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King's Bench Walk

Tracy Holdsworth v Luton and Dunstable University Hospital NHS Foundation Trust [2016] EWHC 3347 (QB)

The Defendant succeeded in full against a clinical negligence claim that it had been negligent per se in carrying out a unicompartment knee replacement to the Claimant, that the Claimant had not given informed consent to that operation and that the femoral component used in the subsequent total knee replacement was too large.

Factual background

The Claimant ("C"), who was aged 59 at trial, had longstanding problems with her right knee, following a number of falls over some years. In August 2009, C was seen by the treating surgeon, Mr Kalairajah ("K"), who noted that she had swelling and pain in her knee as well as a degenerate meniscus, despite taking anti-inflammatories. He advised an arthoscopy, which revealed osteoarthritis. C was advised to do regular exercises. By December 2009, C was given a local steroid injection and was referred for urgent physiotherapy. Following ongoing pain, further options were discussed with C. K recorded their discussions as to the options, and said in his letter to the GP that C was very keen to have a joint replacement and was aware of the risks and potential benefits of doing so.

A unicompartment knee replacement ("UKR") was carried out by K on 22 July 2010 after obtaining C's written consent. However, it was not successful, and a decision was then taken to carry out a total knee replacement ("TKR"). This was carried out in May 2011, but C again derived no real benefit. Finally, a revisionary procedure to insert a smaller femoral implant was undertaken in April 2013, which again failed to alleviate her symptoms. She now has chronic pain syndrome, and is heavily reliant on a wheelchair whilst being no longer able to work.

The issues

C therefore claimed damages on the basis that the Defendant's ("D") treatment of her knee problem was negligent. There were three issues to be determined at trial, as follows:

1) Whether it was negligent per se to carry out a UKR ("the first issue");
2) Whether, in any event, C did not give informed consent for the UKR ("the second issue"); and
3) Whether the femoral component used in the TKR was too large ("the third issue").

Judgment

His Honour Judge Freedman commenced his judgment by setting out the key legal principles of relevance. This focused in particular on the Bolam test, and its subsequent refinement by Bolitho. He stated that, applying the Bolam test in the present case, the question in relation to the first issue was whether no reasonably competent orthopaedic surgeon would have carried out a UKR, and in relation to the third issue was whether no reasonably competent orthopaedic surgeon would have opted to use this particular femoral component. The refinement of the Bolam test in Bolitho only arose in relation to the first issue, as although the expert for C and the expert for D agreed that a body of orthopaedic surgeons would have offered a UKR, C's expert said that it would have been illogical to have done so, whilst D's expert said it was reasonable to undertake the procedure.

As to the second issue, the test espoused in Montgomery v Lanarkshire Health Board [2015] UKSC 11 was highlighted, namely whether a reasonable person in the patient's position would be likely to attach significance to

the risks, or the doctor is or should reasonably be aware that the patient would be likely to attach significance to it. Another aspect of the Montgomery judgment highlighted was that an informed decision requires the information to have been provided comprehensibly.

In considering the evidence in respect of the first issue, HHJ Freedman was satisfied that K genuinely believed that a UKR had a good prospect of relieving C's pain and restoring good function. The expert evidence was, from C's expert, that the surgery stood no chance of success, whereas from D's expert, it was that it stood a 75% chance of eliminating the pain and an 80% chance of the pain being materially diminished.

HHJ Freedman stated that he had to determine the first issue on the basis of which expert opinion was to be preferred. C submitted that her expert must be right in saying that there is no purpose to be served in removing normal bone and tissue in C's situation, that her expert had never come upon surgery being performed in such circumstances, that C was young for such surgery and that such changes as seen at arthoscopy were minimal and unexceptional for a lady of her age.

However, HHJ Freedman found a number of problems in C's expert evidence. In particular, he found it difficult to reconcile the expert's assertion that he had never seen or heard of a UKR being performed in these circumstances with his acceptance that a small body would perform it. The expert also appeared to minimise the findings at arthroscopy, describing them as trivial and normal for her age. Furthermore, although the expert was adamant that change to the hyaline cartilage could not be the source of pain, he had implied in his original report that it could potentially cause pain.

As to D's expert evidence, the judge did not accept the prospects of the operation's success to be as high as suggested given that he was also saying that only a small minority of orthopaedic surgeons would have undertaken the operation. However, he was impressed by his candour that he would not have done so himself, and thus inferred from this that he was demonstrating a willingness to consider opinions other than his own.

HHJ Freedman stated that the decision for him was whether it was legitimate to consider that the cartilage defect might be contributing to C's knee problem. He was satisfied that a responsible body of orthopaedic surgeons would have considered that the findings on arthroscopy might have been the cause of pain and that they would thus have proceeded to offer a UKR. The decision to carry out a UKR therefore withstood logical analysis and was not negligent.

In considering the second issue, HHJ Freedman was able to place reliance on what K and Mr Sharma (a trauma surgeon) had written in their letters to the GP in satisfying himself that they had had long discussions with C where the risks and potential benefits were communicated to her. It was clear to the judge that C had signed the consent form which had identified serious or frequently occurring risks. He accepted K's evidence that he always makes reference to ongoing pain when advising patients of the risks, and was satisfied that they had explained to her the reasonable alternative options. The judge furthermore rejected "the suggestion that because the claimant was "gowned up", she was not in a position to give informed consent". He therefore held that she had given informed consent.

In any event, he was satisfied that there was no causal significance to it, as in his judgment she would have gone down that route whatever was said to her.

In respect of the final issue, it was unchallenged that the components only come in six sizes. K had said that he is careful not to select too small a size due to the risk of it cutting into the femoral bone. There was evidence that other clinicians considered it may have been too large. Although the judge concluded that the prosthesis did err on the large side, it may have been that the next size down would have been too small and carried the risk about which K was concerned. He was therefore unpersuaded it was the wrong size or that it was negligent to have used it.

The claim therefore failed in its entirety.

Comment

This judgment highlights that as long as medical decisions are made logically and carefully, with the patient being

clearly advised of the risks, potential benefits and alternatives to the proposed treatment, a medical practitioner should not need to worry about the existence of responsible but differing opinion. The court will look very methodically at the evidence to ascertain whether the actions taken were capable of being logically defensible. The importance of properly recording the reasons for medical decisions and the advice given to the patient is another matter which this judgment underlines.

Another key aspect of this case was the criticisms which the judge made of the expert evidence from both sides. In particular, the need for internal consistency was an important part of assessing their logical coherence. Additionally, the need to ensure that the estimates of the chance of success of a proposed treatment were realistic and unexaggerated was a crucial element in this process.

The judgment should overall, however, be of comfort to medical practitioners.