Medical Negligence and Personal Injury

Quarterly Newsletter –July 2017

During the second quarter of 2017 (April-June) there has been a flurry of cases within the field of medical negligence. There have been eight judicial decisions; 5 of which have been heard at Court of Appeal level, 2 by a trial judge and 1 procedural decision of Master Cook, Master of the Queen's Bench Division at the Royal Courts of Justice, London. These cases have covered a wide variety of topics including breach of duty and causation and the evolving law of consent. We have also seen the first significant decision on quantum following the recent change of the discount rate where the feasibility of the *Roberts -v- Johnstone* approach has been considered. The long awaited costs decision of *Harrison* was also handed down by the Court of Appeal dealing with the interplay between the Detailed Assessment process and Costs Budgeting. The decisions are summarised by category below.

Breach of Duty

The Court of Appeal handed down its decision in the case of **FB -v- Princess Alexandra Hospital NHS Trust** on 12 May 2017. The case concerned treatment the Claimant received at the A&E department of the Defendant's hospital when she was approximately 1 year and 1 month of age. It was alleged that there was a failure to diagnose pneumococcal meningitis, which caused multiple brain infarcts. The Claimant sustained permanent damage to her brain; she was left with learning difficulties and profoundly deaf.

The Judge at trial was asked to consider the issue of breach of duty: the conduct of the Senior House Officer (SHO) who examined the Claimant in A&E during the early hours of 29 September 2013. The Claimant's case was that the SHO was negligent in (1) failing to take an adequate history, and (2) failing to conduct an adequate examination.

The Claimant claimed that had the SHO performed either task to a standard of a competent SHO she would have been bound to refer the Claimant to the paediatric team. Instead the SHO discharged the Claimant. The Judge found that there was no breach in respect of either history taking or examination on the SHO's part.

The Claimant lodged 10 grounds of appeal that considered both the history taking and examination. Central to this appeal was the standard of care to be expected from an inexperienced SHO. The Court concluded that it was inescapable that the SHO did not elicit why the parents had brought the Claimant to hospital in the early hours of the morning. This, the Court of Appeal held, was probably the result of a flawed approach to taking history (something that all doctors are taught from an early age in their career at medical school). Firstly, the SHO wrongly believed that when a parent witnesses something frightening (in this case eye rolling which precipitated presence at A&E) it is always volunteered by the patient or their parents. Secondly, having formed the view that the Claimant was well, either the SHO did not think about it or she did not consider it necessary to establish why the Claimant had been brought to the hospital at that time (the early hours of the morning). As a result of these assumptions the SHO did not ask the crucial question of what precipitated the attendance at that

time. On this basis, the Court concluded the history taking of the SHO was not carried out to the standard to be expected of a competent SHO and the appeal was allowed.

The Judgment of Lord Justice Jackson is well worth reading because he added comments on a point of principle that arose from this Appeal. The trial Judge concluded that it would have been negligent if an inexperienced doctor such as an Emergency Medicine Consultant or Paediatrician had failed to elicit the relevant facts (the parents witnessing the eye rolling which precipitated the attendance to A&E during the early hours of the morning). Such a failure by an experienced SHO, in trial Judge's opinion, did not amount to negligence.

Lord Justice Jackson noted that the question to be asked was "*What standard of skill and care should the law require from a young professional person in the early years of her career?*" Upon considering the *Bolam* test Lord Justice Jackson noted that the conduct of the SHO in the present case must be judged by the standard of a reasonably competent SHO in an A&E department. The fact that the SHO was aged 25 and "relatively inexperienced" does not diminish the required standard of skill and care. On the other hand, the fact that the SHO had spent 6 months in a paediatric department does not elevate the required standard. SHOs working in A&E will have different backgrounds and experience, they are all judged by the same standard.

Four days later on 16 May 2017 the Court of Appeal gave its decision in the case of **ABC -v- St George's Healthcare NHS Trust**. The case concerned whether it was fair, just and reasonable to impose a duty of care on the Defendant to disclose details relating to a genetic and hereditary condition of the Claimant's father. The Claimant's father was suspected of suffering from Huntingdon's Disease, which posed a 50% chance of a child of that parent developing the condition. The Claimant subsequently became pregnant and at a multi-disciplinary meeting, those concerned with the Claimant's father's care considered whether they should override his confidentiality and inform his daughter of the diagnosis. The father's wish was that the diagnosis should be kept confidential so that his daughter would not be additionally distressed. The care team agreed to keep the diagnosis confidential.

While attending a family therapy session the doctor accidentally informed the Claimant about her father's diagnosis of Huntingdon's Disease. The Claimant subsequently underwent testing and was diagnosed as suffering from the condition.

It was the Claimant's case that if her own diagnosis was confirmed she would have terminated the pregnancy rather than run the risk that her child might, in due course, be dependent on a seriously ill single parent or become an orphan, and the risk that in due course her child might inherit the disease. Her diagnosis would have precluded any subsequent pregnancy. The claim included a wrongful birth claim in respect of the cost of upbringing the Claimant's child.

The Defendant applied to strike the case out and such an Order was granted by Mr Justice Nicol in 2015. The Court of Appeal was not required to consider the substantive merits of the claim but instead whether there was an arguable case to be examined at trial.

The case is an interesting example of how the common law of negligence has developed over the years. Going back to basic principles the imposition of a duty of care concerned 3 issues: whether the Claimant could establish the injury was reasonably foreseeable, whether there was sufficient proximity between the Claimant

and the Defendant for a duty of care to arise, and whether it was "arguably fair, just and reasonable" to impose on the Defendant a duty of care.

Neither party submitted that there was any previous case law from England & Wales, which considered the obligation to disclose information from the practice of clinical genetics. Nor has professional guidance been provided in the context of common law liability. Mr Justice Irwin gave the Court's Judgment and it was concluded that on the face of the submissions presented before the Court the Claimant's case was arguable. The Court of Appeal quashed the Order striking out the claim and the matter was remitted for trial.

The trend in recent Appellant Court decisions has been to enforce patient autonomy (particularly in the context of consent). This case is taking the debate one step further as to informing third parties of information that is confidential between doctor and patient that could potentially impact upon the third party's health. It remains to be seen the extent to which this area of law will develop, if at all.

Causation

The Court of Appeal in the case of **Barnett -v- Medway NHS Foundation Trust** was required to review a complex case involving a claimant, with an underlying condition that made him prone to stress fractures, who was admitted to hospital following a period of acute pain at the back of his left thigh. He was given a seven day course of antibiotics, and discharged home after 13 days. He was readmitted a little over 1 month later as an emergency. Following MRI scanning it was noted that he had developed an abscess in his spine at the level of L5/S1 and infarction at his lower thoracic spinal cord which left him with paraplegia at the level of T7. The Claimant claimed that there was a failure to take blood cultures when he was first admitted, and the question was whether such cultures would have identified the underlying infection?

The trial judge concluded that the failure to take cultures upon admission constituted a breach of duty. The case was dismissed on the ground of the Claimant failing to establish, on the balance of probabilities, that the infection would have been identified upon admission and steps taken to have avoided the consequent paraplegia.

One of the grounds of appeal was the concise, and short, judgment given by the trial judge. The Court of Appeal noted that there is great virtue in writing judgments concisely. "*However, the parties do need to know sufficiently what led to the conclusions reached. In this instance, the judgment gave only the briefest explanation. The obligation is all the clearer in a case of such complexity, and in a case where a key issue is decided on the basis that a claimant has failed to discharge the burden of proof …*".

Upon reviewing the evidence as a whole the Court of Appeal agreed with the trial judge that the evidence fell short of establishing probability. The position of both experts shifted and the evidence of both experts was "somewhat rebarbative". Lord Justice Irwin noted that this is one of those rare cases where "the judge was justified in his inability to resolve an issue of fact" relevant to causation.

Consent

The Court of Appeal gave its decision in **Correia -v- University Hospital of North Staffordshire NHS Trust** on 12 May 2017. The case concerned treatment the Claimant received in respect of a painful recurrent neuroma in her right foot. On 5 November 2008 the Consultant Surgeon employed by the Defendant carried out a surgical procedure following which the Claimant continued to suffer pain, developed a type of neuropathic pain and was diagnosed with Chronic Regional Pain Syndrome. The Judge found that the operation had been performed negligently but that the negligence had not caused the Claimant pain or suffering.

Two issues arose on appeal: informed consent and causation.

The Claimant gave consent to a three stage operation assuming that a neuroma was found. The three stage procedure included exploration, excision of a neuroma (if found) and relocation of the proximal nerve ending so as to minimise the recurrence of any further neuroma. The surgery was negligently performed because stage 3 of the surgery was not completed. There was a failure on the part of the surgeon to deal appropriately with the nerve ending. However, this did not make this a different operation for the purposes of consent, nor an operation for which specific consent was required. The Court held that there was no breach of the Defendant's duty in relation to the Claimant's consent to the operation. The Court held that if a claimant is to rely on the exceptional principle of causation established in *Chester -v- Afshar*, it is necessary to plead the point and support it by evidence. In this case it was not asserted within the Pre-action Letter of Claim or subsequent pleadings that had the Claimant been advised of this risk occurring then she would not have proceeded with the surgery.

This case is further clarification on the law of consent and causation which has been placed under the spotlight following the recent guidance provided by the Supreme Court in *Montgomery*. Essentially, a surgeon is not under a duty to advise a patient of risks that may materialise if the surgery is performed to a sub-standard, negligent level.

The second element of this Appeal is a timely reminder of the Appellant Courts unwillingness to unpick findings of fact. It was noted that in making decisions the trial judge will have regard to "*The whole of the sea of the evidence presented to him whereas an Appellant Court will only be island hopping*". On this basis the Court of Appeal noted that the judge was entitled to accept that the Claimant clearly suffered pain but that the evidence was not sufficiently clear to satisfy him that the breach of duty (the failure to relocate the nerve ending) was the cause of the Claimant's pain. The Appeal was dismissed.

Procedure

The case of **Quintana -v- Surrey and Sussex Healthcare NHS Trust** is a sobering reminder to claimant advisors about the need to ensure a claimant has authority to bring representative proceedings following the death of a loved one, and to act without delay when intending to bring a claim pursuant to the Human Rights Act.

The case concerned a claimant's claim following the death of her elderly mother. A Claim Form was issued on 3 February 2016 naming the Claimant has "Angela Quintana (in her own personal capacity and as Executor of the Estate of Margaret Quintana)". Prior to service of the Claim Form it was discovered that the Deceased's will,

which named the Claimant as her Executor, had not been signed. The Claimant's solicitor advised her that the Claim Form could not be served as it stood because there was no legal entitlement to bring a claim on behalf of the Deceased's estate. The Claim Form was amended prior to service to name the Claimant as "Angela Quintana in her own personal capacity and for Margaret Quintana." The Defendant applied to strike out the Law Reform (Miscellaneous Provisions) Act 1934 claim on the basis that the Claimant did not have title to bring proceedings **at the time of issue** on the basis that such a claim was an incurable nullity. The Defendant's position was that the Claimant issued a claim prior to receiving Letters of Administration which resulted in a claim that was "*born dead and could not be revived*."

Master Cook agreed with the Defendant. Upon reviewing the wording of CPR 17.4(4) and the Court of Appeal authority of *Haq -v- Singh* [2001] the Master concluded that a nullity at inception cannot be given life by an amendment pursuant to CPR 17.4(4). Therefore, the claim was struck out.

The second issue to be considered by Master Cook was whether the Claimant's Human Rights Act claim should also be struck out for failing to satisfy the 'victim' test and being issued out of time. The Master was not prepared to strike out this claim on the grounds of the Claimant being unable to satisfy the victim test. This was because the Claimant's Article 6 rights (right to a fair trial) were engaged and the Court should proceed with caution in a matter where witness evidence had yet to be exchanged.

However, in terms of the limitation point, the Master held that the Claimant had "singularly failed" to adduce evidence from which the Court could conclude that it would be equitable to extend the one-year limitation period set out within the Human Rights Act. The chronology in this case was:

- 23 April 2012 – Deceased's date of death;
- February 2013 – Claimant's solicitor approached by the Claimant. At this point the Defendant Trust had already provided a response to the Claimant's letter of complaint;
- 9 September 2014 – Pre-action Protocol Letter of Claim served;
- 15 January 2015 – Pre-action Protocol Letter of Response served, and
- 3 February 2016 – Claim Form issued.

The Claimant gave no explanation for the delay in issuing the claim. The Master could not accept that the Human Rights Act claim required lengthy investigation. In these circumstances there was deemed to have been an unanswerable case that the Human Rights Act claim is time barred. This claim was also struck out.

Nervous Shock

On 12 April 2017 Mr Justice Goss gave his judgment in the case of **RE (a Minor by her Mother and Litigation Friend, LE) -v- Calderdale & Huddersfield NHS Foundation Trust**. The claim concerned injuries sustained by the First Claimant at the time of her birth. Claims were also advanced by the Second Claimant, the Claimant's Mother and the Fourth Claimant, the Claimant's Grandmother. The Third Claimant was the Claimant's Father, and no claims were pursued by him.

The Court were required to consider the issue of breach of duty and whether, as a matter of principle, the claims advanced by the Second and Fourth Claimants could succeed in respect of damages for nervous shock.

The issue of causation had already been resolved but the standard of midwifery care was considered in detail. The Judge concluded that the midwife should have diagnosed potential shoulder dystocia and, in accordance with all guidelines, summonsed help immediately. The midwife in question had experience of shoulder dystocia and described it afterwards in the internal investigation that followed. The Judge's conclusion on liability was that there was negligence in the delivery of the Claimant by delaying the summonsing of help that was causative of the hypoxic injury that commenced before the Claimant was born.

One of the difficulties in this case was that the original medical records, due to negligence on the part of the Defendant, had been destroyed during the litigation process. The relevant photocopied records, some of which were of poor quality, had been altered and the Judge noted that it would have been helpful to consider the original records to look at the colour of ink used and the different types of pens making the notes in order to identify the order in which amendments were made. That said, the Judge stated: "*The Claimants contend that where there are ambiguities or uncertainties on the face of the documents, the court ought to resolve them in the Claimants' favour. Given that the Defendant failed in their duty to maintain the records, where, by reason of the quality of the relevant records now available compared to what would have been expected to have been clearer on the originals, I consider that it is appropriate to proceed on the rebuttable assumption that my reading of the entries should be the most favourable to the Claimants that is reasonable on the face of the available documents*."

The other interesting point from this case concerned the Judge's dealing of the nervous shock claims. Two issues arose from these claims: whether the Second Claimant was a primary or secondary victim, and whether the events in question were of a sufficiently sudden and "shocking" nature as to entitle the Second and Fourth Claimants to damages for psychiatric injury. There was a measure of agreement between the psychiatrists that both the Second and Fourth Claimants had suffered PTSD. The Fourth Claimant was present throughout the Claimant's delivery. There was a delay to summons help and the Second Claimant was on all fours on the floor for a longer period than was necessary. This meant that she was able to see the delivery of the Claimant's head, which became stuck as a result of the shoulder dystocia. She could see her baby's face, which alarmed her. She found this very worrying and was frightened. There was a sudden appreciation that her baby was in danger and "*that she might break the baby's neck as the baby's body was still stuck in the birth canal*". The Judge concluded that because the damage commenced while the Claimant was still in utero, and therefore part of the Second Claimant, the Second Claimant was a primary victim. However, he also considered the shocking and sudden appreciation of risk criteria in the event that his analysis was wrong.

His view was that if the Second Claimant was a secondary victim, she was entitled to damages for nervous shock. Why? There was no conditioning for what came nor was there any warning of a materialising risk that the Claimant would be born lifeless and require a sustained period of resuscitation. He concluded "*I am satisfied that, for the Second Claimant, this was an outwardly shocking experience that was exceptional in nature and horrifying as judged by objective standards and by reference to persons of ordinary susceptibility. It was not an event of the kind to be expected as "part and parcel" of the demands and experience of childbirth.*"

The Judge also concluded that the Fourth Claimant, who was present throughout the birth, who had sustained PTSD, had a very close relationship with the Second Claimant and was subjected to a sufficiently sudden, shocking and objectively horrifying event for which a claim for nervous shock was established.

Quantum

On 25 May 2017 we saw the first judicial decision on quantum of damages following the change of the discount rate in March 2017. The case of **JR -v- Sheffield Teaching Hospitals NHS Foundation Trust** was decided by Mr Justice William Davies sitting in the Queen's Bench Division at the Royal Courts of Justice, London. The case concerned a birth injury claim where the Claimant was aged 24 at trial. Liability was admitted. The Claimant's injuries included moderately severe spastic cerebral palsy and significant cognitive impairment. The medical consensus was that the Claimant would live until the age of 70. He attended a further education college after he left school and undertook a course in digital media. He retained an interest in IT and photography and was a wheelchair footballer of high quality. A number of items were agreed between the parties but two fundamental points of principle remained in dispute – Whether a claim for lost years is permissible, and how to deal with the accommodation conundrum following the change in the discount rate and the unworkable nature of *Roberts -v- Johnstone*.

Dealing first with the loss of years claim, the Judge agreed that policy considerations which led to the decision in *Croke -v- Wiseman* did not apply to the case of JR. This was because he was not a catastrophically injured child. He was a 24 year old man who can engage with others. Speculation is not required to identify a potential lost years claim. The Judge awarded one half of the pension sum as the appropriate multiplicand. The multiplicand for the lost years was £6,337.50.

The more vexed issue was that of accommodation and how the change in the discount rate impacted upon the application of the formula in *Roberts -v- Johnstone*. The Defendant did not ask for credit to be given for a negative sum in respect of a negative discount rate used within the formula. It was argued that the proper approach was to allow a zero figure for the cost of accommodation. Applying *Wells -v- Wells* (the 100% compensation principle) JR would suffer no loss by investing the capital cost of accommodation from his other capital funds. No income would have been received on those funds and the value of the capital will be preserved in the value of the property.

The Judge quoted the authoritative text of *McGregor on Damages* which argued that with a negative discount rate the correct approach would produce a nil award. The Judge felt that the editor of McGregor was correct when he opined that a fair and proper solution should be found to the conundrum of providing a claimant with the means to purchase special accommodation. However, the Judge was not in a position to find "*the fair and proper solution*" to the problem as a whole. He was simply faced with the case of this particular Claimant.

The Judge was satisfied that applying the *Roberts -v- Johnstone* approach, to which he was bound because it is Court of Appeal Authority, leads to a nil award in relation to the cost of special accommodation. In making his decision he had to consider the return on a risk free investment as representing the Claimant's loss. In concluding this aspect of his Judgment he emphasised the need to find a proper solution to the accommodation conundrum.

What is striking from this decision is that there will be no quick fix for the accommodation solution. *Roberts -v- Johnstone* remains good law until it is overturned at Appellant Court level. The nil award for future accommodation is likely to work in this case where there was a substantial loss of earnings award and a Claimant with a lengthy life expectancy (46 years). The position remains uncertain where the Claimant is post

retirement age or has a short life expectancy. It remains to be seen how the Courts will grapple with these issues and it will only be a matter of time before more creative solutions such as rental or mortgage financing will be explored more fully by the Courts.

Costs

On 21 June 2017 the Court of Appeal gave its long awaited decision in the case of **Harrison -v- University Hospitals Coventry & Warwickshire NHS Trust**. This case concerned the same issue as in the case of *Merrix -v- Heart of England NHS Foundation Trust* which was decided by Carr J. The key issue in this case, and the first time considered by the appellant Court, was the interplay between the Detailed Assessment and costs budgeting processes.

In this case the costs judge, Master Whalan, took the view that so far as budgeted costs were incurred, CPR 3.18 precluded him from subjecting the parties to a "conventional" detailed assessment at the behest of the appellant as paying party unless good reason for doing so was shown. The Court of Appeal took the same approach as Carr J in *Merrix*. Upon considering the relevant CPR rules, it was agreed by the Court of Appeal that the impact of CPR 3.18 cannot be understated. This provision meant that where costs are assessed the costs judge will start with the figure in the approved cost budget; he will not "start from scratch". The Court of Appeal held that Master Whalan was correct in his conclusion. Therefore, there will only be a departure from a costs budget upon subsequent assessment if there is good reason.

The Court declined to explain what will constitute good reason in any given case. No generalised guidance or examples were provided. However, the Court concluded "*the matter can safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case.*"

Harrison is a welcome decision for parties embarking upon Detailed Assessment in costs budgeted cases. It is clear that the costs budgeting process is not a mere form filling exercise but should be taken seriously. Attention should be paid to ensuring costs budgets accurately reflect anticipated costs and in return the parties, and the Court, will be aware of each party's potential liability in respect of costs paid by one party to another.

If you have been affected by the issues discussed in any of these cases, please contact Richard Lodge or a member of our Clinical Negligence team. Alternatively, you can contact us on 020 7814 1200 or email us at enquiries@kingsleynapley.co.uk.

Richard Lodge
Partner
Clinical Negligence and Personal Injury
T +44 (0)20 7814 1249
E rlodge@kingsleynapley.co.uk