The Latest on CONSENT and CAUSATION: *Webster v Burton Hospitals NHS Foundation Trust* [2017] EWCA Civ 62

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This was a consent claim where breach of duty was admitted, there was a dispute about the advice that should have been given and where causation was denied. Unusually the Court of Appeal *reversed the first instance finding on causation* with the result that the brain damaged child's case succeeded.

The decision provides some insight into the type of factual causation evidence that judges find persuasive. It also reminds us of the importance of identifying clearly the advice that should have been given, had a patient-centred, patient-specific approach been adopted.

<u>The Facts and the First Instance Decision</u>

Sebastian Webster suffered cerebral palsy and consequent profound physical and cognitive impairment as a result of hypoxic-ischaemia to the brain occurring between 72 and 48 hours prior to his delivery on 7 January 2003. The parties agreed that had he been delivered on or before 4 January, he would have been born unharmed.

On 31 October, at almost 32 weeks, Sebastian's mother was admitted with some bleeding and a headache. A doctor wanted to admit her and warned her of the risks of placental abruption. Notwithstanding that advice, she signed a discharge form and left. She said that she had been reassured by staff, suffered from anxiety and felt she would do better at home (she lived close to the hospital) than she would if she stayed in. (NB: This otherwise unimportant interlude was important to the Court of Appeal's decision on factual causation).

A scan in November 2002 showed an unusual combination of features: a foetus which was small for gestational age, asymmetry in the circumferences of the head and abdomen and excess liquor. The consultant obstetrician, Mr. Hollingworth, failed to note those anomalies and the Defendant admitted that he had acted negligently in failing to arrange further scans.

On 26 December, Sebastian's mother was admitted to hospital overnight feeling unwell; 27 December was her anticipated due date. She was seen that morning by Mr. Hollingworth who decided that she was well enough to go home with a view, in accordance with guidelines, that she should be seen at 41 weeks for induction if labour had not begun spontaneously by then.

The Claimant's case was that his mother should have been given the choice of continuing with the pregnancy or being induced and that with reasonable advice about the options, she would have opted for induction with the result that he would have been born healthy.

The Defendant contended that further ultrasound scans in November and December (which, as a result of the admitted negligence were not performed) would have been

reassuring and the fetal anomalies would not have given rise to the need for any heightened vigilance or advice about any dangers which might have been avoided by induction.

The trial came on <u>before</u> promulgation of the Supreme Court's decision in *Montgomery*. Accordingly, HHJ Inglis applied the *Bolam* test to the issues of advice and consent. The Judge found that although after further scans Mr. Hollingworth would have had to have a discussion about them with the Claimant's mother, it would not have had to be a detailed discussion and it would have been reasonable for him to advise her that the pregnancy should continue. Accordingly, the Claimant did not establish breach and his claim failed.

<u>The Court of Appeal's Decision</u>

By the time the case reached the Court of Appeal, *Montgomery* had been decided. Simon LJ (giving the only reasoned decision) substituted the correct, patient-focused approach and said that it was clear from the first instance decision that had there been a proper dialogue, Mr. Hollingworth would have explained that, "*there was emerging but recent and incomplete material showing increased risks of delaying labour in cases with this combination of features*" (paragraph 40).

In reversing the Judge's decision and allowing the appeal, Simon LJ found that, even if Sebastian's mother had also been given information about contrary arguments in favour of not intervening, she would still have wanted to be delivered on 27 December. Further, the Court of Appeal rejected the Defendant's submission that rather than agreeing to that request, Mr. Hollingworth would have sought a second opinion.

On factual causation, the Court of Appeal relied on the following matters (paragraph 41):

1. The first instance decision (described by Simon LJ as "*very full and careful*") and this passage in particular:

   > "*I think that had the mother been advised that she should proceed to induction or that there were increased risks in waiting until 6 or 7 January, she would have wanted to be delivered. I think she was fed up with the pregnancy and with the lack of well-being and it was the due date that she had in mind. She would not have wanted it to be put off, since the prospect of induction was looming in any event.*"

2. The mother's evidence that if there had been '*any suggestion of risk I would have wanted him to be delivered*'.

3. Her background: she had a university degree in nursing.

4. Her willingness to take responsibility for her pregnancy, as demonstrated from her decision to leave hospital on 31 October and the reasons for doing so.

Thoughts and Tips

This final point about willingness to take responsibility is interesting. On the one hand, the mother's evidence that she would not have wanted to take any risks was accepted and yet in the preceding October, she had been willing to take the risk of placental abruption.

What is being underlined is that here was an educated person (with a not irrelevant degree), capable of distinguishing what risks she would and would not take and who had demonstrated an ability to process medical advice about her pregnancy and rejected it when she had a contingency plan.

In addition, she had clearly impressed the Judge at first instance and the appeal was assisted by his clear findings and careful reasoning. On a purely human level, every mother can relate to being fed up of being pregnant when at term!

So here, there was an abundance of evidence to support the case that even if given balanced advice by a Consultant favouring continuation of pregnancy, the mother would have chosen induction on her due date rather taking the risks consequent on ploughing on when there was every chance of being induced anyway.

But what if the Claimant is uneducated and/or has had an uneventful pregnancy or other seemingly uncomplicated medical problem with no opportunity to demonstrate willingness to take responsibility for their health?

From a defence point of view, this was a difficult case to defend in the post-*Montgomery* era because there was no strong reason to delay induction since the pregnancy had run to term and as the judge pointed out, "*was looming in any event.*"

And it is interesting to see the Defendant's unsuccessful attempt at running the case often adopted by claimants since *Chester v Afshar*, namely that with proper advice they would have delayed in order to obtain a second opinion. (Quite why and from whom this consultant would have sought a second opinion is unclear from the judgment. Without knowing the background, it does read as a rather unconvincing attempt to get the pregnancy to "bat on" past 4 January). It is, perhaps, only in the context of a specialist, tertiary problem requiring a very particular expertise that such an argument could succeed for the defence.

Tips for Claimants

These cases are difficult! Much will depend on how the patient presents in the witness box. If you are preparing the case for the claimant then:

1. Resist the temptation to focus on breach to the exclusion of factual causation!

2. Identify and articulate in clear, easy to understand terms, the advice that should have been given had a patient-centred and specific dialogue taken place.

3. Get your client to go back in time, put out of their mind knowledge of the injury and press them to explain why, if given the advice you have identified, they are so clear that they would have taken a particular course of action.

4. Look for examples of where they have weighed up advice. If there are none in relation to this clinical episode, look for other medical occasions or, perhaps, instances of mature decision making in a different context.

Tips for Defendants

Defendants seeking to persuade the court that events would have unfolded as they did even in the context of different advice should:

1. Likewise, focus on and clearly articulate the balanced evidence that will be contended for at trial.

2. If appropriate, present clear, focussed evidence about instances illuminating the patient's personality. Perhaps they are a serial non-attender and demonstrate a cavalier or fatalistic approach to their health. Perhaps they have said that they trust the doctor and will do whatever he or she thinks best. Perhaps they have been offered time to go away and think about something but said that they are ready to make a decision there and then. Perhaps (as in *Less and Carter v Hussain*) the claimant has a very strong desire to pursue a particular course of action (in that case to conceive) from which no amount of negative advice would dissuade them. Perhaps the patient is complaining of very severe pain and pressing for an urgent, surgical solution. Even if there is good material in the records, that evidence may be better brought to life by oral evidence.

3. Is there an important deadline? In some cases, patients will want a particular procedure or resolution of a problem in time for a certain event eg a wedding or a sports event.

4. If, as here, the defendant's case is that delay was inevitable because advice needed to be sought from a different clinician then explain why and how long that would take.

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