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# UNITED KINGDOM

## CLINICAL NEGLIGENCE: INFORMED CONSENT AND CAUSATION

### Chester v. Afshar

Court of Appeal: Hale L.J., Sir Christopher Slade and Sir Dennis Henry; [2002] E.W.C.A. Civ. 724 and [2002] 3 All E.R. 552.

Miss Chester suffered from recurrent back pain and consented to elective neurological surgery, on the recommendation of Mr Afshar, but was found post-operatively to have suffered extensive motor and sensory impairment. It was accepted that the lumbar micro-disectomy she underwent had certain irreductible risks attaching to it, including a one to two per cent chance of serious complications, including nerve damage and paralysis. It was also accepted that it would be in accordance with good medical practice to inform a patient of these risks.

The extent to which she had actually been warned of these risks was contested. The defendant maintained that adequate warning had been given while the claimant contended that she her anxieties as to possibly being 'crippled' had been brushed aside and that she had been misled to believe the operation was merely a routine procedure which carried no appreciable risks.

The claimant further contended that had she been properly advised, she would not have consented rapidly to surgery without further reflection and/or medical opinion and that this was sufficient to establish a causal link between the conduct of Mr A and her injuries. It was countered, on behalf of the defendant, that causation would not be established unless Miss C could demonstrate that alternative advice would have led her to continue to refuse such surgery for all time. This divergence of views reflected the two strands of authority which were brought to the attention of the court. The extent to which the actual operation was conducted negligently was also considered.

The trial judge held that there was no evidence of negligent conduct of the operation, despite the adverse outcome, but he preferred the account of Miss C regarding the pre-operative advice. On the issue of causation he also found for the claimant. The defendant appealed on the issues of fact and causation.

**Held,** dismissing the appeal,

1. The judge had considered carefully the evidence provided by the witnesses as to the adequacy of the pre-operative advice and had provided reasons for his decision to prefer Miss C's account. There was no reason to disturb these findings of facts. In particular, he had found that: (i) Miss C was an intelligent and articulate witness describing an episode of unique importance to her and whose recollection of the consultation with Mr A had the 'ring of truth' about it, particularly in relation to some light-hearted comments made by Mr A; (ii) she had complained at an early stage post-operatively about the lack of adequate warning as to the risks; (iii) there was documented evidence as to her personal aversion to surgery and that this was unlikely to have been smoothed into acquiescence in the space of only three days if she had been informed of the risks of nerve damage and paralysis. The test identified by Hutchison J. in *Smith* v. *Barking H.A.* [1994] 5 Med. L.R. 285 of what a reasonable person in the patient's position would have done may be taken to include a reasonable person with Miss C's documented aversion to surgery. Such a reasonable person would have been likely to take a second or even third opinion before consenting to elective neurosurgery in the event that full warning as to the risks had been provided.

2. It was understandable in psychological terms that an experienced surgeon would wish to reassure an anxious patient. However, this was not an adequate legal response to the patient's questions concerning the proposed treatment: *Sidaway* v. *Governors of Bethlem Hospital* [1985] 1 A.C. 871 *per* Lord Bridge at 898 and *per* Lord Templeman at 902 applied.

3. The law is designed to enable the competent patient to choose what is to be done with her body at any given time and principles of causation ought to reflect this. Where a doctor, in breach of duty, fails to draw a particular risk to the patient's attention and that specific risk materialises, causative responsibility will lie. It is not necessary for the patient to prove that she would have refused the operation for all time had she been given the proper advice: *Chappel* v. *Hart* (1998) 72 A.L.J.R. 1344; [1999] Lloyd's Rep. Med. 223 *per* Gaudron, Gummow and Kirby JJ. applied.

4. The possibility that the claimant might (even with proper advice) have undergone the operation at some time in the future may be a relevant issue as to quantum of damages: *Chappel* v. *Hart* followed *per* Gaudron and Gummow JJ.

5. The doctor is not to be held liable for coincidences which are unconnected to him, such as anaesthetic failure or lightning striking the operating theatre: *Chappel* v. *Hart* followed *per* Gummow J.

6. There was no need to reconsider in detail whether or not the operation had been performed negligently as Miss C only wished this to be left open if she lost the main issue as to causation.

**Commentary.** What is the correct approach to causation in an informed consent case? It is accepted in English law that the 'but for' test of factual causation must be applied. In other words, the claimant must show, on a balance of probabilities, that *she* would not have consented to the procedure had she known of the risk. and thereby the injury would not have occurred (*Smith* v. *Barking, Havering and Brentwood H.A.* [1994] 5 Med. L.R. 285 (Hutchinson J.)—some jurisdictions adopt an objective or hybrid test: *Arndt* v. *Smith* [1997] 2 S.C.R. 539 (Can. Sup. Ct.)).

What if, however, the patient would only have postponed the procedure until a future date? She would then be exposed to the very same risk of injury. Does the claimant also have to prove that she would never have undergone the procedure in the future? If she cannot, is her claim restricted to damages for the period until she would/might have had the procedure in the future? This is the point of principle decided by the High Court of Australia in *Chappel* v. *Hart* (1998) 72 A.L.J.R. 1344 and which the Court of Appeal was asked to decide in *Chester*. In *Chappel* v. *Hart*, it divided the court resulting in five judgments that are, at times, bewilderingly complex (for a discussion see, P. Cane, 'A Warning About Causation' (1999) 115 L.Q.R. 21 and J. Clarke, 'Causation in *Chappel* v. *Hart*: Common Sense or Coincidence?' (1999) 6 *Journal of Law and Medicine* 335).

The majority of the High Court (Gaudron, Gummow and Kirby JJ.) held that the claimant was entitled to recover even though she would have had the procedure in the future. Her injury was as a matter of logical and common sense attributable to the doctor's failure to warn her of the risk. It was not, as the minority (McHugh and Hayne JJ.) said a matter of coincidence that the injury occurred because the doctor's negligence had not increased the risk of her being injured. On the contrary, it was the very harm that the doctor had negligently failed to advise her about.

In the instant case, the Court of Appeal approved and applied the majority view in *Chappel* v. *Hart*. A causal connection was established between the defendant's negligence and the claimant's injury. Delivering the judgement of the court, Sir Dennis Henry set out the court's assessment of the policy behind the doctor's duty to inform and how that led the court to its conclusion. He stated (at [47]):

> The purpose of the rule requiring doctors to give appropriate information to their patients is to enable the patient to exercise her right to chose whether or not to have the particular operation to which she is asked to give her consent . . . The object is to enable the patient to decide whether or not to run the risks of having that operation at that time. If the doctor's failure to take that care results in her consenting to an operation to which she would not otherwise have given her consent, the purpose of that rule would be thwarted if he were not to be held responsible when the very risk about which he failed to warn her materialises and causes her an injury which she would not have suffered there and then.

It is difficulty to argue with this reasoning. It would undermine the rule and be unjust for a doctor to require a patient to show that she would never have a particular procedure in the future (see also *Chappel* v. *Hart*, *supra*, *per* Kirby J. especially at [95]–[96]). It is also counterintuitive to think that because the patient may run the risk in the future—by agreeing to and having the procedure—the negligence is not connected to her injury. At worst, she will be exposed to a small risk of injury which is unlikely *then* to eventuate—exceptional circumstances aside (see below). She had in a real and immediate sense suffered injury that she would not otherwise have suffered. That should be sufficient to establish a causal link.

Let us then take stock of the Court of Appeal's reasoning and some of the factual applications it discussed. There are *three* possible situations:

*1. The claimant would have consented to undergo the procedure even if warned of the risk:* This is not problematic. The claimant will have failed to establish a causal link

between the defendant's negligence and her injuries: *Smith* v. *Barking, Havering and Brentwood H.A.*, *supra*; *O'Keefe* v. *Harvey-Kemble* (1998) 45 B.M.L.R. 74 (C.A.) and *Smith* v. *Salford H.A.* [1994] 5 Med. L.R. 321 (Potter J.).

2. *The claimant would not have consented to the procedure if warned of the risk and can establish (the burden being on her) that also she would not have done so at any time in the future:* Again, this is not problematic. The claimant will have established causation and may (subject to issues of quantum and assessment) recover all foreseeable damages attributable to her injuries.

3. *The claimant would not have consented to the procedure if warned of the risk but it cannot be shown that she would not have undergo the same (or a similar) procedure at some time in the future:* This is the point in *Chappel* v. *Hart* and *Chester*. The Court of Appeal's view (following the majority in *Chappel*) was that the claimant had established a causal link with her injuries and could recover damages for them. However, in quantifying her future loss, the claimant's damages would be reduced to take account of the risk of injury arising from the procedure being carried out at a future point. However, in ordinary circumstances common sense will suggest that the small risk (it was of one to two per cent in *Chester*) is most unlikely to eventuate at that future date. Therefore, any reduction in her damages would be small and, on principle, arguably there should be none; the risk is probably speculative.

There is one exception to this. Where, following the procedure, it is discovered that the claimant is *particularly* at risk of the injury such that for her the risk is in fact much greater than for the 'ordinary' patient, then the future deduction will be all the greater (see [42] *per* Sir Dennis Henry).

Of course, if the risk becomes substantial enough, the evidence may lead the court to conclude that the claimant would not have the procedure in the future in the light of the now enhanced risk to herself. Her situation would then be indistinguishable from (2) above.

Alternatively, the evidence may lead the court to conclude that the claimant would indeed have had the procedure because of the more serious consequences to her of not undergoing it; then the court may take the view that the claimant would, on a balance of probabilities, suffer the injury in any event at a future point in time. There seems to have been the assumption in *Chappel* v. *Hart* that the claimant could not, in these circumstances, recover anything. The Court of Appeal's view, however, seems to be that while she would not, in such circumstances, be entitled to compensation for her loss *after* the injury would have occurred, she could recover for any loss or suffering prior to that time ([41]–[42]). It is suggested that this is better view following *Jobling* v. *Associated Dairies Ltd.* [1982] A.C. 794 (H.L.).

One final point arising out of the Court of Appeal's judgment. The court drew attention to the need to see causation as a mechanism by which the law attributes responsibility for harm suffered by an individual to the particular conduct in question. As such, causation is not merely a mechanistic application of the 'but for' test. Causation questions may, in a particular case, require the court to make a policy judgment of whether to attribute responsibility. This may work both ways. As the House of Lords has recently shown, in exceptional cases responsibility may be attributed even though the 'but for' test is *not* satisfied (see, *Fairchild (Suing on Her Own Behalf)* v. *Glenhaven Funeral Services Ltd.* [2002] U.K.H.L. 22 and [2002] 3 All E.R. 305(H.L.)).

More likely, as the Court of Appeal accepted, merely satisfying the 'but for' test may not necessarily lead to liability. Legal causation and remoteness rules may exclude liability. The Court referred to Lord Hoffman's example in *Banque Bruxelles S.A.* v. *Eagle Star* ([1997] A.C. 191 at 213) of the doctor who negligently fails to discover that his mountaineer/patient has a weak knee. The subsequent injury suffered by the mountaineer as a result of something not related to the knee is not attributable to the doctor's negligence even though 'but for' his negligence the mountaineer would not have been injured. The

injury is simply outside the scope of the doctor's duty of care. Thus, the injury is too remote (see also, *Brown* v. *Lewisham and North Southwark H.A.* [1999] Lloyd's Rep. Med. 110 (C.A.)). Likewise if an operating theatre were struck by lightening, this would not be attributable to any negligence by the doctor or hospital (at [43] *per* Sir Dennis Henry); the injury and negligence would be unrelated, mere coincidences (see also, *Hogan* v. *Bentinick Colleries* [1949] 1 All E.R. 588 *per* Lord MacDermott at 601—employer not liable where worker injured in employment is burned in hospital fire or in accident whilst in ambulance). Also, the Court of Appeal approved the view of Gummow J. in *Chappel* v. *Hart* (*supra*, at [66]) that a doctor would not be liable for an injury resulting from something unrelated to the risk of which the patient is not properly informed, for example in *Chappel* v. *Hart* or *Chester*, injury arising from an anaesthetic accident (at [43] *per* Sir Dennis Henry). [AG]

## INFERTILITY TREATMENT: POSTHUMOUS USE OF SPERM AND WITHDRAWAL OF CONSENT

### Mrs U v. Centre for Reproductive Medicine

Court of Appeal: Lord Phillips M.R., Mummery and Hale L.JJ.; [2002] E.W.C.A. Civ. 565 and [2002] Lloyd's Rep. Med. 259.

Mrs U claimed that a sample of sperm taken from her deceased husband and held by the Centre for Reproductive Medicine ('the Centre') should be made available to her for use in fertility treatment. The legality of any proposed fertility treatment depended on the existence of written consent to posthumous use of gametes or embryos held by a centre licensed under the Human Fertilisation and Embryology Act 1990. In the case of Mr U, such consent had been provided in writing, but later the consent form was amended following discussion with a specialist nurse who advised Mr and Mrs U as to the Centre's policy of not permitting posthumous use. The issue arose as to whether Mr U's revocation of written consent was valid, or whether he had been subject to undue influence such that the revocation was invalid. The Centre applied for declaratory relief under the court's inherent jurisdiction. The President of the Family Division held ([2002] Lloyd's Rep. Med. 93) that the withdrawal of consent was valid and that storage and use of the sperm posthumously would be unlawful. Mrs U appealed.

**Held,** dismissing the appeal,

1. The Centre could only continue to store Mr U's sperm and use it to treat Mrs U posthumously if it had an effective consent to do so.

2. On the face of it, there was no such consent given the change to form HFEA (96)6 initialled by Mr U.

3. The Centre was entitled to rely upon the form unless and until it was clearly established that the form did not represent a valid decision by the person signing it because, for example, of forgery, duress, mistake as to the nature of the form, misrepresentation or undue influence.