# THE TIMES

## The Times 2TG Moot Final 2023

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The Times 2TG Moot is a joint initiative between 2 Temple Gardens and The Times. The aim of the moot is simple: to provide the most open and accessible mooting competition in the country, to enable students from all backgrounds and tertiary education institutions to participate.

As a set of chambers, we have long placed an emphasis on oral advocacy, believing that there is no substitute for oral argument and debate in getting to the nub of an issue. We (as do many other chambers) reward pupillage applicants who have gained experience and shown excellence in mooting.

However, we are all too aware that mooting competitions may appear inaccessible and something of a 'closed-shop'. Mindful of this, we devised the Times 2TG Moot in 2015/2016, which is open to all tertiary education students.

This year, for the first time, we have worked in partnership with several academy schools in inner London to provide mooting workshops to the students. The workshops included a plenary session with the students explaining the role of a barrister and the routes to a career at the Bar. We had the pleasure of hosting the students from the academy schools at the moot semi-final at the Royal Courts of Justice in November 2022. We hope to have inspired some future competitors, and future rising stars.

Whether the mooters go on to apply to 2TG or to pursue a career elsewhere, we are delighted to have encouraged and supported students in this key aspect of their legal education and hope that, with the continued invaluable support and coverage from The Times, we have made some contribution to broadening access to the profession.

## Judges



Lord Wilson

#### The Right Hon Lord Wilson of Culworth Kt

Nicholas Allan Roy Wilson, Lord Wilson of Culworth became a Justice of the Supreme Court in May 2011. Since retiring from the Supreme Court in 2020, Lord Wilson has acted as an arbitrator.

In 1967, after reading jurisprudence at Worcester College, Oxford, Lord Wilson was called to the Bar of England and Wales; and for the next 26 years, first as a junior and ultimately in silk, he practised almost exclusively in the field of family law.

From 1993 until 2005 he was a judge of the Family Division of the High Court. From 2005 until May 2011 he was a judge of the Court of Appeal.



#### Justice of the Supreme Court, The Right Hon Lord Hamblen of Kersey Kt

Nicholas Archibald Hamblen, Lord Hamblen of Kersey became a Justice of the Supreme Court in January 2020.

Lord Hamblen was educated at St John's College, University of Oxford and Harvard Law School, and was called to the Bar (Lincoln's Inn) in 1981.

Lord Hamblen

He practised at the Commercial Bar from 1982-2008. He was appointed Queen's Counsel in 1997, an Assistant Recorder in 1999 and a Recorder in 2000.

Lord Hamblen was appointed to sit as a Justice in the High Court in November 2008 and was a nominated Commercial Court Judge.

In February 2016 he was appointed a Lord Justice of Appeal.



Lady Justice Asplin

#### The Right Hon Lady Justice Asplin DBE

Lady Justice Asplin was called to the Bar (Gray's Inn) in 1984. She was appointed both a Master of the Bench and Queen's Counsel in 2002. She was made a Deputy High Court Judge in 2007 and a Justice of the High Court (Chancery Division) in October 2012. She has written a Guide to the Chancery Applications Court for Litigants in Person.

She was sworn in as a Lady Justice of the Court of Appeal in October 2017.

In March 2021, she was appointed as Chair of the Judicial ADR Liaison Committee.

## Finalists



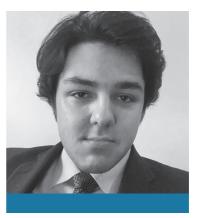
Eliza Bond Bar Course Student at The Inns of Court College of Advocacy



Jeffrey Chu GDL Student at BPP University, London



Aurora Guerrini BPP Law School



Kieran Bailey Bar Course Student at City Law School, London

## Moot Problem

#### IN THE SUPREME COURT OF THE UNITED KINGDOM

#### CLINICAL NEGLIGENCE

BETWEEN:

#### **MS MARIA SMITH**

Claimant

**CLAIM NO. 2TG2023** 

- and -

#### ST MARGARET'S HOSPITAL NHS TRUST

**Defendant** 

#### **CASE SUMMARY**

- Ms Smith is a well-known environmental campaigner. In line with her strongly held views on the dangers of over-population, she decided that she did not want to have any children. However, as condoms are not biodegradable and hormonal contraception gave her terrible side effects, her birth control options were limited. After several months of consideration, Ms Smith decided to undergo surgical sterilisation.
- 2. In late 2015, Ms Smith attended St Margaret's Hospital to undergo a tubal ligation procedure whereby surgical clips would be applied to her fallopian tubes. The clips would block the eggs released from her ovaries reaching her uterus and would therefore prevent her from conceiving. Unfortunately, the operating surgeon failed to attach the one of the clips correctly and Ms Smith remained fertile.
- 3. Unaware of the procedure's failure, Ms Smith stopped taking her oral contraceptive tablets in early 2016. Shortly afterwards she had a passionate but short-lived relationship with a man she met at an environmental conference in Brazil and became pregnant.
- 4. In January 2017, Ms Smith gave birth to a baby boy she named Giles. As he grew, it became apparent that Giles had significant physical disabilities. Genetic testing has shown that these are attributable to a very rare congenital condition for which Ms Smith (unbeknownst to her) was a genetic carrier.
- 5. Despite her initial reluctance to have children, Ms Smith gave evidence at trial that Giles was deeply loved, and she had no regrets about bringing him into the world. Ms Smith and Giles have settled in a commune in the Chiltern Hills and the other commune members provide a great deal of practical and emotional support in dealing with Giles's disabilities.

#### The Claim

- 6. In 2019, Ms Smith commenced a claim against the Defendant NHS Trust in negligence. She was claiming:
- (a) Damages for pain, suffering and loss of amenity in respect of pregnancy and childbirth ("**the Mother's Claim**"); and
- (b) The additional costs of maintaining Giles, over and above the living costs of a healthy person, occasioned by his disabilities ("the Maintenance Claim"). The Maintenance Claim was made for the duration of Giles's life. The parties agree that advances in medical science mean that it is likely that Giles will live until he is 70 years old.
- 7. Unfortunately, after commencing proceedings Ms Smith was diagnosed with an aggressive form of cancer. With palliative treatment to slow the disease, expert oncology evidence suggests that she is likely to survive for another ten years only.

#### The First Instance Decision

8. At trial, damages were awarded in respect of both the Mother's Claim and the Maintenance Claim. In relation to the latter, Michael J held as follows:

"As to the Maintenance Claim, I consider that the law on this point is in a sorry state. It is beyond argument that a child with profound mental or physical difficulties will cost more to maintain as a result of those needs than a child who is healthy. However, despite the Court regularly proceeding on the assumption that these additional costs are recoverable where the child's birth resulted from negligence, it is far from clear to me that this should be the case in principle, or indeed is the case in law.

*Mr* Ivo, Counsel for the Defendant NHS Trust, made a spirited argument that the case of Parkinson v St James and Seacroft University Hospital NHS Trust [2001] EWCA Civ 530 was wrongly decided and that the correct approach was in fact that laid down in McFarlane v Tayside Health Board [2000] 2 AC 59. While it may be the case that the Court of Appeal in Parkinson erred in taking a different approach to McFarlane, their decision is nevertheless binding on this Court.

Accordingly, I find that Ms Smith can recover the additional costs of maintaining Giles occasioned by his disabilities. There are, unfortunately, no authorities on the duration of such an award. However, as this claim is at heart a claim for economic loss sustained by Ms Smith, I conclude that recovery cannot be permitted beyond her expected date of death ten years' hence".

#### The Court of Appeal Decision

9. The Defendant appealed Michael J's decision to the Court of Appeal in respect of the Maintenance Claim only. Ramiro LJ, giving the judgment of the Court, held as follows:

"Michael J was correct in considering herself bound by the decision of this Court in Parkinson v St James and Seacroft University Hospital NHS Trust. While I have my concerns about the correctness of that decision as a matter of principle, I too am bound to apply it.

As to the period in respect of which additional maintenance costs are recoverable, my view differs from that of the Court below. Although this claim is brought by Ms Smith alone, it is reasonably foreseeable that the parent of a disabled child would – during their lifetime – make whatever provision necessary for their child's care after their own death. For this reason, I consider that the additional costs of maintaining Giles for the duration of his life are fairly, justly and reasonably considered to be a loss of the mother's. I therefore have no hesitation in awarding damages for the duration of Giles's anticipated life expectancy, notwithstanding the fact that Ms Smith is unlikely to survive beyond 2033".

#### The Appeal

- 10. The Court of Appeal's decision on the Maintenance Claim is being challenged by both parties. The Defendant NHS Trust advances the following two grounds of appeal:
- (a) Parkinson v St James and Seacroft University Hospital NHS Trust was wrongly decided and should be overruled. In cases of wrongful conception, the law should not discriminate between claims for the maintenance costs of disabled and non-disabled children: in neither case should these be recoverable.
- (b) In the alternative and in any event, the Court of Appeal erred in awarding damages in respect of Giles's additional maintenance costs for the remainder of his life. These should be limited to Ms Smith's life expectancy of ten years posttrial.
- 11. Ms Smith's cross-appeal also invites the Supreme Court to find that the case of *Parkinson v St James and Seacroft University Hospital NHS Trust*, along with *McFarlane v Tayside Health Board*, was wrongly decided and should be overruled. The whole of the costs of maintaining an unwanted child are foreseeable and should be recoverable. The Defendant's second ground of appeal is resisted by Ms Smith, but there is no cross-appeal on this point.

#### Cases:

McKay v Essex Area Health Authority [1982] QB 1166

McFarlane v Tayside Health Board [2000] 2 AC 59

Parkinson v St James and Seacroft University Hospital NHS Trust [2001] EWCA Civ 530

Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52

Nunnerley and Anor v Warrington and Liverpool Health Authority [2003] Lloyd's Rep Med 365

### The Times 2TG Moot Committee



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