]Ch 621[AB 976] at [84] [AB1002], when declining to extend the common law on private nuisance, said with regard to laws bearing on privacy that:

> "….. There are already other laws which bear on privacy, including the law relating to confidentiality, misuse of private information, data protection (Data Protection Act 2018), harassment and stalking (Protection from Harassment Act 1997). This is an area in which the legislature has intervened and is better suited than the courts to weigh up competing interests: cf *Wainwright v The Home Office* [2004] 2 AC 406 esp at para 33, in which the House of Lords held that there is no common law tort of invasion of privacy and that is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush approach of common law principle.
>
> And at [94] [AB 1003]:
>
> ….. As mentioned earlier, common law principles of confidentiality and misuse of private information, and statutory intervention, such as the Protection from Harassment Act 1997, the Data Protection Act 2018 and planning law and regulations, suggest that, if there is a legal lacuna is to remedy, that is best left to the legislature rather than to the courts to fashion"

31. See also *Wainwright* at [19] to [20] [AB 260]. In the light of those comments by judges in the most senior courts, I do not consider that there is a real prospect of success that a

claim based on the potential development of a tort of invasion of physical privacy, save by legislation.

32. The Claimant also relies on the case of *Murray*, primarily a claim under Art 8. In particular, the Court of Appeal at [56] and [57] [AB 511] stated that:

> "56. ….In this appeal we are concerned only with the question whether David, as a small child, had a reasonable expectation of privacy, not with the question whether his parents would have had such an expectation…..
>
> 57. It seems to us that, subject to the facts of the particular case, the law should indeed protect children from intrusive media attention, at any rate the extent of holding that a child has a reasonable expectation that he or she would not be targeted in order to obtain photographs in a public place for publication which the person who took or procure the taking of the photographs new would be objected to on behalf of the child. …."

It is clear that such comments, and also the references in the judgment to the claimants' reasonable expectation of privacy, relied on by the Claimant, were made in the context of both their Art 8 claim and their claim for misuse of private or confidential information.

33. In the case before me, there is no suggestion in the statement of case that there was any misuse of the baby's private or confidential information, and the facts are very different to those in *Murray*. I can see no basis for that decision supporting this claim.

34. With regard to the Claimant's reliance on Lord Neuberger's judgment in *PJS v News Group Newspapers Ltd* [2016] UKSC 26 at [58] [AB 716], I note again that this was a claim under Art 8 of the ECHR, and for misuse of private information. The breach of confidence and invasion of privacy claims were made under Art 8. The claimant sought to protect information about his private life from publication. It is clear from the judgments that the injunction was continued to prevent misuse of private information (and breach of the right to respect for private and family life) and the references in the judgments to "intrusion" relate to the consequences of that tort, rather than that "intrusion" was recognised as a freestanding tort. There is also no suggestion in *PJS* that *McKennitt, Campbell* or *Wainwright* were no longer good law.

35. With regard to the Claimant's reliance on *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 in support of a free standing claim for breach of confidence, I refer to the Court of Appeal's decision in *Douglas v Hello Ltd (No. 3)* [2005] EWCA Civ 595; [2006] QB 125 at [53] where it was said:

> "We conclude that, in so far as private information is concerned, we are required to adopt, as the vehicle for performing such duty as falls on the courts in relation to Convention rights, the cause of action formerly described as breach of confidence. As to the nature of that duty, it seems to us that sections 2, 3, 6 and 12 of the Human Rights Act all point in the same direction. The court

> should, insofar as it can, develop the action for breach of confidence in such a manner as will give effect to both Article 8 and Article 10 rights. In considering the nature of those rights, account should be taken of the Strasbourg jurisprudence. In particular, when considering what information should be protected as private pursuant to Article 8, it is right to have regard to the decisions of the ECtHR. We cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion."

36. See also the judgment of Buxton LJ in *McKennit v Ash* at [8] and [11] [AB 396,397], which followed the Court of Appeal's judgment in *Douglas*, to the same effect.

37. Similarly, Eady J's comments in *Mosley v News Group Newspapers Ltd* [2008] EMLR 20 at [7] [AB 337], refers to "*the old-fashioned breach of confidence*" now having statutory protection under the Human Rights Act 1998, although I accept that he regarded the tort as retaining its status in equity, and having been "*extended*" by the 1998 Act. However I note that the headnote at (1) [AB 331] states: "*In order to find the rules of the English law of breach of confidence, recourse had to be made to Arts 8 and 10 of the European Convention on Human Rights.*" There is in fact no claim made for "breach of confidence" in this claim, nor could there be, on the facts (see Paragraph 55 below).

38. Thus, those paragraphs in the PoC which rely on breach of physical privacy/ breach of privacy rights would show no reasonable grounds for a claim being made, and such claims would have no real prospect of success, unless it can be demonstrated that the facts pleaded would support a claim for misuse of private or confidential information, alternatively breach of confidence in equity.

39. On the basis of the Claimant's submissions at paragraph 18 of her skeleton argument, the following paragraphs of her PoC make or support a claim only for intrusion into her physical privacy: paragraphs 7(6), 22 to 33, 35 to 45, 47-50. It follows from my conclusions that such a tort does not form part of English law, that such paragraphs therefore show no reasonable grounds for being made and have no real prospect of success, nor is there any compelling reason for such claims to proceed to trial.

Claim for breach of the duty not to act in conflict of duty

40. The second issue on the law is in respect to the Claimant's claim for breach of the duty not to act in conflict of duty. This is not explained in the PoC, but is expanded upon in the Claimant's skeleton argument at paragraphs 34-35. It is said that:

> "If, as we contend, Ms Lumsden misused Ms Pryor's confidential information or private information and intruded into her physical privacy, this will amount to her acting in conflict of interest and duty and is part of the infringement of privacy."

41. Thus, this allegation is now said to form part of a claim for misuse of confidential or private information, although not pleaded as such, again perhaps now recognising that there is no freestanding tort of breach of the duty not to act in conflict of duty. Certainly

no authority was produced to support such a cause of action. The claim relies entirely on Ms Lumsden's failure to comply with certain sections of the NMC Code and the approach of the Nursing and Midwifery Council to the actions of Ms Lumsden as expressed in the letter of 31 August 2018 to Ms Lumsden [HB 328]. The NMC Code [AB/34] and Joint Statement [AB/35] are not statutory regulations, nor other forms of legislation. They do not create any cause of action in civil law. The fact that the Council considered that Ms Lumsden was in breach of the NMC Code does not constitute a cause of action. The Claimant has not identified any parts of those documents said to create such a cause of action.

Whether the Claimant should be permitted an opportunity to amend

42. I have mentioned that claims for misuse of the Claimant's private or confidential information or breach of confidence are nowhere pleaded in the Claim Form or PoC. But it is appropriate to consider on an application for strike out and/or summary judgment whether a claimant might be able to formulate a viable claim if their statement of case was permitted to be amended: *In Soo Kim v Youg* [2011] EWHC 1781 per Tugendhat J. at [40].

43. Before I turn to whether the facts pleaded might support a claim for misuse of the Claimant's private or confidential information, I address what is required to establish such a claim. Toulson and Phipps *Confidentiality* at 7-062 -7-065 [AB 1069] states that a "two stage process" is adopted. First, the claimant must have a reasonable expectation of privacy, and secondly, the court must consider whether the defendant's interference was justified by other relevant considerations.

44. The law was recently summarised by Warby J in *Duchess of Sussex* at [28] – [31] as follows:

> "28. The Human Rights Act 1998 obliges the Court to interpret, apply and develop English law in conformity with the European Convention on Human Rights . Where an individual complains that her privacy has been violated by newspaper reports, the Court must ensure that its decision properly reconciles the competing Convention rights: those protected by Articles 8 and 10 . Article 8(1), so far as relevant, requires the state to respect a person's "private and family life … and [her] correspondence". Article 10(1) guarantees the right to transmit and receive information and ideas without state interference. Both rights are qualified. Interferences can be justified, but only if they are prescribed by law, and are necessary and proportionate in pursuit of one of the legitimate aims identified in Articles 8(2) and 10(2). Here, on each side of the equation, the legitimate aim for consideration is "the protection of the rights of others".
>
> 29. Domestic law gives effect to this framework through the tort of misuse of private information. Liability is determined by applying a two-stage test. The principles are explored in some detail in *ZXC v Bloomberg LP* [2020] EWCA Civ 611 [2020] 3 WLR 838 [40-48], [103-109] and in *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB) [2021] 4 WLR 3 [63-74], [111-119], [120-122].

> For the purposes of this case, it is possible to summarise them as follows.
>
> 30. At stage one the question is whether the claimant enjoyed a reasonable expectation of privacy in respect of the information in question. One way the question has been put is to ask whether a reasonable person, placed in the same position as the claimant and faced with the same publicity, would feel substantial offence. There must be something of a private nature that is worthy of protection. In some cases, the answer will be obvious; but the methodology is to make a broad objective assessment of all the circumstances of the case. These include (1) the attributes of the claimant, (2) the nature of the activity in which the claimant was engaged, (3) the place at which it was happening, (4) the nature and purpose of the intrusion, (5) the absence of consent and whether it was known or could be inferred, (6) the effect on the claimant and (7) the circumstances in which and the purposes for which the information came into the hands of the publisher ("the *Murray* factors")…… If the information, or similar information about the claimant, is in the public domain, or is about to become available to the public, the court must have regard to that. In such a case it is a matter of fact and degree as to whether the legitimate expectation of privacy has been lost. Privacy rights can survive a degree of publicity for the information or related information.
>
> 31. At stage two, the question is whether in all the circumstances the privacy rights of the claimant must yield to the imperatives of the freedom of expression enjoyed by publishers and their audiences. The competing rights are both qualified, and neither has precedence as such. The conflict is not to be resolved mechanically, on the basis of rival generalities. The court must focus intensely on the comparative importance of the specific rights being claimed in the particular case; assess the justifications for interfering with each right; and balance them, applying a proportionality test. The Court must have regard to the extent to which it is or would be in the public interest for the material to be published. The decisive factor at this stage is an assessment of the contribution which the publication of the relevant information would make to a debate of general interest. Other factors to be weighed in the balance are the subject-matter, how well-known the claimant is, the claimant's prior conduct, and editorial latitude. …..."

45. Those paragraphs of the PoC which the Claimant now submits in her skeleton argument make or support a claim for misuse of private information are as follows:

i) Paragraphs 7(1) to 7(4), which set out the information in respect of which it is said that the Claimant had a reasonable expectation of privacy (at 7(5)), namely:

> "(1) The details of the care and treatment that the Claimant was receiving at the hospital was private and confidential information and the property of the Claimant.

> (2) The records, including clinical records, of the Claimant's care and treatment was private and confidential information, the property of the Claimant.
>
> (3) The details of the Claimant's current and past relationships were private information, the property of the Claimant.
>
> (4) The Claimant had a right of privacy, including a right of respect, in regard to her post-birth treatment at the hospital on 6th and 7th June 2017 and subsequent midwife and nursing care and treatment, including [the Claimant's child], Mr Hayden and the Claimant having no contact with the Second Defendant."

ii) Paragraphs 21, 24, 45, 49(2)(c).

46. With regard to the information at 7(1), there is no allegation that either Defendant misused such information. Any claim in relation to paragraph 7(1) therefore shows no reasonable grounds for being made nor has any real prospect of success.

47. With regard to the information at 7(2) and 7(3), both Defendants had a right to access the Claimant's medical records for the legitimate purpose of providing medical and nursing care. The only allegations that the information in such records was misused are as follows:

i) Paragraph 21 (2),in respect of the allegation that Ms Lumsden accessed the Claimant's clinical records so that she could be the midwife in charge for the day; and

ii) Paragraphs 24 (2) and (3) in respect of the allegation that Ms Lumsden used information from the Claimant's clinical records as to the Claimant's previous relationships.

48. With regard to the information at 7(4), this is unclearly pleaded, but it can be deduced that it is an allegation about the Claimant's post-birth care and treatment and that there was a breach of her reasonable expectation of privacy. In order to found a cause of action for misuse of confidential information/breach of confidence it has to be identified what Ms Lumsden did that could constitute such a tort. The allegations about Ms Lumsden's conduct can be summarised from the PoC as follows:

i) Asking many intrusive questions about the Claimant's relationship with her partner: paragraphs 24 and 25;

ii) During a period of 9 hours, approaching the Claimant on no less that 10 occasions and possibly up to 20 occasions, and handling and touching the Claimant's baby at least 3 times and possibly up to 5 times: paragraph 22(1) and (2);

iii) Speaking to and texting GH on 16, 18 and 19 June 2017, partly whilst she was on duty on Mat Base: paragraph 26;

iv) Picking up the Claimant's baby when she was crying, whilst the Claimant was in the bathroom, and commenting to the Claimant's mother, who was visiting, that the Claimant looked like her mother: paragraph 27;

v) Addressing GH as "Gary" when he arrived to visit the Claimant, causing an uncomfortable atmosphere: paragraph 29;

vi) Laughing and joking loudly with one of her colleagues at the nurse's station behind the Claimant's cubicle, making the Claimant feel uncomfortable: paragraph 31;

vii) Coming over to the Claimant's bed and trying to make conversation whilst the Claimant's mother and GH was there: paragraph 32;

viii) After GH had left, coming to see the Claimant and telling her that she had met GH in Benidorm the previous year and spent some time with him, making the Claimant feel that there had been a prior sexual relationship between Ms Lumsden and GH: paragraph 35;

ix) Continuing to discuss the time she had spent in Benidorm with GH and his friends, and commenting on the likeness of the Claimant's baby to GH, whilst the Claimant was breastfeeding: paragraph 36;

x) Continuing to come repeatedly to the Claimant's bedside and starting conversations about GH, despite the Claimant making it clear that she did not want to engage in such conversations: paragraph 37;

xi) Causing the Claimant by such conduct to discharge herself early from the hospital although she was not in a fit state to do so having just had a caesarean section and a further operation; paragraphs 38 and 39;

xii) Speaking to GH in such a way as to embarrass him and make the Claimant feel uncomfortable when GH came to collect her from hospital: paragraph 41;

xiii) Speaking to the Claimant's daughter L who had come to the hospital referring to the new baby as L's "half-sister" which was inappropriate and degrading, and upsetting for L and the Claimant: paragraph 42;

xiv) Speaking sarcastically to GH when he left the ward: paragraph 43;

xv) Causing the Claimant to become distressed after leaving the hospital because she felt that she had betrayed by GH: paragraph 44.

49. If the allegations made are true (and they are denied/not admitted/a differing account given by Ms Lumsden) then it is apparent that the Claimant had a very unpleasant and distressing experience. However, I do not consider that any of these allegations, assuming for the purposes of these applications in the Claimant's favour that they are true, could realistically form the basis of a claim for misuse of private /confidential information or breach of confidence. The number of attendances by Ms Lumsden on the Claimant and her baby, even accepting the Claimant's account of the number of attendances, (as to which Ms Lumsden's account differs) are not out of the norm in

respect of a woman who has just undergone a caesarean section and other gynaecological surgery, and has a new born baby. There are also many circumstances where most people receive unwelcome and intrusive questioning from people with whom they are obliged to interact. That is part of the many ups and downs of everyday life. The primary reason for the Claimant's distress was the growing realisation that GH had been lying to her and had probably been unfaithful to her, particularly during her pregnancy, with the unpleasantness of the situation exacerbated by the circumstances of having just given birth, and the suspicion that the treating midwife had been the person with whom GH had had a sexual liaison. The most that could be said about the pleaded conduct, in my view, is that it was conduct calculated to embarrass, humiliate and cause distress to the Claimant. There is no tort to remedy this.

50. With regard to the information about the Claimant's previous abusive relationship, whoever was the midwife attending to the Claimant would have had access to that information, and there are likely to be good reasons why that should be the case, so that any potential safeguarding risk to mother and child could be flagged up. There is no allegation that Ms Lumsden used the information in any other way than to identify to the Claimant that she was aware of it, and the claim alleges that she mentioned the information only to the Claimant. On the basis of the judgment of Mann J in *Gulati* and Warby J in *NTI v Google* (see Paragraph 27 above) publication of the information to others is not necessarily required, but it is nonetheless difficult to see how this could found a cause of action when, unlike the position in *Gulati*, Ms Lumsden was entitled to access the information, unless possibly it could be demonstrated that she used the information not for appropriate medical or safeguarding purposes. There is the further problem of point of law raised by the Trust, namely that the information contained in the Claimant's clinical records is not her property: *Your Response Ltd v Datateam Business Media Ltd* [2015] QB 41 [AB 550] at [42] [AB 565]. Although it is generally accepted that health authorities which keep such records must not disclose any information from them to third parties without consent, here there was no disclosure to any third party.

51. Finally, any assertion of a reasonable expectation of privacy would be extremely difficult to maintain in the light of the Claimant's conduct in putting the events complained of in the public domain, in publications in Take a Break magazine and the Liverpool Echo, which were then re-published in many other media outlets including the Sun newspaper; and her intention to discuss these events on television (see evidence at paragraphs 29 to 31 of the witness statement of Mr Manley [HB 134] and Exhibit MJM 2 [HB 238]). The fact that the Claimant's name was not included in the publications would be unlikely, in my view, to overcome that problem.

<u>Allegations relating to the events after the Claimant was discharged from hospital</u>

52. The allegations in paragraph 7(4) of the PoC also relate to the matters set out at Paragraph 13 above, when the Claimant was visited at home by Ms Maher, a Community midwife. The complaint relates to Ms Maher having a discussion with Ms Lumsden at the Claimant's request, and reporting back to the Claimant, and a telephone call made by Ms Lumsden to the Claimant, again at the Claimant's request. The matter can be dealt with shortly because the Claimant in both cases consented to the conversations, and in fact asked Ms Maher to ask Ms Lumsden to telephone her. The Claimant's case is that there is a triable issue on the matter of the Claimant's consent,

because it should be judged in the context of the whole claim, but I do not accept that submission. The Claimant, on her own case, sought out the information which Ms Lumsden provided to her in the telephone conversation on 16 June 2017, and consented to it being given to her.

53. Secondly, again on the Claimant's case, the information that Ms Lumsden provided in that conversation related to Ms Lumsden's own relationship with GH, and was not therefore the Claimant's information which had been relayed. Accordingly, paragraphs 46 to 50 of the PoC will be struck out as showing no reasonable grounds for being made, and Defendants are entitled to summary judgment in respect of them as showing no real prospect of success, and there being no compelling reason for this claim to proceed to trial.

54. I have accordingly concluded that there would be no useful purpose served by permitting the Claimant an opportunity to amend the legal basis of her claim.

Breach of confidence

55. Although no claim for breach of confidence is made, and no submission was made that the facts would support such a claim, for completeness I note that my conclusions above relate also to such a potential claim. In addition, the Claimant's conduct in putting the events complained of in the public domain (see Paragraph 51 above), would, in my view, be a significant problem in such a claim.

Whether the Claimant should be given a further opportunity to amend the Claim Form and PoC

56. Even if I am wrong as to my conclusions that there would be no useful purpose to be served by an amendment to the pleaded case, in my judgment there is no good reason to permit such an indulgence to the Claimant for the following reasons.

57. The claim came before Deputy Master Toogood at a CCMC on 10 December 2020, and the Deputy Master determined that the legal basis of the claim was insufficiently clear to enable the court to make directions for trial and proceed to costs budgeting, and made an order staying the claim until 26 March 2021 and failing any application being made by that date the claim would be struck out [HB 112-114].

58. It is clear from the transcript of the transcript of the hearing [HB 296-307] that the Deputy Master had reached this conclusion from her pre-reading of the papers, as she raised the issue at the commencement of the hearing, because of her concern that on the claim as pleaded she could not make directions or costs budget the claim. She gave Counsel for the Claimant (not the Claimant's present Counsel) every opportunity to explain on what legal basis the claim was made, but was, in my view for very good reason, not satisfied with the explanation provided. I note that the Deputy Master made it abundantly clear that the claim as pleaded faced a major difficulty, but she gave the Claimant the opportunity to rectify that, by explaining her concerns with the legal basis for the pleaded claim in detail and at some length, and by the order that she made. Those advising the Claimant could have been under no illusion that if the claim was to survive in any form an application for permission to amend would have to be made with a draft amended statement of case. Instead, the Claimant, for reasons which are entirely

unclear, filed a skeleton argument (prior to, and different from, the skeleton argument filed in response to the Defendants' applications).

59. I note also that in correspondence both before and after the CCMC, solicitors for Ms Lumsden notified the Claimant's solicitors about the problems with the legal basis for the Claimant's claim: MM5 [HB 256], MJM6 [HB 261], but again no application to amend was made.

60. Having failed to take heed of the warnings given, or to take the opportunity to apply to amend before any strike out application was made, I do not consider that the court's resources and additional costs of the Defendants should be incurred on a second occasion.

Conclusion

61. Although only Ms Lumsden's application sought the strike out of/summary judgment in respect of the entirety of the claim, and the Trust's did not seek strike out of or summary judgment in respect of Paragraphs 21(2), 24 (2) and (3), the consequence of my conclusion that the claims made in respect of such paragraphs show no reasonable grounds for being made/have no real prospect of success/ there is no compelling reason for such claims to proceed to trial against Ms Lumsden, is that, as the only claim against the Trust is for vicarious liability in respect of Ms Lumsden's conduct, those claims fall be to struck out as against the Trust also.

62. In the light of my conclusions on the Defendants' applications, the orders sought by the Claimant's application are no longer relevant, so I make no order on that application. I note only that it would have been appropriate, in my view, to strike out paragraph 1 of Ms Lumsden's Defence, for the same reasons as those indicated by Deputy Master Toogood at the CCMC. The fact that Ms Lumsden might not have the means to pay damages does not mean that she would have had no liability if the claim had succeeded, albeit that the Claimant might have decided only to pursue her employer for damages.