BRIEFING

MEDICAL LAW

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INTRODUCTION

LISA DOBIE
Head of the 1 Chancery Lane Medical Law Group

What a strange time we find ourselves in. As we are inundated with headlines and statistics daily, I can fully see how this may be a difficult time to find focus.

But litigation rumbles on in the shadows of the coronavirus outbreak. As we all get to grips quickly with remote working practices and mastering court hearings by video app, 1 Chancery Lane is here to help in any way that it can. We are business as usual. Indeed, it has been a busy time for 1 Chancery Lane's medical law practitioners.

In this briefing we give you a round-up of some of the recent cases that 1 Chancery Lane's barristers have been involved in (*Whittington Hospital NHS Trust v XX* [2020] UKSC 14 in which Edward Faulks QC appeared for the Appellant Hospital, *Paul v Royal Wolverhampon NHS Hospital* [2019] EWHC 2893 in which Laura Johnson appeared for the Claimants and *R (Lewis) v Senior Coroner* [2020] EWHC 471 in which Julian Waters appeared for the Claimant). Ella Davis also looks at the decision in *ABC v St George's Healthcare NHS Trust* [2020] EWHC 45.

You might also be interested to know that the NHSR have announced an indemnity scheme, known as the Clinical Negligence Scheme for Coronavirus (CNSC). It has been designed to respond to the new contracts being put in place for healthcare arrangements to respond to coronavirus, such as those with the independent Sector and organisations supporting testing arrangements. View details of the scheme here.

All members of 1 Chancery Lane and our clerks room continue to work remotely. We offer our full range of services and are happy to provide telephone and video conferencing services for court hearings, conferences and settlement meetings. We look forward to providing you with assistance and support in the testing weeks and months ahead.

Best wishes to you all.

WHITTINGTON HOSPITAL NHS TRUST V XX [2020] UKSC 14

EDWARD FAULKS QC

KATIE AYRES

On 1 April 2020 the Supreme Court handed down judgment in the case of *Whittington Hospital NHS Trust (Appellant) v XX* (Respondent) [2020] UKSC 14 ('*Whittington*').

Edward Faulks QC appeared for the Appellant Hospital and was instructed by Bevan Brittan LLP.

The judgment provides an interesting analysis of the limits of compensatory damages in tort where the head of loss claimed might be considered to be against public policy.

Facts

The Claimant was a young woman who had been born in 1983. She had cervical smear tests in 2008 and 2012 and cervical biopsies in 2012 that were negligently wrongly reported by the Hospital (liability was admitted). In 2013, when the errors were detected, her cervical cancer was too far advanced for her to have surgery. Instead, she was advised to have chemo-radiotherapy, which would result in her being unable to have children. Before having the treatment, she had eight eggs collected and frozen.

The issue under appeal related to the damages payable for the loss of the Claimant's ability to have a child. She and her partner wanted to have four children using a commercial surrogacy arrangement in California (two with her own eggs and two with donor eggs). Fee-paying arrangement are unlawful in the UK but there is nothing in the criminal law stopping prospective parents from entering into a commercial agreement abroad. In the UK surrogacy is permitted on a non-commercial basis where reasonable expenses can be paid. Alternatively, if this claim was unsuccessful she intended to use non-commercial arrangements in the UK.

At first instance the judge held that, following *Briody v St Helen's & Knowsley Area Health Authority* [2000] EWCA Civ 1010; [2002] QB 856 ('*Briody*'), the claim for commercial surrogacy must be rejected as being contrary to public policy, and that surrogacy using donor eggs did not restore the Claimant's to her pre-tort position (i.e. it did not restore her fertility or provide her with a genetically-related child) and as such no damages would be awarded.However, damages could be awarded for two own-egg surrogacies in the UK.

The Claimant appealed against the denial of her claim for commercial surrogacy and the use of donor eggs. The Hospital cross-appealed against the award for the two own-egg surrogacies. The Court of Appeal dismissed the cross-appeal and allowed the appeal on both points. The Hospital then appealed to the Supreme Court.

The appeal raised three issues.

1. Can damages to fund surrogacy arrangements using the claimant's own eggs be recovered?
2. If so, can damages to fund arrangements using donor eggs be recovered?
3. In either event, can damages to fund the cost of commercial surrogacy arrangements in a country where this is not unlawful be recovered?

Decision

In a rare majority decision, the Supreme Court dismissed the appeal. Lady Hale gave the majority judgment, with which Lord Kerr and Lord Wilson agreed. Lord Carnwath gave a judgment dissenting on issue three only, with which Lord Reed agreed.

The case of *Briody* was central to the appeal. In that case, owing to medical negligence, the claimant underwent a sub-total hysterectomy when aged 19, she having lost two babies in quick succession. Her ovaries were left intact. Many years later, she brought proceedings claiming damages for, among other things, the cost of a Californian surrogacy. Ebsworth J rejected both proposals, partly because the chances of success using her own eggs were so low and partly because commercial surrogacy was not lawful here. By the time the case reached the Court of Appeal, however, eggs

had been successfully recovered from the claimant and fertilised with her partner's sperm. There were then six embryos in storage. Nevertheless, the chances of success were still no more than 1%.

On appeal to the Court of Appeal, on the Californian proposals, Lady Hale, delivering the lead judgment, found that they were "*contrary to the public policy of this country, clearly established in legislation, and that it would be quite unreasonable to expect a defendant to fund it*". Further and in any event she found that it would not be reasonable to expect the defendant to pay for the implantation of the claimant's embryos when this had such a slim chance of success. As to a surrogacy using donor eggs, she found that this was "*not in any sense restorative of Ms Briody's position before she was so grievously injured. It is seeking to make up for some of what she has lost by giving her something different. Neither the child nor the pregnancy would be hers*".

In *Whittington*, Lady Hale, also delivering the lead judgment for the majority noted that the Court was not bound by the ratio of *Briody*, and that the persuasiveness of that ratio has been adversely affected by the developments in law and social attitudes which had taken place since then. Lady Hale at [28-39] set out the numerous ways in which the law and social attitudes had changed since the decision in *Briody* to encompass a far wider definition of 'family life' and to give women greater autonomy over the decision to put themselves forward as a surrogate.

Lady Hale (with whom all members of the Court agreed on this issue) did not consider that the case involved consideration of the illegality defence as nothing which the Claimant proposed to do involved a criminal offence either here or abroad. As such, the normal principles of compensatory damages applied. Damages in tort seek to put the injured party in the position she would have been in had she not been injured; but they cannot be recovered where it would be contrary to legal or public policy, or unreasonable.

Lady Hale found on the first issue that *Briody* did not rule out the award of damages for own- egg surrogacy arrangements made in the UK. Whether it was reasonable to seek damages for this head of loss depended on the chances of a successful outcome. In the Claimant's case those chances were reasonable (unlike in *Briody*).

On the second issue, the view expressed in *Briody*, that damages for donor-egg surrogacy arrangements could not be recovered as they were not restorative of what the Claimant had lost, was probably wrong then, and was certainly wrong now due to the development of legal and social attitudes towards surrogacy and family life. This aspect of *Briody* was therefore overruled.

On the third issue she found that UK courts will not enforce a foreign contract if it would be contrary to public policy, but due to the developments in law and social attitudes she found that it was no longer contrary to public policy to award damages for a foreign surrogacy arrangement provided that certain limiting factors applied (predominantly centred on adequate safeguarding of the child).

Lord Carnwath's dissenting judgment (with which Lord Reed agreed) differed from the majority on the third issue only. In his view, it would offend the principle of legal coherence for civil courts to award damages based on conduct which, if undertaken in the UK, would offend its criminal law.

Comment

Given that *Briody* was decided less than 20 years ago it is striking that the court in *Whittington* reached the opposite conclusion.

In relation to the first issue, the case clarifies that claimants will now have to prove a reasonable chance of success of the surrogacy if recovery of damages for own-egg surrogacy arrangements is to succeed. It is not clear what a 'reasonable chance' actually means. In *Briody*, the chances were less than 1%, clearly unreasonable, but it is not clear where the line of reasonableness is to be drawn. On the balance of probabilities? Or something less?

In relation to the second issue, Lady Hale made the courageous call to overrule her own decision in *Briody* on this point. In her last case in the Supreme Court she conclude not only that the decision could not stand in light of the legal and societal developments since 2000 but also that the decision was likely to have been

wrong at the time it was decided. It is clear now that there is nothing in principle barring a woman recovering damages for the cost of donor-egg surrogacy arrangements.

However it was the third issue that was the most controversial, as evidenced by the slim majority decision. There is certainly something unsatisfying in the majority's reasoning which must stem from the conflict between the criminal law (which is supposed to embody public policy towards certain issues) on the one hand preventing commercial surrogacy arrangements in the UK, and the majority's decision that public attitudes are no longer in principle against such arrangements.

The effect of the decision is that whilst it is illegal to enter into a fee-paying arrangement in the UK, it is not illegal for UK-based prospective parents to procure such an arrangement abroad. There can be no moral or societal justification for this distinction. Either public policy dictates that as a society we have decided not to allow a fee-paying process, whether at home or abroad, or we have not. Lord Carnwath makes the point that the (historically at least) best yard-stick for gauging public policy is that contained in the criminal law, which in this country prohibits such agreements. The majority's decision to instead turn to other evidence to identify the public policy in relation the issue suggests that the majority were of the opinion that the criminal law itself was out of date and needed reform.

Parliament has legislated on surrogacy on a number of occasions. It has not so far chosen to make commercial surrogacy agreements lawful. On the basis of the recent Law Commission consultation, there is not much of an appetite to change the position. It must be at the very least questionable whether the Supreme Court should be in effect sanctioning an arrangement which parliament has chosen to make unlawful. BA polite way of casting doubt on the decision was that chosen by the minority who emphasised the need for coherence in the law. A less polite interpretation of the decision was that the Supreme Court chose to ignore parliamentary sovereignty and decide a public policy question for themselves.

The judgment marks a significant departure from the previous position and it is to be expected that claims for surrogacy arrangements, whether through donor eggs domestically, or through foreign commercial agreements, will be much more common in the future. It appears that offending the criminal law may be no bar to the recovery of damages if the court thinks on the facts that an award is reasonable.

PAUL V ROYAL WOLVERHAMPTON NHS TRUST [2019] EWHC 2893 (QB)

LAURA JOHNSON

The vexed issue of secondary victim claims in cases where there is a material gap in time between breach of Duty and onset of injury was once again considered in the High Court late last year in a strike out application brought by the defendant Trust.

The two claimants, who were young children at the time (aged 9 and 12), were alone with their father on a shopping trip when he collapsed in the street as a result of a heart attack, banging his head and bleeding onto the pavement. The children witnessed his collapse and death which occurred in traumatic circumstances. Both children have suffered psychological injuries as a result of the experience.

The children and their mother have conventional claims as dependents of the deceased. In addition the children have secondary victim claims. The factual basis of the claims that there was a failure in the care given to the father some 14 months before his death when he presented at hospital with chest and jaw pain. It is the claimants' case that those symptoms were inadequately investigated. Had proper investigations been carried out they would have disclosed coronary artery disease that could have been treated, which would have avoided his death.

Master Cook struck out the secondary victim claims of the children in a decision handed down on 4 November 2019. He concluded that the claims did not arise in an uncertain or developing area of law and that "I cannot sensibly distinguish the facts of the current case from those in *Taylor v Somerset Health Authority*." He went on to say:

"To focus simply on the death of Mr Paul as being the first point at which the consequence of the Defendant's negligence became apparent is not an approach which is supported by the authorities. To do so overlooks entirely that there must be a proximate connection between the initial negligence and the shocking event. It is this proximity in space and time that allowed Lord Oliver to impose the duty of care in *Alcock* and was described by Lord Dyson MR in *Taylor v A Novo* as "*a necessary, but not sufficient, condition of legal proximity*". It is this proximity which has been found to exist in all successful secondary victim claims including *Walters* and it is the lack of such proximity which explains why the claims in cases such as *Taylor v Somerset Health Authority* and *Taylor v A Novo* failed."

It was the position of the claimants that the case is clearly distinguishable from *Taylor v Somerset Health Authority*, which was concerned with what is known as the "immediate aftermath extension" (where the secondary victim comes upon the immediate aftermath of the incident), where there was no suggestion that the deceased's heart attack had occurred in traumatic circumstances and indeed the claimant had not witnessed it. She was told of her husband's death at the hospital and asked to see his body in the mortuary. *Taylor v A Novo* was a case that was concerned with two events – an accident that caused minor injury to the deceased and her death some weeks later as a result of complications from that minor injury. The claimant did not witness the initial accident but witnessed the death.

It was argued on the Claimant's behalf in *Paul* that these cases, either individually or in combination, did not amount to binding authority that where there is a material gap between breach of duty and injury a secondary victim claim cannot arise. It was argued that the Claimants' case was much more closely analogous to that of *North Glamorgan NHS Trust v Walters*, in which there was a gap of a number of weeks between the breach of duty and the fit that started the seamless event culminating in the death of the claimant's child, as a result of which she suffered injury. *Walters* was expressly distinguished by the Court in *Taylor v A Novo*.

The decision of Master Cook that the position in law is clear and unambiguous in these cases is not a view shared by many practitioners and there is emerging commentary that is critical of his decision.

Laura Johnson acted for the child claimants. Permission to appeal was granted earlier this year with the appeal to be heard later in the spring.

REFRESHER ON NEGLECT IN INQUESTS

SUSANNA BENNETT

R (Lewis) v Senior Coroner for North West Kent [2020] EWHC 471 (Admin) is a timely reminder of the ingredients for an inquest's finding of neglect and the need for a coroner to put the issue to a jury, where there is sufficient evidence. In these judicial review proceedings the Claimant Ms Lewis, the sister of the deceased, applied successfully for the jury's decision to be quashed after the coroner refused to leave the issue of neglect to the jury.

The facts: Ms Lewis' death, the inquest and the judicial review

Jennifer Lewis, the deceased, had for many years suffered from mental health problems. Between October 2010 and her sad death in July 2017 she was sectioned under various provisions of mental health legislation and was admitted to multiple hospitals. From 17 October 2014 she was an inpatient at the Bracton Centre, a psychiatric unit operated by Oxleas NHS Foundation Trust (the "Trust"). In the final year of her life Ms Lewis lost a significant amount of weight which came with health consequences including diarrhoea, hair loss, and problems with her eyesight. The weight loss was thought to be linked to bariatric surgery a few years previously. It required monitoring. She was admitted to external hospitals on 2 occasions for her physical health problems. Notwithstanding the treatment, her physical decline progressed. On 14 July 2017, around a fortnight before her death, she was found half-conscious in her room at the Bracton Centre, in a severely undernourished, unkempt and dehydrated state. She was transferred to Darrent Valley Hospital, where she sadly died on 27 July 2017 from malnutrition.

It was the Claimant's case at the inquest that the Trust did not properly monitor Ms Lewis' physical decline, did not respond adequately to the same, and failed to follow its own policy on hydration and nutrition.

At the summing up to the jury, the Senior Coroner did not leave neglect as an issue which they should consider. When challenged by Counsel for the Claimant, Mr Waters, he referenced the cases of *R. v HM Coroner for North Humberside and Scunthorpe Ex p. Jamieson* [1995] Q.B. 1 and *R v Galbraith* [1981] 1 WLR 1039 and stated that this omission was intentional. He did not give reasons.

The High Court, consisting of Davis LJ, Edis J and Judge Lucraft QC, determined unanimously that the factual matrix surrounding Ms Lewis' death gave rise to the issue of neglect, applying *Galbraith* principles, and that this should have been put to the jury. The inquest was therefore flawed and its conclusions had to be quashed.

The law on neglect

The case shines a spotlight on a coronial finding of neglect, and when it will be appropriate. The leading case on this is the Court of Appeal's decision in *Jamieson*, which is referred to in detail by the High Court in the present case. Neglect is defined at p 25:

"(9) Neglect in this context means a gross failure to provide adequate nourishment or liquid, or provide or procure basic medical attention or shelter or warmth for someone in a dependent position (because of youth, age, illness or incarceration) who cannot provide it for himself. Failure to provide medical attention for a dependent person whose physical condition is such as to show that he obviously needs it may amount to neglect…

(10) As in the case of self-neglect, neglect can rarely, if ever, be an appropriate verdict on its own. It is difficult to think of facts on which there would not be a primary verdict other than neglect. But the notes to form 22 in the Rules of 1984, although in themselves of no binding force, are correct to recognise that neglect may contribute to a death from natural causes, industrial disease or drug abuse…"

The Chief Coroner's Guidance No. 17 also gives binding guidance on findings of neglect, from para 74, referring to Jamieson (footnotes not included, emphases in original):

"74. The following does no more than outline the concept of neglect in coroner law. Neglect is not a conclusion in itself. It is best described as a finding. It must be recorded as part of the conclusion (in Box 4). It has a restricted meaning according to the case law. It should not be considered as a primary cause of death.

75. A finding of neglect (formerly lack of care) was specifically approved in Jamieson. It may form part of the conclusion in Box 4, either as words added to a short-form conclusion (see paragraph 32 above) or as part of a narrative conclusion.

76. Neglect is narrower in meaning than the duty of care in the law of negligence. It is not to be equated with negligence or gross negligence. It is limited in a medical context to cases where there has been a gross failure to provide basic medical attention.
…

82. There must be a clear and direct causal connection between the conduct described as neglect and the cause of death: Jamieson. The conduct must have caused the death in the sense that it 'more than minimally, negligibly or trivially contributed to the death': see Khan. The 'touchstone' is 'the opportunity of rendering care … which would have prevented death: Staffordshire case. It is not enough to show that there was a missed opportunity to render care which might have made a difference; it must be shown that care should have been rendered and that it would have saved or prolonged life (not 'hastened' death): Khan. [emphasis added]"

Discussion

Neglect is in my experience a rare finding for a coroner or jury to make. It occupies an awkward position as a description of acts or omissions which contribute causally to a person's death, but which are not to be regarded as the primary cause. Although the rules stress the distinction between a finding of neglect and common law negligence, the former having a narrower meaning, a finding of neglect in the medical context strongly suggests negligence by the relevant healthcare provider.

The facts in this case, in which Ms Lewis died of malnutrition, and questions were raised by her family about her treatment at the Bracton Centre, fall clearly within the remit of "neglect" as defined in *Jamieson*. Strikingly the Senior Coroner gave no reasons for his conclusion that a finding of neglect was not open to the jury. It is worthy of note (and ironic) that he then proceeded to raise concerns about Ms Lewis' treatment in a report under regulation 28 of the Coroners (Investigations) Regulations 2013.

What can we take from the case? It is heartening to see that the Divisional Court will readily overturn the conclusions of inquests in which the jury have been misdirected. It underlines the need for coroners to state their reasons when making decisions regarding what conclusions are open to the jury. One can only hope that it will encourage coroners to take more care in future to ensure that conclusions for which there is sufficient evidence are left to the jury, in order to avoid the cost, inconvenience and distress of a fresh inquest.

The claimant was represented by Julian Waters of 1 Chancery Lane, instructed by McMillan Williams.

A DUTY TO BREACH THE DUTY OF CONFIDENCE?

ELLA DAVIS

Following the Court of Appeal's holding that it was arguably fair, just and reasonable to impose on clinicians treating a patient with a genetic disease, a duty of care to disclose his diagnosis to his child, the court's full decision in *ABC v St George's Healthcare NHS Trust & Ors* [2020] EWHC 455 (QB) has now been handed down.

The tragic background to the case was that the claimant, ABC, argued that she should have been told that her father, XX, had (or was suspected to have) Huntington's disease, against his express wishes. She argued that had she been told of her 50% risk that she also had this genetic disease, she would have terminated a pregnancy to avoid potentially passing the disease to her child. XX made clear that he did not want either ABC or her sister to know about his Huntington's disease, precisely because of the potential impact on their decision about whether to have children. ABC later tested positive for the disease.

In short Yip J decided that a duty of care was owed but that it had not been breached and that in any event the claim failed on causation grounds. Further, although ABC's Article 8 rights were engaged, the Human Rights Act claim added nothing to the common law claim.

Duty

XX was detained in the Second Defendant's hospital as a result of killing ABC's mother. ABC was nevertheless heavily involved in his rehabilitation and Yip J found that ABC was a patient of the Second Defendant as a result of her participation in family therapy. However, Yip J did not accept that the matters complained of could properly be characterised as badly performed family therapy so as to bring the claim within the scope of the duty owed to ABC as a patient. Further, ABC was still a third party to the relationship between the defendants and XX.

Yip J further rejected ABC's alternative argument that the defendants' clinicians assumed responsibility for deciding whether she should be told of XX's diagnosis. The Second Defendant's assumption of responsibility in the course of family therapy did not extend to all aspects of her wellbeing and she could not be said to have relied on the defendants to undertake the balancing exercise as to whether she should be told of XX's diagnosis.

In the further alternative, ABC argued that the court should recognise a duty of care in this novel situation. Yip J recognised that she should not attempt to define the limits of any duty owed by doctors to those who are not their patients, but that she was required only to decide whether on the facts of this case a relevant duty was owed to ABC.

In her judgement, although information about genetic risk lay outside of the duty owed to ABC in the context of family therapy, ABC's participation in the family therapy was still an important part of the factual matrix. Through it, the Second Defendant's clinicians

had a significant amount of information about ABC and her circumstances. Further, they had a direct line of communication with her. There was therefore a close proximal relationship between ABC and the Second Defendant.

It was also not merely foreseeable but foreseen by the Second Defendant that ABC was at risk of suffering harm if information about her genetic risk was withheld.

In holding that it was fair, just and reasonable to impose a duty in this situation, Yip J acknowledged that a duty to ABC would conflict with the duty of confidence owed to XX. However, the duty of confidence is not absolute. Yip J rejected the various policy arguments put forward by the defendants, including fear of defensive practice and floodgates arguments.

Yip J therefore held that there was a duty of care owed by the Second Defendant to ABC to balance her interest in being informed of the genetic risk against her father's interest and the public interest in maintaining confidentiality. The duty further extended to acting on the outcome of that balancing exercise.

Yip J considered that in recognising such a legal duty the law was not imposing a new obligation on clinicians because the legal duty runs parallel to the existing professional duty which all experts in the case agreed exists.

Breach of Duty

On the evidence that she had heard, Yip J found that there was no way of alerting ABC to her genetic risk without directly breaching XX's confidentiality. She therefore asked herself whether the decision not to disclose was one which no reasonable forensic psychiatrist could have reached with the assistance of a multi-disciplinary team and the support of the genetics service. She noted that there was no clear consensus among the experts as to what the outcome of the balancing exercise should have been. She found that the decision not to disclose was supported by a responsible body of medical opinion and was not a breach of the duty identified.

Causation

Notwithstanding her finding as to breach of duty, Yip J considered whether, on the balance of probabilities, ABC would have terminated her pregnancy if the genetic risk had been disclosed to her.

Yip J found that a decision to inform ABC of her genetic risk could not have been made before early October 2009. At that stage XX had a working diagnosis of Huntington's but had not undergone testing. The latest date on which ABC could have undergone a termination was 6 December 2009. It was found to have been theoretically possible for ABC to have been counselled and tested in time for her to undergo termination if she had been told of her genetic risk in early October. However, if ABC were to have undergone testing in time to terminate her pregnancy, she would have had to have done so without first having a molecular diagnosis for XX.

While Yip J found ABC to be a truthful witness, she acknowledged that ABC's evidence was given with hindsight. That evidence did not fully grapple with the advice that ABC would have been given not rush to testing in pregnancy. ABC's eventual decision to get tested two years after learning of XX's diagnosis was materially influenced by the litigation. Further, Yip J took account of the fact that when ABC did learn of XX's diagnosis, she decided that her sister, then in early pregnancy, should not be told. Yip J also rejected ABC's account that she would have proceeded to termination without foetal testing (although again, not because she considered ABC to be deliberately untruthful).

ABC therefore failed to prove on the balance of probabilities that she would have undergone a termination.

Conclusion

The Court of Appeal's decision had appeared to have far reaching implications. However, the failure of this unusual claim means it remains to be seen how significant that decision will be. The fact, as Yip J acknowledged, that any claimed breach of a duty such as she found would be tested by reference to Bolam/Bolitho principles, is an important check in the context of the policy arguments raised by the

defendants. Indeed on the facts of this case there was disagreement between the clinicians involved as to whether to disclose and the expert witnesses called by the parties also admitted to struggling with the case.

Further, this case is another example, as with many of those cases which followed Montgomery, of the difficulties honest claimants face in proving what they would have done in a hypothetical scenario when their view is inevitably clouded by hindsight.

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