Medical Negligence and Personal Injury

Quarterly Newsletter –October 2017

The Courts have remained busy during the third quarter of the year; the key decisions from the past quarter, divided by category, are summarised below.

Liability

On 23 June 2017 the decision in Lucy Diamond -v- Royal Devon & Exeter NHS Foundation Trust was handed down. This case was heard at trial in relation to liability, causation and quantum. The claimant, who was 45 years of age at trial, had an extensive history of chronic back pain. On 6 December 2010, she underwent spinal fusion surgery with a view to relieving her symptoms. Despite short term improvement in her symptoms, in time her pain returned and the surgery proved to be of limited benefit. Unfortunately, the claimant also developed a post-operative incisional hernia.

On 9 May 2011 the claimant saw a general surgeon. He resolved to repair the hernia, carrying out an open mesh based repair with abdominal wall reconstruction. He explained that this would either be a large synthetic mesh or if a "tension-free" closure could not be achieved, a biological mesh would be necessary. The surgery was carried out on 28 June 2011. The divided recti were closed and a large prolene mesh was secured with protacks. Following the surgery the claimant continued to complain of abdominal swelling and pain. It was not until 5 August 2014, after being assessed by another surgeon, that she underwent a hernia repair with a single stitch and full abdominoplasty.

The claimant's case focused around two areas: the first was that there was a failure by the spinal surgeon to examine the claimant's abdomen at his post-operative review appointment where the claimant had complained of abdominal distension. Secondly, there was a failure by the general surgeon to ensure that the claimant had given informed consent before proceeding to repair the hernia with a mesh.

Dealing first with the treatment provided by the spinal surgeon, the judge found the evidence of the claimant and her mother to be persuasive. The spinal surgeon should have examined the claimant's wound and a failure to do so fell below an acceptable standard. This constituted a breach of duty. The defendant did not challenge this aspect of the case.

Turning to causation, the judge concluded that there was a missed opportunity to diagnose, or suspect, the presence of a hernia at the first post-operative assessment. The judge concluded, as a matter of logic and common sense, that if the claimant had been referred for an ultrasound after the first review appointment the whole process up to repair surgery would have been expedited. It is likely that the diagnosis would have been made the following month with referral to a general surgeon and subsequent examination brought forward by two months. On the balance of probabilities, the repair surgery would have been undertaken approximately 2 months before the time when it in fact occurred. As a result of the defendant's breach of duty the claimant suffered abdominal pain for an additional 2 months.

In relation to the treatment provided by the general surgeon, the judge concluded the issue in favour of the claimant, also preferring the evidence of the claimant and her mother. The general surgeon indicated in his evidence that he would have discussed the risks of a mesh repair for future pregnancy. However, upon considering the evidence the judge concluded that the claimant was not asked whether she was planning to become pregnant in the future. There was general consensus amongst the parties that the claimant should have been counselled about the potentially adverse effects of a mesh being present in pregnancy. On this basis there was a lack of informed consent. The general surgeon could not reasonably have excluded the prospect of a pregnancy in the future; to fail to mention the risks associated with the presence of an abdominal mesh amounted to a breach of duty. The surgeon was under an obligation to mention the possibility of a primary suture repair. On the totality of the expert evidence, the parties agreed that the claimant should have been told that this was an option and was a possible alternative to a mesh repair.

Dealing with causation on the second issue the judge concluded that the claimant should have been advised of the alternative of a suture repair and the high, if not inevitable, failure rate leading to a recurrence of the hernia during the claimant's lifetime. The surgeon should also have explained that a pregnancy would put additional strain on a suture repair with a real risk of recurrence of the hernia. The crucial question was what the claimant would have elected to do armed with the knowledge that a mesh repair carried certain risks in the event of a pregnancy and that a suture repair was a possibility, albeit likely to fail.

The judge felt that although the claimant was a reliable witness her view was clouded by the knowledge that she acquired upon speaking to the second surgeon who carried out the stitch repair. Although the claimant was giving her honestly held belief that does not automatically follow that what she now believes to be the case would in fact have been the position at the material time.

The judge concluded that even if she had been in a position to give informed consent exactly the same procedure would have been undertaken. He concluded "*looking at the matter both objectively and subjectively in the face of the advice which would have been given to her, it would have been irrational for her to opt for a suture repair; and I find that she is not a person who would act irrationally.*"

The claimant then sought to advance a further argument that where there has been a negligent nondisclosure of information by a doctor then that can create a right for the claimant to claim damages. This assertion was based on the Supreme Court decision in *Montgomery* and the House of Lords decision in *Chester -v- Afshar*. The judge concluded that the claimant did not fall within the *Chester* exception. In the first instance, it is difficult to see how it could be said that the claimant had suffered an injury in consequence of the operation. Furthermore, it cannot sensibly be argued that the outcome was intimately connected with the duty to warn such that it should be regarded as being classed as a breach of duty. It followed, therefore, that while the general surgeon was found negligent in his preoperative counselling, no consequences flowed and accordingly causation was not established.

The judge did award damages for pain and suffering and loss of amenity as a result of the two-month delay in diagnosing the hernia. This caused the claimant considerable discomfort and was unsightly. The claimant's suggested figure of £7,500 was awarded.

A few weeks later, another judgment on breach of duty, causation and quantum was handed down; this time in the case of Giles -v- Chambers. This case concerned treatment provided to the claimant at a private clinic for VASER liposuction removal of fat from the claimant's thighs and buttocks. Following the procedure the claimant's legs appeared to subside, and as the swelling went down, became uneven, bumpy and mottled. She could feel virtually no fat under the skin, just muscle and bone, and there was an obvious asymmetry in her hips.

Due to the unattractive result/outcome of the surgery the claimant commenced a claim in contract and tort. The key questions the Court was asked to address in relation to liability were:

What type of cosmetic surgery to her legs had the claimant requested and contracted for with the defendant? Was the defendant negligent and/or in breach of duty in the way in which she performed the cosmetic surgery? If so, has the final outcome been caused or contributed to by such negligent failures?

There was a significant dispute between the parties as to the surgical procedure the claimant had requested. The defendant alleged that the claimant had requested a high definition procedure which involves the substantial removal of fat to reveal a muscular structure, exposing the muscles and leaving no visible fatty tissue, the preferred appearance of bodybuilders and those who wish to convey an impression of being fit and muscular. The claimant's case was that she had intended to undergo debulking which involves the selective removal of areas of fat in overweight individuals, or those who are concerned about parts of their body having excessive adipose tissue. The latter is by far the more common procedure.

HHJ Graham Wood QC first set about resolving this factual issue. The judge reached this conclusion after taking into account the claimant's lifestyle. Staying fit and healthy was an important aspect of her lifestyle, and sustaining a feminine appearance and postponing the signs of advancing middle age were more important especially with the image she would need to convey as a result of her successful career in the beauty profession. As a result of establishing a national reputation in this field she was exposed to media publicity. He concluded "*a desire for a thigh feminine gap, and a more feminine appearance is not only plausible but in my judgement a highly likely aspiration for the claimant. It is difficult to imagine the claimant opting for an image which produced extremely sculptured and exposed muscles which was anything other than feminine, and loved by bodybuilders especially when she had been given strong advice that it was inappropriate.*"

The defendant alleged that the claimant on more than one occasion stated that she wanted "*all her active muscles exposed*". However, at no point within the consent process documentation were the words 'high definition' used to describe the procedure. On this basis the judge concluded that it was more likely than not that the claimant did not request a sculptured and muscled high-definition appearance with the removal of substantial quantities of fat. Instead it is likely that she was after a specific result, namely a more feminine appearance with a thigh gap.

In light of the judge's findings on the primary question of fact it was agreed between the parties that the question of causation, negligence and/or breach of contract would be established. It was unnecessary to consider in detail the subsidiary questions. In essence, the claimant underwent a surgical procedure that she neither requested nor consented to.

In terms of causation, the judge concluded that the risks were materially increased by performing the more extensive and aggressive procedure involved in the high-definition technique. If the claimant had had a measured degree of liposuction applied to selected areas, as she had requested and expected, the amount of fat removal would have been significantly controlled and she would not have had the consequences of this highly unsatisfactory cosmetic result which now required extensive revision.

The judge was then asked to consider quantum and gave a detailed judgment in respect of each head of loss. Of note, however, is the award for loss of congenial employment which was assessed at £5,000. This was on the basis that the cosmetic injury, together with the deterioration in the claimant's mental health, prevented her from pursuing a part-time occupation as a fitness instructor from which she derived tremendous enjoyment. Both cosmetic and psychiatric injuries significantly impacted on her ability to pursue the business as a beautician providing specialist services of permanent make up.

As for future loss of earnings, the judge noted that on the balance of probabilities the claimant is more likely to have focused on her business as a beautician and would have given up the role of a fitness instructor well before she was 60. Therefore, he assessed the future loss of earnings as a lost opportunity / *Blamire* award in the sum of £7,500.

On the same day as Giles, judgment in Thorburn -v- South Warwickshire NHS Foundation Trust was handed down. Another case where the Court was asked to consider breach of duty, causation and quantum. This case concerned the alleged clinical negligence during left knee replacement surgery on 23 December 2009. The claimant's case was that the femoral components of the knee replacement was malrotated, leading to pain, stiffness and limitation in movement of the joint and the need for revision surgery in 2013.

The consequence of the claimant's physical restrictions was to lose the opportunity to earn profits in a business that he was developing called Ecological Horticulture Ltd to market a product called Terawet. In the alternative he claimed that his injuries had, at the very least, caused him to lose the ability to earn consultancy fees.

The judge's overall assessment of the claimant was that although he may have sought to portray matters in a particularly favourable light to his situation he was not a dishonest witness. He noted his tendency to make unequivocal assertions which on later examination turned out to be incorrect. This caused the judge to be cautious about his evidence, in particular where what he had to say either contradicted contemporaneous documents or was asserted in evidence without any supporting document.

The defendant conceded in closing submissions the issue of breach of duty. The judge noted that although it is accepted with knee replacement surgery that there can be a minor malrotation "*within the range of error and is not indicative of substandard surgery*" he was satisfied on the evidence before him that there was an excessive degree of malrotation. The need for lateral release of the muscles during the surgery was highly suggestive of over stuffing of the medial side of the joint which would be the consequence of malrotation.

As for causation, the judge was satisfied that the malrotation was the cause of the claimant's knee pain and restriction in movement. That said, it was possible that there was also infection around the replacement joint. The judge concluded "*it seems to me more likely than not that, given the steps taken by Mr Birch to avoid*

contamination and the cultivation of the same organism in 3 separate samples, that there was infection present in the knee at the time of the revision surgery. But the lack of evidence of inflammatory response of the kind that would be expected here, coupled with the evidence of Mr James that the malrotation was sufficient on its own to account for all the symptoms, led me to conclude that I cannot be satisfied on the balance of probabilities that such infection was the cause of the claimant's symptoms."

It was the claimant's case that as a result of his injury he had lost the opportunity to develop a successful business, but if that business had failed, the claimant would have returned to his consultancy work. The claimant claimed that the Court could be satisfied that at the very least he would have received earnings from the consultancy but that the greater amount that he may have made had his business been successful should be awarded as loss of chance. The claimant then mounted a backstop position that if the claimant was unable to establish the claim he should be able to recover a lump sum award following the *Blamire* approach.

The judge heard substantial evidence from the parties on this issue. The claimant's case was that his ecological business had a real chance of succeeding because:

1. His strong history in the field of agricultural technology;
2. His technical and market knowledge;
3. Terawet is now a successful product on the market;
4. He had found a committed investor.

The defendant's response was:

1. The claimant's financial projections were inherently implausible;
2. An investor performing competent due diligence would have been put off from investing in the scheme with someone of the claimant's business background, including his previous bankruptcy and failure of a previous product;
3. He had a history of difficult relationships with investors;
4. There were many other contingencies in the success of the business including success of field trials, interest in the product in the marketplace and underlying issues relating to the claimant and his wife's health.

The judge concluded, upon analysing all the evidence, as follows:

1. Given the claimant's unreliability as a witness he should treat the projections with great caution;
2. There was a significant chance that the investor would have withdrawn from this venture had he discovered the claimant's previous business failure;
3. There is a still higher chance that the claimant would not have attracted other investors who would have been willing to accept him as a partner. The original investor's position was unusual because of his particular interest in the sphere of agricultural technology and his desire to become involved in the business arose not just from financial motives but also out of the desire to be involved in a project in his retirement. Other investors would probably have explored the financial aspects of the business much more carefully;
4. It is possible that the money introduced would have been insufficient to keep the company afloat;

5. At the time of the failure of the business, field trials of the product had not taken place;
6. The claimant has had problems with his right knee leading to the need for total knee replacement on that side and has separate back problems. Such health problems may have led him to withdraw from the business in any event.

Taking all the above factors into account the judge was driven to the conclusion that the claimant could not prove that he had more than a negligible chance of success in this business venture. Any of the factors identified by the judge would have brought the failure of the business. Cumulatively, the chance of at least one bringing down the project in the judge's view was "*overwhelming*".

The judge found for the defendant in respect of the claim for past loss of earnings/loss of chance of the claimant developing his business. However, a reduced figure was allowed for loss of consultancy work.

All other heads of loss in respect of quantum were fairly standard and the judge was asked to consider well-rehearsed arguments typically advanced in medical negligence claims. However, it is pleasing to note that the judge concluded that the *Housecroft* discount when calculating gratuitous care should be 25% and not 33% regularly contended by NHS Resolution. The judge correctly stated that 25% represents "*the almost universal deduction in recent cases.*" Hopefully NHS Resolution will now apply common sense, and the law for that matter, when making such deductions in their Counter Schedules.

Procedure

On 12 September 2017 in the case of Jones -v- Chichester Harbour Conservancy & Others Master McCloud handed down judgment on one of the most litigated parts of the White Book – service of a Claim Form. In this case the deadline for service of the Claim Form was 17 January 2017. The Claimant's solicitor emailed a copy of the Claim Form to the Defendant's solicitor at 4.27 p.m. on 17 January 2017 and the hard sealed copy was sent by first class post that evening. The hard copy was physically received by the Defendant on 18 January 2017; the Defendant had not indicated a willingness to accept service by email. The question to be determined by the Court was whether the Claim Form had been served during its period of validity. The answer to this question involved reviewing and attempting reconcile the tension between CPR 6.14 and 7.5. The former noting that the Claim Form is deemed to be served on the second business day after completion of the relevant step set out in rule 7.5(1). Rule 7.5 states that the Claimant must complete the relevant step before midnight on the calendar day 4 months after the issue of the Claim Form.

The Master held that rule 7.5 is in truth a special case and exists in its current form to provide a clear statement to a claimant as to what steps must be taken within 4 months from the date of issue of the Claim Form. It does not alter the role of deemed date of service for documents other than Claim Forms. To read rules 6.14 and 7.5 literally would create a "*dead*" period of a day or two at the end of the period of validity of the Claim Form during which in these circumstances the Claim Form could not validly be served by any of the methods in rule 6.14 which have deemed dates of service after expiry of the Claim Form.

In the Master's judgment, the current position is –

1. The correct approach when determining whether, for the purpose of answering the question "was the claim form served during its period of validity" is to ascertain whether the Claimant has carried out the step required by rule 7.5 within the time provided for doing so.

2. The purpose of the "deemed date" of service provisions is to operate as a means to ensure that it is clear to the parties what date is to be used for the purpose of calculating such things as the date for service of acknowledgment of service or defence.
3. The deemed date of service provisions also assist a defendant when calculating the starting point for calculating time to respond.

This is a very sensible decision which goes some way to simplifying the approach to service of a Claim Form and gives much need guidance for practitioners in relation to the tension between CPR 6.14 and 7.5.

Quantum

The Court of Appeal gave its decision in Shaw -v- (1) Dr Kovac, (2) University Hospitals of Leicester NHS Trust on 18 July 2017. This case involved the somewhat ambitious advancement of what can only be described as a novel head of damages. The facts were as follows: the deceased, an 86 year old man died following an operation for a trans-aortic valve implant. It was claimed by the deceased's daughter that neither the deceased nor his family were given proper information as to the true nature of, and risks inherent in, the actual surgical procedure deployed; and that in consequence no properly informed consent was given by the deceased to such an operation. The Defendant admitted liability but the case went to trial. At trial the judge awarded £5,500 for the deceased's pain, suffering and loss of amenity.

On appeal it was argued by the claimant that the judge should in addition have awarded a sum representing a further and distinct head of loss – compensation for what was described as the unlawful invasion of the personal rights of the deceased and his loss of personal autonomy. An award suggested, by the claimant, as appropriate for this so-called head of loss was £50,000.

The Court held that unlawful invasion of personal autonomy was not a distinct cause of action. Firstly, such a cause of action had never been pleaded; and, secondly, in any event, the failure to give proper advice so as to obtain informed consent to what would otherwise be an unauthorised invasion of the deceased's body is properly formulated as an action in negligence/breach of duty.

The novel head of loss was formulated as compensatory damages but the claimant accepted that never before has a head of loss been expressly awarded or acknowledged in any previous reported authority. The Court was not persuaded and concluded:

1. The head of loss claimed was contrary to principle;
2. The key question to ask was, what it is that the claimant's proposed award is required to compensate, over and above what is already comprehended in the award of general damages for pain, suffering and loss of amenity;
3. The Court of Appeal was unable to identify such a candidate; if an individual's suffering is increased by his or her knowing that his or her "personal autonomy" has been invaded through want of informed consent then that can itself be reflected in the award of general damages;
4. Finally, it cannot be said that the deceased's estate has had no remedy. The infringement of the deceased's right to personal autonomy led to a concession of breach of duty of care which in turn "*led to an award of substantial damages. So there has been a remedy.*"

Looking at the case from a step back, the Court of Appeal noted that what was actually being sought by the claimant was a compensatory award of £50,000 for loss of expectation of life in a personal injuries action – a claim that is precluded by s.1 of the Administration of Justice Act 1982. No injustice arose in this case following the Defendant's admission of liability and the award of general damages to the estate of the deceased as assessed at trial.

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.

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