

Petrena Mary Keane v David R Tollafield (2018)

CC (Birmingham) (Judge Williams) 08/08/2018

PERSONAL INJURY – NEGLIGENCE – PROFESSIONAL NEGLIGENCE

CAUSATION : CLINICAL NEGLIGENCE : CONSENT : DISHONESTY : DUTY OF CARE : PAIN : QUALIFIED ONE-WAY COSTS SHIFTING : RISK : SURGEONS : SURGICAL PROCEDURES

A surgeon had not breached his duty of care towards a patient by failing to explain the risks of a surgical procedure to her. Despite the claimant's oral evidence contradicting her written statement, she should not be deprived of the protection of qualified one-way costs shifting, because the defendant had failed to show that she did not have a genuine belief in the contents of her statement when she made it.

The claimant sought damages from the defendant surgeon for negligence following an operation on her left foot.

The claimant was aged 40, and suffered left foot pain and back pain. She was diagnosed with a hallux valgus (a bunion), interdigital neuroma and degeneration of the lumbar spine. After three consultations with her, the defendant recommended surgery to correct the bunion and excise the neuroma. Following the surgery, she developed severe pain in her foot and was diagnosed with complex regional pain syndrome (CRPS). Her employment was terminated due to ill health. She alleged that the defendant had not specifically warned her of the risk of CRPS after surgery, and although it was mentioned on the consent form, it had not been discussed with her. She further alleged that the defendant should have discussed alternatives to surgery such as foot orthotics. In their joint statement, pain management experts agreed that the claimant was not in fact suffering from CRPS, but the bulk of her symptoms were due to scar pain and neuropathic pain affecting the dorsum of the foot. The defendant adduced video surveillance evidence which showed the claimant walking her dog for 30 minutes with no discernible limping or pain.

The defendant submitted that he had discussed all relevant risks with the claimant, including CRPS, and argued that she had exaggerated her symptoms and should be deprived of the protection of one-way costs shifting.

HELD: Duty of care: awareness of risks – The defendant's duty of care extended to obtaining the claimant's valid consent for the surgery, including taking reasonable care to ensure that she was aware of material risks of an operation, *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 followed. The defendant had adequately discussed with the claimant the risk of CRPS prior to surgery because: (a) CRPS was expressly referred to as a risk of surgery in the fact sheet that the defendant had drafted and provided to the claimant. The defendant's information sheets were more detailed than those used by other health care professionals. The content of the fact sheet was consistent with it being an important part of the defendant's standard practice to warn patients of the risk of CRPS; (b) the contemporaneous documents were consistent with the defendant having followed his standard practice by discussing with the claimant the risk of CRPS; (c) the defendant was an impressive witness with considerable experience of performing this type of surgery, and with knowledge and awareness of the potential complications; (d) it would have been extraordinary for the defendant to have specifically listed the risk of CRPS in the consent form if there was no discussion over that risk; (e) if the defendant had not raised the risk arising from surgery, it was incredible that the claimant and/or her husband, who were articulate and intelligent people, would not have raised it themselves; (f) the claimant and her husband's oral evidence had departed markedly from their written evidence. In oral evidence they accepted that a discussion about the risks of surgery had taken place (see paras 30-34 of judgment).

Duty of care: alternatives to surgery – The only non-operative treatments specifically mentioned by the experts were different footwear or insoles. However, the claimant had already unsuccessfully sought to treat her bunion pain by changing her footwear and taking painkillers, but remained in significant pain. The experts agreed in their oral evidence that orthotics were not useful in treating bunions. At the time the claimant consented, surgery was the only realistic option and there was no reasonable alternative treatment available. That was no doubt why the local podiatrist had suggested a referral to a specialist, and why the claimant's GP then made the referral to the defendant in his capacity as a podiatric surgeon. The defendant had not breached his duty of care to the claimant (paras 38-41, 45).

Causation – Even if the consent process had been deficient in some way, the claimant would probably still have elected for surgery when she did, weighing up the low risk of CRPS against the high probability that surgery would improve her existing and severe symptoms (paras 46-52).

One-way costs shifting: was the claimant dishonest? One way costs-shifting provided that an order for costs made against an unsuccessful claimant would not be enforced, subject to certain exceptions under CPR r.44.16(1) including "where the claim is found on the balance of probabilities to be fundamentally dishonest". The claimant's oral evidence had been confused, but the defendant had not established on the balance of probabilities that she did not have a genuine belief in what she said in her statement at the time she made it, 15 months before the trial, *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67 followed, *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) applied. In her statement the claimant said she could walk about a mile before her foot became too painful. The video evidence showed her walking normally for approximately one mile over a period of 30 minutes. However, she had repeatedly said that her pain was variable, and that she could walk short distances. She had not deliberately exaggerated her symptoms and should not be deprived of the protection of qualified one-way costs shifting (paras 53, 62-63, 72-73).

Claim dismissed

Counsel:

For the claimant: Tom Gibson

For the defendant: Marcus Dignum

Solicitors:

For the claimant: Lawyers Incorporated Ltd

For the defendant: Clyde & Co LLP

LTL 19/11/2018 : [2018] 8 WLUK 306

[Click here to access case analysis on Westlaw UK](#)

Document No. AC5004921