Medical Negligence and Personal Injury

Quarterly Newsletter –December 2017

The key Court decisions during the 4th quarter of 2017 are summarised below by category.

Liability

On 23 November 2017 the decision in the case of *Meadows -v- Dr Khan* was handed down by Mrs Justice Yip. This case concerned a wrongful birth claim which often involve tricky and emotional issues. The claim was bought by Mrs Meadows for the additional costs of raising her son who suffers from both haemophilia and autism. The Claimant had sought advice from the Defendant to enquire whether she was a gene carrier for haemophilia. Had that been the case she would have had foetal testing in any subsequent pregnancy and terminated the pregnancy if the baby carried the haemophilia gene.

The Claimant underwent a standard blood test and was given the all clear. However, in order to make such a diagnosis she needed to be referred to a haematologist to undergo specific gene testing. She subsequently became pregnant and gave birth to her son who suffered from both haemophilia and autism. The legal question to be determined was can a mother who consults a doctor with a view to avoiding the birth of a child with a particular disability recover damages for the additional costs associated with an un-related disability?

The Defendant's position was that she did not accept responsibility for the unrelated condition (the autism) but only for the additional needs that flow from the condition for which she was consulted about – the haemophilia.

The judge found for the Claimant stating that the autism arose out of a pregnancy which would have been terminated but for the Defendant's negligence. The Claimant's son was a product of a particular pregnancy which only continued to exist as a result of the negligent advice. The condition of autism was the natural consequence of a pregnancy and would not have continued if the Defendant's duty had been performed correctly. The scope of the duty in this case extended to preventing the birth of the Claimant's son, and all the consequences that brought with it.

Damages had already agreed between the parties in the alternative pending the Court's decision. Sums had been agreed if damages were limited to the additional needs attributable to the haemophilia and, in the alternative, both conditions (haemophilia and autism).

The decision in *TW -v- Royal Bolton Hospital NHS Foundation Trust* was given on 4 December 2017. This case came before Mr Justice King for a trial on liability and causation. The Claimant was injured by a period of near total hypoxic ischaemia following collapse of his circulation shortly before his birth. The Defendant had admitted that if the Claimant had been delivered by Caesarean section 7 minutes earlier he probably would have been spared brain injury.

Prior to arrival at the delivery unit on the morning in question the Claimant's mother made two telephone calls to the maternity unit seeking advice from the midwifes after her waters had broken. At a late stage in proceedings the Defendant disclosed telephone records and were prepared to accept the family's account of the telephone discussions. Therefore, the Court was required to consider two issues: breach of duty and factual causation. Breach of duty focused around whether the Defendant NHS Trust was in breach in failing to invite, or advise, the Claimant's mother to come to hospital when she first telephoned the delivery unit. Instead the midwife advised the Claimant's mother to put on a pad, walk around and call back in 30 minutes. This was despite the Claimant's mother repeating that her waters had broken.

The judge was satisfied in the circumstances of this case that there was a breach of duty on the part of the midwifery advice given by telephone. He concluded that the Claimant's mother during the first telephone call should have been issued, at the very least, with an invitation to come into hospital to be assessed and checked out when she was ready to do so. The key issues here were factual. This was a case where the mother was clearly wanting to come in and was giving a clear history of her waters having broken. Furthermore, this particular mother needed to have an invitation extended to her in order to be checked out and provide support and reassurance. The judge held that any midwifery opinion in this context that is was reasonable and responsible practice not to at least invite the mother to the hospital does not withstand logical analysis.

In terms of factual causation, the Defendant excepted that had the Claimant's mother been advised to attend the hospital she would have done so immediately. The judge was, therefore, required to reconstruct the events that would have occurred upon the Claimant's mother attending the delivery unit at an earlier stage, and whether a Caesarean section would have occurred early enough to spare the Claimant of brain injury.

On causation the judge felt that the best evidence must be the timings described by the obstetrician on duty and the midwifes as to give a best guide on what would have happened. The evidence of how fast each action would have taken upon admission, and how fast the preparations for a Caesarean section were expected to take as described by the clinical team are the best measure as to what would have occurred. On this basis the judge concluded that the Claimant's mother would have been assessed, advised of the risks of a Caesarean section and transferred to theatre and undergone a Caesarean section. Delivery would have been achieved no less than 7 minutes earlier and in light of the Defendant's admission, spared brain injury. Accordingly, the judge found for the Claimant in respect of breach of duty and causation.

This case acts as a good reminder of the importance of factual evidence when reconstructing a series of events that have taken place a number of years before legal proceedings commenced. Factual evidence may not only consist of witness statements taken by family members but also third party evidence such as telephone records to establish the fact of a telephone call actually taking place. Care should also be taken to ensure that specific requests are made from Defendant NHS Trusts for disclosure of documents that may not ordinarily be filed with a patient's medical records – telephone records/logs are a good example of such a class of document.

Gallardo -v- Imperial College Healthcare NHS Trust was handed down on 8 December 2017. This case concerned what should happen following treatment and the duty to inform a patient of its outcome, prognosis, and any requirement for follow-up or further treatment and monitoring. The case concerned a

claimant who in 2001 underwent surgery for removal of a malignant gastrointestinal stromal trauma (GIST). Unfortunately for the Claimant the cancer re-occurred in 2011 at which point he underwent further major surgery. Since that point his condition was closely monitored. It was only when investigating the return of his symptoms in 2010, and upon writing to his surgeon to request records held privately, that the Claimant became aware that he had in fact previously had a tumour removed. The Claimant was confused at this point because he had spent many years thinking that his problem was stomach ulcers. The case was further complicated by the fact that during the post-operative period in 2001 the Claimant transferred from the NHS into a private wing of the Charing Cross Hospital, although treated by the same surgeon.

The case therefore concerned the extent to which a patient should be advised of his condition, prognosis and follow-up treatment. Extensive reference was made to the Supreme Court's decision in *Montgomery* although this case does not represent an additional gloss or extension of the *Montgomery* principle.

Upon considering the Claimant's evidence and the content of the medical records the judge concluded that there are a number of features of the evidence that led him to the firm conclusion, and finding of fact, that the Claimant had been treated for the removal of a gastrointestinal stromal tumour, that there was a significant risk of recurrence, and that he would need regular surveillance in the form of CT scans. All of these facts were never properly explained to the Claimant at the time and the judge found that the Claimant did not subsequently become aware of the true nature of his diagnosis, and its implications, until the email from his private surgeon in November 2010 following his request for medical records.

Furthermore, the judge held that even if he had reached a different conclusion as to what the Claimant had been told about his condition, there was no evidence at all that either he or his GP were appropriately advised of the need for future check-ups and CT scans.

The question then became who bears responsibility for what is a double failure in communication: a failure to inform the patient about his true condition, and a failure to advise him of the need for future check-ups?

In relation to when the information should have been provided to the Claimant, the judge stated that this was plainly a discussion that "must" have been held. It ought not to be postponed for longer than necessary without good reason. Otherwise the doctor risks losing the patient's trust and confidence, and the patient's right to be informed is not respected. The judge held, at paragraph 84, "*the decision ought, it appears to me, to take place as soon as the patient is well enough to take in what he needs to be told and to participate fully in the discussion. It ought not to be delayed on therapeutic grounds unless it would be seriously detrimental to the patient's health. It should be clearly recorded, to avoid future uncertainty, and it ought to be communicated in writing to the patient's GP so that it is on the patient's records*". In the Claimant's case this should have been communicated to him during the post-operative period at the point at which his condition was stable enough to allow him to take in the gravity of the information he was being told. The judge borrowed the words of Lord Kerr who gave judgment in *Montgomery* stating "*the assessment is therefore fact-sensitive, and sensitive also to the characteristics of the patient*".

The next question to consider was who was responsible? Was the Defendant responsible in light of the fact that during the post-operative period (the time of the failure to advise) the Claimant had transferred from the NHS to the private sector. The judge was not impressed by such an argument and in particular the Defendant's attempt to absolve itself from liability. Instead the judge noted that the duty to warn and

advise was a continuing responsibility which on the facts as he found them was never discharged. The Claimant was entitled to be informed by the Defendant of the outcome of his treatment, of his prognosis, and of his continuing need for regular check-ups and CT scans that ought to have been informed before the point at which the Claimant transferred to the private sector. The Defendant had a continuing duty to so inform the Claimant which it failed to discharge.

Turning to the issue of causation, it was agreed between the medical experts that the recurrence of the tumour is likely to have been diagnosed in 2006 with further surgery taking place in 2007. In other words, four years earlier than the actual date of the second surgery. The judge was satisfied that the surgery would not have been as extensive, or difficult, as it proved to be in 2011. The Claimant would, therefore, have avoided four years of added pain and discomfort. Therefore, the judge found for the Claimant in respect of breach of duty and causation and was then asked to consider the issue of quantum.

Relatively mainstream, and straightforward, heads of loss were pursued but there was an interesting discussion in relation to AXA PPP's subrogated claim for expenditure that they had incurred. The judge noticed that AXA had simply inserted the right of subrogation in correspondence and played no active role in proceedings. Had the Defendant discharged its duty, the Claimant would still have needed to undergo further surgery in the future. He would have been under an obligation to disclose his known pre-existing medical condition to any prospective health insurer. It is self-evident that this would have been likely to have a material bearing on his ability to access health-insurance. The judge noted that the subrogated claim could not succeed on the basis on which it had been advanced. It was not a loss that flowed from the Defendant's negligence. What the Claimant could have claimed, in the alternative, if there was evidence to support such a claim, was the additional cost of his private treatment in 2011 over and above what it would have cost had the treatment been carried out in 2007. Therefore, of the £83,940 claimed the judge allowed £4,292 for the cost of treatment to drain a pleural cavity which would not have been required had surgery been performed earlier.

This case is interesting on two levels: firstly in relation to patient autonomy and what they are entitled to know about their treatment, prognosis and the need for follow-up surveillance. Although this case does not provide a gloss to the Supreme Court's decision in *Montgomery* it does continue the theme amongst recent case law of patient autonomy. Secondly, this case acts as a reminder to practitioners that subrogated claims from private healthcare insurers should not be advanced without scrutiny. They should not be taken at face value; they should be analysed and the standard principles of quantum applied to determine (a) do the costs flow from the defendant's negligence and (b) what costs would have been incurred but for the breach of duty?

On 15 December 2017 the judgment in *Thornton -v- Homerton Hospital* was given. This was a fatal accidents claim arising from the death of Mr Thornton in December 2012 who was then aged 74. He died of oesophageal cancer. It was alleged that Mr Thornton received negligent treatment in January 2012 when he attended the emergency department of Homerton Hospital and, according to the claim advanced by his Estate, there was a missed opportunity to refer him for further investigation that would have led to an earlier diagnosis of malignancy. Essentially, Mr Thornton attended the emergency department on 9 January 2012 with a food bolus lodged in his throat. The bolus had been lodged for some time (reportedly lodged for approximately 18 hours). It was common ground between the parties that the bolus cleared during the course of his attendance and while awaiting an appointment with a doctor. Following a

consultation which involved taking of a medical history, an assessment of the presenting problems, an examination and discussion of treatment options Mr Thornton was discharged without any recommendation for further investigation but was told that he should return to the emergency department if he felt unwell, or if he was unable to tolerate fluids or food.

The first issue for the judge to consider was a matter of fact. Mr Thornton's daughter advanced that her brother, who attended the emergency department with Mr Thornton and had since died, told the doctor that his father had a history of swallowing problems. Upon considering the witness evidence from Ms Thornton and the content of the medical records the judge was satisfied that the evidence given by Dr Candler as to what he elicited from the examination of Mr Thornton and his history taken was accurate. He noted "*I am satisfied that Dr Candler asked the question and received a response that led him to include the entry in the discharge letter, namely that there have been no history of swallowing difficulties*".

Turning to the issue of breach of duty the judge noted that the Court is concerned with the decision-making exercise in the real environment of an accident and emergency department at the time, and not following a reflective forensic exercise in the Court room. During the course of the evidence provided by the accident and emergency experts the matter that divided them was the extent to which features such as age, duration of obstruction and the fact of total obstruction were significant to mandate a further referral. The judge favoured the Defendant's evidence. He noted that there was no question of Dr Candler not being sufficiently aware of the risk that the food bolus obstruction could have had a more sinister cause. It was precisely because he was aware of this that he did, as the judge found, investigate Mr Thornton's previous medical history, asked questions of his history relating to swallowing difficulties and considered whether there was in his history, or his clinical findings, anything suggesting possible malignancy.

The judge concluded "*in my judgment what one might reasonably derive from the literature is that there is no golden rule that sets a mandatory requirement for a referral for further investigation following what is believed to be a first presentation with a food bolus obstruction, particularly where, as in the present case, the same has cleared without medical intervention.*" The Court concluded that the emergency department doctor carried out a reasonable examination, made reasonable enquiries of Mr Thornton and came to a decision that was in the circumstances consistent with this duty. He was not in breach of duty and the Claimant's claim was dismissed.

Damages

The Court of Appeal handed down the decision in *JR -v- Sheffield Teaching Hospitals NHS Foundation Trust* on 24 October 2017. The focus of the appeal was the basis on which future accommodation claims are to be calculated in the new environment with a discount rate of -0.75%.

The Defendant appealed the first instance decision against the award of damages in respect of lost years. The Claimant then cross appealed in respect of the award for future accommodation costs. Shortly before the appeal hearing the Defendant made an offer in the following terms: the Defendant abandon the appeal in respect of lost years, the Claimant's claim for accommodation costs on the cross appeal be settled for £800,000. The normal consequential cost orders would follow from the Claimant's success on both the appeal and the cross-appeal. The Claimant's Counsel noted that this was "*an offer which the claimant could not refuse*".

Therefore, the case resolved without there being argument on the basis of calculation for future accommodation claims. However, Lord Justice Jackson gave the following warning in approving the settlement "*I wish to make one matter clear. The issues of law which would have arisen on this appeal may arise on a future occasion and may have to be decided by this court after argument. Therefore, in approving the present settlement as being obviously beneficial to the claimant, we are not expressing any view about the merits of the arguments which would have been deployed in the proposed appeal and cross-appeal.*" The "accommodation conundrum" therefore rolls on.

On 24 November 2017 the Court of Appeal handed down its decision in *Smith -v- Lancashire Teaching Hospitals NHS Foundation Trust and Others*. This appeal concerned what has been a long-running issue within fatal accident claims. Namely, whether the provisions concerning the right to bereavement damages under section 1A of the Fatal Accidents Act 1976 are to be interpreted as extending to a person who was living with the deceased in the same household for at least two years before the death as husband or wife or civil partner (a 2 years + cohabitee). If this provision could not be interpreted in this way then the Claimant alleged that they would be incompatible with the European Convention on Human Rights. Furthermore, the Claimant claimed that the Court should declare the provision incompatible and the Secretary of State for Justice should pay damages to the Claimant under the Human Rights Act equal to what would have been the bereavement award at the date of death.

The Court of Appeal noted that the heart of the appeal is that the judge at first instance was wrong to hold that the scheme for bereavement damages under section 1A of the Fatal Accidents Act, and specifically its failure to extend to damages to 2 year + cohabitees, does not fall within the ambit of Article 8 for the purposes of Article 14 (the prohibition of discrimination).

The Court of Appeal held that the scheme for bereavement damages is properly regarded as a positive measure, or modality, by which the state has shown respect for family life, a core value of Article 8. For these reasons the Court concluded that the current scheme for bereavement damages in section 1A of the Fatal Accidents Act, with its exclusion of unmarried cohabitees like Ms Smith, falls within the ambit of Article 8. The Court also held that in the context of bereavement damages under section 1A of the Fatal Accidents Act, the situation of someone like Ms Smith, who was in a stable and long-term relationship in every respect equal to marriage in terms of love, loyalty and commitment, is sufficiently analogous to that of a surviving spouse or civil partner to require discrimination to be justified in order to avoid infringement of Article 14 in conjunction with Article 8.

In terms of reading the Fatal Accidents Act in a manner that is compatible with the European Convention on Human Rights, the Court accepted the judge of first instance analysis that section 1A cannot be interpreted as to include 2 year + cohabitees. The Court of Appeal issued a declaration of incompatibility and noted that this was the appropriate relief in the present case.

However, in relation to the Claimant's claim for damages, the Court noted that section 6(1) of the Human Rights Act provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. This is, however, qualified by section 6(2) which provides that subsection (1) does not apply to an act if, as a result of one or more provisions of primary legislation, the authority could not have acted differently. In essence, the Defendant in this case could not be ordered to pay damages because by not making an award for bereavement damages they were in effect complying with the primary legislation.

At the appeal hearing the Claimant abandoned her claim for damages in light of section 6 but reserved the right to attack the validity of section 6 in any subsequent proceedings before the European Court of Human Rights.

Although a declaration of incompatibility has been issued in respect of section 1A of the Fatal Accidents Act, in practical terms this has little effect. Public authorities (these include NHS Trusts) can continue to rely on section 6(2) to justify not paying a bereavement award to a 2 year + cohabitee on the basis that they are simply following the provisions of primary legislation (the Fatal Accidents Act). Although interesting from a legal perspective this will have little impact, if any, in practice until this issue is considered by Parliament. In light of the current political climate and the priorities of the current administration, one has to question the likelihood of the compatibility of the Fatal Accidents Act being a priority, or even on the radar, of the Ministry of Justice.

Interim Payments

Porter -v- Barts Health NHS Trust decided on 18 December 2017 involved a claimant who had sustained a hypoxic brain injury and now suffers from quadriplegic cerebral palsy and microcephaly. The case is listed for trial in October 2018 but an application for an interim payment in the sum of £1,900,000 was sought. This was sought to cover the acquisition and adaptation of property and a further year's worth of care and case management costs to trial.

The judge considered the application on the *Eeles* approach, which is now standard practice since the Court of Appeal gave its guidance in 2009. However, the issue central to this application was the basis on which an interim payment application for purchase of accommodation should be calculated. Reference was made to the impact the change in discount rate has had on the *Roberts -v- Johnstone* calculation and the issues discussed at first instance in the case of *JR -v- Sheffield Teaching Hospitals NHS Foundation Trust*. The judge essentially applied an *Eeles* approach and was satisfied that the purchase and adaptation of the property identified represents the only viable solution to the Claimant's needs. The judge was also satisfied that the trial judge will allocate, by way of damages in the form of a lump sum, sufficient capital to enable her to be accommodated substantially in accordance with the requirements set out in her expert reports. In his view a lump sum for the purchase of accommodation was unlikely to be less than £900,000. On this basis and applying the *Eeles 1* approach he assessed the reasonable proportion of the lump sum to be £972,000.

However the judge felt that there was an *Eeles 2* urgency about this case and then proceeded to factor in additional heads of loss that would be included within a lump sum. He felt that a very large capital sum in this case would almost inevitably be made. He accepted that that would reduce the amount in respect of other heads of claim which the trial judge can order by way of a periodical payments order, but in his view it is most unlikely that the judge would choose to make a periodical payments order precluding the purchase and adaptation of suitable accommodation. He noted "*the accommodation issue, on the evidence, transcends all other considerations*".

On that basis the judge calculated the *Eeles 2* lump sum to be £2.1 million in addition to the £972,000 for *Eeles 1*. By applying a reasonable proportion and factoring in the value of previous interim payments the Court awarded £1.9 million by way of a further interim payment.

This is a useful example of the approach the Court is likely to take when asked to award an interim payment of a significant sum to purchase property prior to trial. The approach suggests that the Court will simply follow the *Eeles* criteria and apply reasonable proportions to each head of loss that is capable of forming the lump sum award at trial. Although the Court noted the various alternatives to the *Roberts -v- Johnstone* calculation, and the conundrum that these present following the change in the discount rate, these issues will not be determined by a judge at an interim payment stage. These issues can only be determined following a full trial and hearing of evidence - the very point made by the judge in the *JR* case.

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