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King's Bench Walk

Rodney Crossman v St George's Healthcare Trust [2016] EWHC 2878 (QB)

The Facts

The Claimant was a 63-year-old man who sought treatment for a numb arm and painful, stiff neck. Investigations revealed widespread degenerative changes and constitutional narrowing of the spinal canal. He was referred to a neurosurgeon, Professor Papadopoulos, who advised a conservative treatment plan that included physiotherapy for three months with an outpatient review with him thereafter.

Nevertheless, the Claimant was immediately put on the waiting list for surgery by the hospital with no further review booked.

When the Claimant received appointments for both pre-operative assessment and the actual surgery he contacted the hospital to explain there had been a mistake and was told he would be put to the back of the waiting list if his appointments were not kept. The Claimant therefore attended both appointments. When another doctor consented the Claimant he strongly advised him to delay surgery as a result of his INR (a measure of the blood's ability to coagulate) reading. However the Claimant was adamant the surgery proceed.

Mr Papafopoulous reviewed the MRI scan and performed both a foraminotomy and Luminectomy.

Unfortunately the Claimant suffered a radicular nerve rood injury as a result of the operation. There is no suggestion of negligence and the chance of this complication materialising was in the order of 0.5%.

It was agreed that had the treatment plan as originally envisaged been followed the Claimant would have had the same operation three months later with the same level of risk. Given the low level of risk it was a finding of fact that had the treatment taken place three months later the Claimant probably would not have suffered an injury.

The Legal Issues

The Defendant's negligence in not following the conservative treatment plan and not questioning why this had not been followed at the pre-operative stage was admitted.

The issues the Court had to determine were:

1. To what extent was the Claimant contributory negligent?
2. Was the Defendant's negligence causative of the Claimant's loss?

The Judgment

The Court found the Claimant was not at fault for not raising the change in his treatment plan with the hospital; there was no contributory negligence.

The Defendant's failure to delay surgery until after conservative treatment caused the Claimant's injury.

Reasoning and Comment

On the question of contribution

It is perhaps surprising that the Claimant, despite knowing that surgery was not advised as a first course allowed himself to be carried along in the momentum of treatment such that when he was advised against surgery at the eleventh hour (for reasons unrelated to the rationale for the original treatment plan) he even rejected the advice and was insistent that the surgery go ahead.

The Claimant had a number of opportunities to assert his autonomy, put his foot down and question the treatment change but he did not (to any great degree). The Court cited the recent trend in jurisprudence to place a heavier burden on the medical profession to explain rather than expect patients to question, as emphasised in the Supreme Court's decision in Montgomery v Lanarkshire Health Board [2015] AC 1430. The personal characteristics of the Claimant were deemed significant by the Court given the finding the Claimant sometimes appeared 'confused' during cross-examination and that the Claimant was not someone who finds it easy to express himself'.

There is an obvious tension between the Claimant's assertive rejection of strong medical advice to cancel the surgery and the Court's description of a patient too intimidated to question the professionals. However, the Court concluded it to be a reasonable reaction for a patient to just 'get it over with' this far down the road towards surgery. Had the Claimant been more forthright in questioning the change in plan it was found that the original conservative treatment plan would have been the first port of call and the operation postponed. However, such was the Defendant's mistake that chain of causation was not broken by the Claimant's action/inaction.

On the causation question

Had the Claimant had the operation on a different occasion he would not have suffered the injury and therefore medical causation was made out on conventional 'but for' principles. Is it really an application of the 'but for' test? As the level of risk to the Claimant remained the same whether the negligence occurred how can this negligence be causative of the Claimant's injury? It must be a fantastically expansive interpretation of the conventional 'but for' principle if the occurrence of the Claimant's injury was entirely coincidental to the Defendant's breach of duty. Had the Defendant negligently fixed the Claimant's surgery for a day later, following the Court's reasoning, the Claimant would not have suffered the injury as at any time the risk of surgery was very low. It would be very surprising if a liberal interpretation of the 'but for' were not challenged and at the very least labelled differently. Hospital trusts may shudder in fear at the ramifications of this judgment. Is this going to lead to a fresh avenue of claims where non-negligent treatment performed on a negligently altered treatment date results in liability when a low risk complication materialises?

Finally, it is interesting to consider the discussion on what the Court's judgment might have been had the there been a finding that the complications the Claimant suffered would have arisen had the Claimant had the surgery at a later date following the original conservative treatment plan.

While the comments are obiter this judgment is an important reinforcement of the limited scope of the Chester v Afshar [2004] UKHL 41 causation principle. The Court emphasised the decision in Chester was intended to be a narrow modification of traditional causation principles based on a patient's right to individual autonomy. The Court considered the Court of Appeal's reluctance in subsequent attempts to apply Chester to extend its scope outside the field of clinical negligence and in circumstances where there has been a breach of the Doctor's duty to properly advise as to the dangers of treatment. Without this scenario in the Claimant's case the Court found the fault to be less fundamental as the Claimant was aware of the change in treatment plan and went along with it without significant question, he was warned of the risk of surgery and had the surgery carried out by his known consultant.

In this context, with no finding the Claimant's consent to treatment was vitiated it is perhaps surprising the Court found Mr Crossman faultless for going along with the change in treatment plan. The judge took account of the

observations of the Supreme Court in Montgomery that *'an approach which requires the patient to question the doctor disregards the social and psychological realities of the relationship between a patient and her doctor……Few patients do not feel intimidated or inhibited to some degree'* and that the Claimant 'is not someone who finds it easy to express himself'. Yet this psychological pressure was not significant enough render the Claimant's consent defective and bring Chester principles into play. There may therefore be scope yet to apply Chester principles to similar change in treatment plan cases where such was the pressure placed upon a particularly vulnerable patient to go along with the Defendant's negligence that any consent to treatment must be vitiated.