12
King's Bench Walk

The Head to Toe Series
EYES

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Clinical Negligence Resulting in Blindness Some Key Issues

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- Causation
  - But For
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- Quantum
  - Life expectancy
  - Psychiatry
  - Care claims
  - Technology
  - Accommodation

Causation

- ‘But for’ is better
- What do you need to prove it?
- **MARIO SCHEMBRI v IAN MARSHALL** [2020] EWCA Civ 358.
- X died from an untreated pulmonary embolism (PE). The morning after consulting her GP, she had collapsed at home and suffered a fatal cardiac arrest. The GP admitted that he had breached his duty of care in failing to refer her to hospital the day before but denied that the breach had caused her death. It was common ground that, had the deceased been referred to hospital at the proper time, the PE would have been diagnosed and that potential treatment would have included thrombolysis. The judge considered the medical literature and expert evidence on treatment for PE and found that the respondent was unable to prove, on the balance of probabilities, that the deceased would have been in the 64-75% who would have survived. However, he also found that her chances of survival would have been significantly increased if she had been in hospital overnight. He then asked himself whether, on the evidence as a whole, it was more likely than not that she would have survived had she been referred to hospital, holding that that was all the respondent needed to prove and that it was unnecessary to establish the precise mechanism by which survival would have been achieved.

But For/Schembri

- The GP submitted that the judge, having found that it was not conclusively proved that the deceased would have survived had she been admitted to hospital, should have found against the respondent; he should not have posed a separate, overriding question based on general survival rates of patients with PEs in hospital.
- In respect of positive proof of survival the judge had found that, although the respondent could not positively prove that the deceased would have been in the 64-75% survival cohort suggested by the evidence to which he had referred, her survival prospects would have been significantly better had she been in hospital when she became unstable.
- It was legitimate for him to have decided that he needed to have regard to the medical literature and the overall mortality of patients when considering whether thrombolysis might have been effective, in the light of statistical evidence that was highly favourable to her, Gregg v Scott [2005] UKHL 2 followed.
- It was also legitimate because of the "large number of unknowns" to which the judge had referred and because the reason why the actual outcome was not known was that the admitted negligence prevented it from becoming known (see paras 45, 50-51 of judgment).
- The judge had taken the approach of seeing whether the suggested mechanism for avoiding the death could be positively established and had concluded that a "specific train of events or mechanism" which would have saved the deceased, absent the negligence, could not be shown, Drake v Harbour [2008] EWCA Civ 25 followed. He had found that death was the highly likely result of an undiagnosed and untreated PE. He had then proceeded to examine the evidence "as a whole" to assess her chances of survival on the balance of probabilities, referring to evidence which clearly indicated that she was most unlikely to have died in hospital. He had not erred in posing that question; he had been entitled to take a common sense and pragmatic view of all the evidence. Therefore, after exhaustive consideration of all the material, the judge was satisfied that the result that occurred was caused by the breach of duty. He was entitled to be so satisfied. The case was not one in which statistics were used to reverse a strong case in the GP's favour; statistics were not determinative of causation issues. Instead, the judge had focused primarily upon the deceased's condition and likely presentation on her hypothetical admission to hospital, concluding that her survival prospects were very high (paras 52-56).

Material Contribution

- There will be occasions when there are problems disentangling what would have happened from what did happen by reason of the breach of duty.
- However the Courts will expect the experts to try hard, indeed try very hard indeed, to disentangle the actual and the counterfactual.
- See BAE Systems (Operations) Limited v Konczak at paragraphs 55 to 72 (AB186-191). [2017] EWCA Civ 1188
- If that is not possible, and the injury is indivisible, the cases of Bonnington Castings v Wardlaw [1956] AC 613 (HL) AB 444, Bailey v MoD [2008] EWCA Civ 883, Williams v Bermuda [2019] CSOH 31 the path opens up to indivisible injury.
- However, note Davies v Frimley [2021] EWHC 169 (QB) which continues the jurisprudence on the meaning of material contribution.

Material Contribution II

- In Davies v Frimley the Claimant succeeded on 'but for'.
- There has been some commentary doubting whether the trial judge considered material contribution available in clinical negligence claims.
- The more nuanced reading of a complex case and an extensive judgment (obiter on material contribution) is that HH Judge Auerbach was highlighting a major issue: material contribution is not a special category granting a golden pass to liability, nor a discrete principle of law. The following principles held sway:

> "*First, where the harm is divisible, a party will be liable if their culpable conduct made a contribution to the harm, to the extent of that contribution. Secondly, where the harm is indivisible, a party will be liable for the whole of it, if they caused it, applying "but for" principles. Thirdly, if two wrongdoers have both together caused an indivisible injury, in respect of which it is impossible to apportion liability between them, then each is co-liable for the whole of the injury suffered.*"

Material Contribution III

- As the judge noted, in Williams v Bermuda Lord Toulson remarked: "The Board does not share the view of the Court of Appeal that the case [Bailey v MoD] involved a departure from the 'but for' test.
- The case of Wilsher v Essex HA [1988] AC 1074 held that material contribution does not operate where there are multiple potential causes, only one of which was negligent, but the identity of the operative cause is unknown.
- Professor Sarah Green has succinctly observed (Causation in Negligence, Hart Publishing, 2015, Chapter 5, p 97):

  "It is trite negligence law that, where possible, defendants should only be held liable for that part of the claimant's ultimate damage to which they can be causally linked ... It is equally trite that, where a defendant has been found to have caused or contributed to an indivisible injury, she will be held fully liable for it, even though there may well have been other contributing causes ..."

Material Contribution IV

- However there are contrary academic views
- Ultimately it all comes down to evidence.
- The line between what is perceived to be a 'but for' case and a material contribution case may be an interesting line.

Quantum – Life Expectancy

- If a PPO is 'do-able' then fine.
- Often in these cases there will be arguments about breach, let alone causation
- There may also – where, for example, there is an accompanying brain injury – be specific life expectancy issues
- There may accordingly be a real need to have some sort of guide as to life expectancy from which to quantify the claim. This can be a particular issue with the elderly.
- For a defendant it may be very useful to be able to assess LE, for obvious reasons.

Quantum - Psychiatry

- Clearly there will be obvious identifiable psychiatric issues in some cases
- In other cases the reaction to blindness may be masked by stoicism, or lack of exposure to day to day life
- A particular issue is with the elderly, who may be unwilling to talk matters through and a psychiatrist with expertise of this age group may be particularly appropriate.
- The medical records need to be examined with care to look for signs of pre-existing vulnerability
- Equally, a psychiatric diagnosis means that treatment may be available

Quantum – Care Claims

- A suitably qualified and experienced expert is critical, whether for claimant or defendant
- The expert will need to be able to listen and engage. With the elderly that can be a significant issue – will the care package proposed actually be accepted in part let alone whole?
- Many people are put off by the idea of new people coming in to their home, people they cannot see, people they will find it harder to trust
- Agency care is therefore quite likely to be problematic

Quantum – Technology - Accommodation

- A lot of technology can be useful
- Unfortunately, some expert reports can read as if a copy and paste exercise has been carried out from a catalogue.
- Explanation is needed. Along with some common sense and tailoring.
- Again, but not exclusively, the older age group may not have the technology affinity
- As to accommodation, there may be a very significant and understandable desire for the claimant to remain in his/her own home, with the familiarity and confidence that can bring
- The perfect may be the enemy of the good – a new property might be preferable, a major reworking of. The existing property might be helpful. However as long as the basics of, for example, accommodation for a carer, are provided for then compromise may be sensible elsewhere.
- As ever the need will be for close co-operation of the legal and expert teams and sensitivity to the individual claimant. That goes, just as much, where possible, for defendants as well.