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Medical Liability Briefing

Causation in Medical Consent Cases post-Montgomery

So far in 2017 there have been two cases which have clarified the need for claimant parties to establish causation on a conventional basis in cases where a breach of duty in respect of a clinician's obtaining of medical consent is found proven, and the continuing narrowness of the *Chester v Afshar* exception

Correia v University Hospital Of North Staffordshire NHS Trust [2017] EWCA Civ 356

This claim related to the treatment of a painful recurrent neuroma in the right foot. On 5 November 2008 D carried out a surgical procedure. The claimant continued to suffer pain, developing a type of neuropathic pain: chronic regional pain syndrome (CRPS).

The claimant alleged negligence both in the advice given and in the performance of the operation, as well as advancing a claim based on the nature of her consent to the operation. At trial is was held that the index operation had been negligently performed, but that the negligence had not caused the claimant pain or suffering. The claimant appealed.

It was argued that the Claimant had consented to an operation which involved a three-stage procedure and had not been warned of the material risks of an operation which omitted the third and crucial step of relocation. It was said that if she had been warned, she would not have undergone the operation and this entitled her to damages since the risk of damage from the material omission was something about which she should have been warned.

Simon LJ (with whom Black LJ agreed) held there were difficulties with the argument that the negligent omission of the third stage negated her consent. It has held that the operation was not different from the one consented for, but the negligent omission of the third stage was a breach of duty which had the potential to give rise to liability for damages if all the other elements of the tort of negligence were made out. The claimant made an informed choice to have the surgery, and the injury was not 'intimately linked' with the duty to warn.

As to causation, Simon LJ held (adding something which ought to serve as practical advice for claimant litigators):

"27. ...the decision in Chester v. Afshar, envisaging a 'narrow and modest departure' from (per Lord Steyn) or 'some extension' to (per Lord Walker) traditional causation principles, is scant support for the appellant's argument. It follows that in my judgment there was no breach of the defendant's duty in relation to the appellant's consent to the operation.

28. ... The crucial finding in Chester ... was that, if warned of the risk, the claimant would have deferred the operation. In contrast, in the present case, it was not the appellant's case that she would not have had the operation, or would have deferred it or have

gone to another surgeon ... if a claimant is to rely on the exceptional principle of causation established by Chester v. Afshar, it is necessary to plead the point and support it by evidence. In the event, the material evidence, such as it was, did not support the appellant's case on this aspect of the causation argument. As the recorder found (at §220), the appellant did not say she would not have had the surgery if advised differently."

Diamond v RDE Trust [2017] EWHC 1495 (QB)

In this case it was held that a surgeon failed to advise the Claimant, who attended for abdominal hernia repair, of the alternative of suture repair (which was highly unlikely to succeed) rather than a mesh repair. The latter would lead to possible complications in pregnancy. HHJ Freeman (sitting as a high court judge) held that (at §28):

"... there was a breach of duty in relation to the counselling process for the mesh repair:

i) it should have been explained to the Claimant that there was attendant upon a mesh repair certain risks, should she become pregnant in the future; and

ii) the claimant should have been told a primary suture repair as opposed to mesh repair was possible even if there was a high risk of failure."

The court considered causation. It was held that had the claimant have been counselled adequately as to the risks and benefits of each alternative treatment, on the balance of probabilities, the surgeon would have provided the claimant with reasonably adequate information for her to make a properly informed decision as to her treatment.

The Claimant's causation argument was rejected by the court, despite it finding the claimant and her assertions, to be wholly credible. The judgment bears closer study. It was held that, as to the Claimant (who was found to be a wholly truthful and credible witness):

"46. ... recalling specific events or conversations is markedly different from attempting to reconstruct what her response would or might have been if given certain information. Expert witnesses, lawyers and others are trained not to use the benefit of hindsight to inform their opinion of what might or should have happened. It is, however, human nature for people to permit that which eventuated to influence their thinking on what they might have done if warned about a particular risk. ...

47. I conclude that the Claimant genuinely believes and has convinced herself that she would have opted for a suture repair, if she had been provided with all the relevant information. Accordingly, what she said to me in evidence accords with her honestly held belief. But it does not of course, automatically follow that what she now believes to be the case would in fact have been the position at the material time."

Counsel for the claimant raised two arguments in closing:

(1) that even if the court were to conclude that the claimant would not have opted for the alternative treatment in any event, she is entitled for damages for the shock of finding out some three year later that there would be some additional risk to her in pregnancy; and/ or

(2) that she should be awarded some form of 'free-standing' damages.

The judge rejected the first argument (at §52) as having *"neither factual or legal validity"* on the basis of the facts.

The second argument was dealt with in some detail by the court:

"54. The further argument advanced by Mr Kellar is that where there has been a negligent non-disclosure of information by a doctor then, that of itself, can create a right for the patient to claim damages. ...

55. .. Montgomery is only of marginal relevance to the present case. ... As I read the speeches, the Supreme Court did not lend any support to the proposition that a mere failure to warn of risks, without more, gives rise to a free-standing claim in damages.

56. Equally, as it seems to me, Chester is not authority for the proposition that a claimant does not need to prove causation, in the conventional sense, as a result of failure to provide informed consent. ...

57. It is apparent, therefore, that the facts in Chester were striking and very different from the instant claim. The important point, however, as emphasised by Simon LJ [in *Correia*] *(and by other judges in recent cases) is that Chester permits only a very modest departure from established principles of causation. ...*

58. In my judgment, this Claimant cannot come within the Chester exception. In the first instance, it is difficult to see how it could be said that she has suffered an injury in consequence of the operation. Even if it be said that when, later, she was advised not to child-bear, that constituted an injury. It cannot sensibly be argued that that outcome was intimately connected to the duty to warn such that it should be regarded as being caused by the breach of the duty to warn.

59. At all events, I am satisfied that Chester does not provide a claimant with a free-standing remedy in circumstances where there has been a failure to warn of risks attendant upon surgery. ... Of course, in this case, the Claimant does say that she would not have had this operation if properly warned but that is not my finding of fact. The important point is that if the Court of Appeal had construed Chester as modifying such principles of causation to the extent that a mere negligent failure to warn, without more, could sound in damages such could not be reconciled with what Simon LJ said at [28] set out above."

By Thomas Crockett