

Castello v Gonschior: The Importance of Choosing the Right Discipline of Expert in Clinical Negligence Claims & the Limitations of Res Ipsa Loquitur

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In *Castello v Gonschior* [2021] EWHC 2742 (QB), Lambert J provides an important reminder of the importance of choosing the right experts and an example of the relevance, or lack of relevance, of complaints by other patients, and the evidential principles of “*res ipsa loquitur*” and *Keefe v The Isle of Man Steam Packet Co Ltd* [2010] EWCA Civ 683 [2010] EWCA Civ 683 (“*Keefe*”) in clinical negligence claims.

The Defendant cosmetic surgeon undertook a closed rhinoplasty on the Claimant. The Claimant alleged that the Defendant’s technique, negligently, caused a further septal deviation, leaving her with an “S” shaped deviation of the septum, causing her breathing difficulties and leaving her with a nasal timbre, together with associated injuries, loss and damage. Liability and quantum were in dispute.

The parties were in agreement that if the deviation were caused by the surgery, whatever the precise mechanism of causation of deviation, that represented negligent technique. Factually, however, the parties were in dispute: the Claimant contended that the deviation was caused by the surgery, whereas the Defendant contended that it pre-dated the surgery.

The Court found for the Defendant. The primary reason for this was the Court’s assessment of the expert evidence. The Claimant called Professor Kirwan, an aesthetic plastic surgeon. The Defendant called Professor Lund, honorary consultant in ENT and professor emeritus in rhinology.

The Court considered that, although Professor Kirwan had considerable expertise in the field of cosmetic surgery generally, there was nothing in his professional background which suggested to the Court that he had, or purported to have, a specialist interest in the internal anatomy of the nose. His experience did not focus upon rhinoplasty, and his specialist publications did not touch upon that procedure.

By way of contrast, Professor Lund’s work had extensive and professional life-long experience of surgical procedures of the nose: “*I am wholly confident that her knowledge of the anatomical relationship of the structures of the nose is infinitely greater than that of Professor Kirwan*”.

This assessment undoubtedly and expressly coloured the Court’s determination of the central issues between the experts, namely (1) the mechanism(s) by which the septal deviation might inadvertently have been caused by the surgery and (2) the Claimant’s current condition and the causes of that condition. The Court said that, subject to being satisfied that Professor Lund’s evidence made logical sense, without hesitation, it preferred the evidence of Professor Lund.

The Court, in those circumstances, found (1) that the Claimant’s nostril airflow was within normal limits and (2) for the septum to have become deviated, it would have been necessary for it effectively to have been disarticulated in some way, and the Defendant would, if this were the case, have to have been aware of his error (which he was not). The Court found that the deviation was pre-operative and had probably been asymptomatic, which was not uncommon in the general population.

The case is therefore a clear reminder of the necessity to obtain expert evidence from a person with specialist expertise on the precise central matters in issue, or risk being evidentially out-matched at trial (even when instructing an expert with considerable surgical expertise generally, as the Claimant did in this case).

The Court also dealt with an argument that “*res ipsa loquitur*” applied, dismissing the same on the basis that the issue in this case was not whether or not the septal deviation was a negligent or non-negligent consequence of surgery (e.g. if caused by the surgery, would there be an evidential burden to show that it was not caused negligently), but rather the

factual issue of whether the deviation existed pre-surgically or not.

Similarly, the Court addressed an argument that *Keefe* (an industrial disease case where the Court, evidentially, judged the Claimant's case benevolently and the Defendant's case critically due to the absence of historical noise survey records which should have been available) should be applied so as to judge the Claimant's evidence benevolently and the Defendant's evidence critically, on the basis that there was no reliable record, as the Claimant said there should be, of the course of the septum throughout its length. The Court rejected this argument: there were a number of factors with respect to when the septal deviation occurred and it was not just the absence of records, one way or another, which was relevant. The Court considered that in that multi-factorial case, that piece of evidence could not be looked at in isolation. There was no scope for the evidential rule.

Finally, and usefully, the Court made clear that it was not assisted by complaints by other patients, because it did not know why the patients were dissatisfied, whether that dissatisfaction was justified or not, and whether the Defendant had been in breach of duty.

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