

Chester v Afshar and causation in the House of Lords

By C J Lewis Esq.

Facts

The facts in this important case are easy enough to summarise. The well-known neurosurgeon, Mr Afshar, was found by the trial judge to be in breach of duty in not warning the patient of the small risk of paralysis resulting from cauda equina compression during the lumbar operation. The risk materialised through no fault of the surgeon and the unfortunate patient suffered serious permanent injury. The judge, Sir Denis Henry, did not find for a fact that she would never have had the operation if warned (that would have been an open and shut case for the patient, just as it would have been a hopeless case if the finding was that the warning would not have deterred the patient). He found that she would have declined to have it *at that time*, but would have sought a second or even a third opinion. He made no finding one way or another as to whether she would have had it somewhere at someone's hands at some future date. The judge concluded that that was good enough to show that the surgeon was liable for the injury. The Court of Appeal agreed. It seemed to me at that time, and still does, that there was no great problem on causation. It was perfectly logical and sensible to state that, even if she did at some future time undergo the operation, the chances of the injury arising were the same as originally, i.e. a very great deal less than 50%, and therefore the appropriate conclusion was that the injury would not have occurred. Of course, if the fact that the patient suffered this injury was good evidence that she probably would have suffered it also in any later operation, which is sometimes the case, then she could not succeed. But that was not the case here.

House of Lords

Where I really cannot agree with the House of Lords is that all of them, with the possible exception of Lord Walker, took the view that, as the surgeon's breach of duty had not increased the risk of the injury happening (i.e. the very fact that the chance of injury, though still very low, would remain precisely the same at any future operation), he had not caused the injury. I don't follow this. The chance of her suffering the injury at any future date was 1%. What is wrong with the argument that

therefore on the balance of probabilities she would not have suffered it. But, with the possible exception of Lord Walker, who alone made the point that the scenario might well be different at a later date (in terms of surgeon, environment and maybe other more subtle factors), the House agreed that to permit the claimant to succeed in this case there would have to be an extension to the normal rules of causation (just as there was in their decision in *Fairchild* MLC... – and I wonder if that will also be the case when soon we hear their decision in *Gregg v Scott* MLC 0851 CA).

The claimant nevertheless succeeded, albeit by a bare majority (just as in the similar Australian case of *Chappell v Hart* MLC 0067). Three of the judges were for making such an extension on policy grounds, two were not. The policy is that patients' rights to disclosure have to be protected. If the surgeon fails to recognise those rights and the very injury against which he was required to give a warning materialises, it is only right and proper that he should be held liable, even if that amounts to putting him in the position of insurer.

Minority view

The simplest expression of the minority view was put by Lord Hoffman, who, if we may ignore his unhelpful analogy of a roulette player, said that the claimant had failed to prove her loss as the risk would have been the same whenever or wherever the operation might have been done. In other words, the purpose of warning was to enable the patient, if she so wished, to take steps to remove or minimise the risk – which it had not been proved she would or could have done. Therefore the surgeon's failure to warn had not been the cause of her injury. Nor did he see any good reason for a policy extension. Lord Bingham took a similar view on both conclusions, stating that he saw no reason to provide for potentially very large damages to be paid by a defendant whose breach of duty had not been shown to have worsened the physical condition of the claimant.

Majority view

Those in favour of the claimant's case were Lords Steyn, Hope and Walker. But, as I have said, they agreed with the minority (at any rate the first two clearly did), that the application of normal principles of causation would not permit the claimant to succeed. I appreciate that the 'but for' argument is not conclusive on questions of causation. If it were enough in itself one would simply say that but for the failure to

warn the probability is that the patient would not have suffered the injury if in fact she had decided to undergo the operation at some later date. But, when a perfectly reasonable argument on causation would lead simply enough to the result that the majority were favouring, why one has to get tangled up in this alternative, subtle argument about no causation because the risk would be the same at any future operation beats me.

Anyway, having argued themselves into a corner in that fashion, the majority went on to allow the policy extension, telling us that, just as in *Fairchild*, there was in this case, too, no causation proved on ordinary legal principles, but there was a special case for making an exception and declaring that in these particular circumstances there would be a special rule for deeming causation to have been proved, or at any rate, -- and this is of course the important issue shorn of legal casuistry -- for imposing liability on the surgeon. Maybe the imminent decision of the House of Lords in *Gregg v Scott* will take a similar line.

In practice

What does this decision mean in practical terms to the busy medical practitioner? In the first place it means that if your client would have declined an operation if given a necessary but omitted warning of a risk and the risk materialised and the relevant injury occurred, her claim is not defeated by the fact that, though declining the operation at that time, she would probably have decided thereafter to have it anyway. But are there any limits to this? What if she would have decided, after taking a second opinion, to have it a few days later with the same surgeon in the same hospital? Perhaps the court would conclude that the chance of the risk materialising in those circumstances did not remain the same, but, as it had already been seen to have happened in virtually identical circumstances, it could be inferred that it would probably happen again. On the other hand, the risk in this *Chester* case was one that materialises totally at random, and one remembers that the chances of the tossing of a coin producing, say, a sixth consecutive tails is (I believe) still fifty percent.

In the second place, this decision, by the very manner in which it is based on policy, indicates (a) that patients' claims may in other contexts be able to initiate new rules of law, and (b) that some members of the House of Lords clearly have empathy – I

would not presume to say sympathy – with the position of the patient vis-à-vis the doctor.

THE END