Causation Strikes Again: Dalchow v St George's University NHS Foundation Trust

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On 20 January 2022, Hugh Southey QC (sitting as a Deputy Judge of the High Court) handed down judgment in the case of *Dalchow v St George's University NHS Foundation Trust* [2022] EWHC 100 (QB). The decision gives rise to some interesting considerations on causation and the judicial assessment of expert evidence, and provides a useful illustration of the application of *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324.

Background

The Claimant's claim was for losses arising from the debridement of the peno-scrotal skin, lower abdominal wall and perineum, and a bilateral orchidectomy, as the result of a delayed diagnosis of Fournier gangrene (a form of necrotizing fasciitis which effects the perineum and scrotum).

On 14 April 2015, the Claimant was seen at St George's for the removal of a benign epididymal cyst on his scrotum. The procedure was uneventful, and the Claimant was discharged at 3:45 pm with pain recorded as "*within patient's own acceptable limits*".

By 4:30 am on 15 April 2015 the Claimant's pain was so severe that he returned to St George's with a pain score of 10/10 VAS. It was accepted by the Defendant that the level of pain and its failure to respond to paracetamol and ibuprofen meant that the case was a "*very, very unusual presentation for post-operative pain or small haematomas*".

The Claimant was examined and treated with regular morphine. By 8:30 am, the Claimant was starting to lose sensation to the scrotal area.

At 11 am the Claimant was examined by a urology Senior Registrar. The differential diagnosis included post-operative pain, a small haematoma or early infection. It was accepted at trial that a small haematoma was an illogical explanation for the Claimant's clinical presentation. Proper consideration was not given to the need for an urgent ultra-sound to assist with management or to rule out an interruption in the blood supply to the testicle.

The Claimant was reviewed by a Consultant Urologist at 12 pm. Rapid scrotal swelling was noted and the working diagnosis was of "*?haematoma/active bleeding??*". Erythromycin, an antibiotic, was prescribe (but not administered, which was an admitted breach of duty by the Defendant) and an ultra-sound scan was requested. Whilst the treating Consultant said in oral evidence that the ultra-sound scan was ordered as "*urgent*", there was no documentary evidence of this. The ultra-sound scan request form was completed at 2:39 pm. There was no evidence to explain the delay between the examination and the request. The ultra-sound scan was completed by 3:12 pm where it was noted that "*[t]here are multiple small molecules of gas within the fluid surrounding the right testicle, tracking up along the spermatic chord.*" The ultra-sound scan could not be used to diagnose Fournier gangrene.

The Claimant was reviewed by the urology Senior Registrar at 6:15 pm when a diagnosis of Fournier gangrene was made. The key symptom in the diagnosis was skin breakdown. This had not been present at the examination at 12 pm and was of rapid onset.

Breach & Adverse Inferences

Having summarised the law in relation to breach of duty at [85]-[90], Mr Southey QC went on to find that:

- It was not unreasonable for the working diagnosis to be that of a small haematoma, but that other differential diagnoses ought to have been considered.

- It was unreasonable and a breach of duty not to administer antibiotics at 12 pm, after they had been prescribed.
- It was not unreasonable for the urology Senior Registrar to wait until he had spoken to the Consultant to order the ultra-sound scan.

The Judge went on to find that by 12 pm, when the Consultant Urologist examined the patient, due to the uncertainty of the diagnosis an urgent ultrasound was required. An urgent ultrasound should be conducted within two hours.

The Defendant did not accept that it was practical to complete the ultrasound in two hours. This was pivotal to any finding of breach of duty. There was no direct evidence on the point, nor was there any explanation given for the delay in failing to complete the ultra-sound request form. Mr Southey QC considered the *dicta* of Brooke LJ in *Wisniewski* (*ibid*.):

> "*(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
>
> *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
>
> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
>
> *(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.*"

In applying *Wisniewski*, the Judge found at [96]:

> *"The agreed evidence was that an urgent USS should be conducted within 2 hours. There was some evidence that in some cases this standard may not be practically possible. However, in this case I have no evidence that any efforts were made to obtain an urgent USS. It appears that nothing happened for over 2 hours before the USS form was completed. The Defendant does not accept that I should conclude that it was practical to conduct a USS within 2 hours. Although I do not have direct evidence on this issue, applying the approach in* Wisniewski *it appears to me that I am entitled to find that a USS could have been conducted within 2 hours. The expert evidence makes it clear that it is unusual for it not to be possible to conduct a USS within 2 hours. The issue in this case appears to have been the delay in completing a request form. This was a sufficiently unusual incident that it is likely to have been memorable and so there is no reason to believe that an explanation for the delay in completing the USS could not have been provided if there was one. Mr Sabbagh accepted that the need to complete the form could have been overlooked. In those circumstances, the absence of evidence explaining the delay in obtaining the USS and, in particular, the absence of evidence explaining the failure to complete the request for the USS means that I can find there was no good reason for it."*

In a nutshell, the Defendant had failed to provide an explanation for the delay in completing request form which should have been available if there was one. In those circumstances, the Court was entitled to draw an adverse inference. The Defendant was in breach of duty for failing to complete an urgent ultra-sound within two hours.

Causation

In going on to consider causation, Mr Southey QC outlined the approach that the court should take at [97]:

> *"i) The Claimant accepts that there is a burden on him to demonstrate that any breach of duty caused or materially contributed to loss.*
>
> *ii) In determining whether the breach of duty caused or materially contributed to loss, I have to make findings as to what treatment would have been delivered had there been no breach of duty. That issue requires me to make factual findings applying the balance of probabilities.*

iii) Assuming that I reach findings regarding what would have happened that are adverse to the Claimant, I then have to apply the Bolam *test to determine whether the treatment that would have occurred would have been negligent. A Defendant cannot rely on a finding that the treatment that would have been offered would have resulted in the same outcome if that treatment would have been negligent (*Bolitho *at 240F).*

iv) If I conclude that the breach duty denied the Claimant of alternative treatment that would not have been negligent, I have to determine whether loss was caused. In that context there was a dispute about whether it is sufficient for the Claimant to prove a material contribution to the loss."

Applying these principles to this case, the Judge found:

- The ultra-sound scan completed earlier would have been suggestive of infection but would not have diagnosed the Fournier gangrene. In those circumstances, on the balance of probabilities, the Claimant would probably not have been taken to theatre for several hours after the results of the ultra-sound scan. Applying *Bolam* and *Bolitho*, it was not unreasonable not to take the Claimant to theatre on receipt of the ultra-sound report. As surgery is the crucial step in saving skin and soft tissue in cases of Fournier gangrene, the delay in conducting the ultra-sound scan did not cause the Claimant's loss.
- On the evidence before the Court, antibiotics alone would not have prevented the Claimant's loss. That required the combination of antibiotics and surgery. As the surgery should not have been started sooner, the breach in relation to antibiotics was not causative.

In any event, the Judge went on to find that even if he was wrong about that, he would not have found that there was any quantifiable loss in this case. The evidence before the court did not allow it to assess "*how much better*" an outcome earlier surgery would have allowed. Ordinarily, this would be the point at which the court considered arguments of material contribution. Mr Southey QC found that the Claimant's case here failed on a pleading point: material contribution was pleaded in relation to an indivisible injury, which this was not. (For more information on the law of material contribution and indivisible injuries, please see Thomas Herbert's recent blog.)

The claim was dismissed.

Concluding Remarks

This case provides a lesson for both Claimants and Defendants alike:

- Make sure your experts can deal with breach and causation adequately. This is something that must be rigorously tested in conference, backed up by literature. Delay cases are notoriously difficult on causation and the courts are not generous in their interpretation of expert evidence on this issue.
- A failure to provide an explanation may be to your detriment. It is imperative that where an explanation can be provided for a delay or a lack of evidence, it is included in a witness statement.