IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

B E T W E E N:

THE MIDDLE ENGLAND UNIVERSITY HOSPITAL NHS TRUST

Appellant

and

ANTON BANKS

Respondent

SKELETON ARGUMENT ON BEHALF OF THE RESPONDENT

Authorities

Montgomery v Lanarkshire Health Board [2015] UKSC 11
Duce v Worcestershire Acute Hospitals NHS Trust [2018] EWCA Civ 1307
Thefaut v Johnston [2017] EWHC 497 (QB)
Chester v Afshar [2004] UKHL 41; [2005] 1 A.C. 134

Introduction

1. Submissions are made on behalf of the Respondent, who seeks to uphold the decision of the Court of Appeal on two grounds:

    a. Holding J had erred in her statement of the test in *Montgomery v Lanarkshire Health Board [2015] UKSC 11*. Doctors were now under a duty to take reasonable care to ensure that the patient was aware of any material risks involved in any recommended treatment. The test of materiality was whether, in the circumstances, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor was or should reasonably be aware that the particular patient would be likely to attach significance to it, and the application of the *Bolam* standard of assessment by Holding J was erroneous. The risk of septal perforation and the risk of further surgery was one of which any reasonable person in the patient's position would want to be made aware - and merely giving a leaflet containing this information was insufficient. Additionally, Holding J had effectively found that Anton was in a precarious emotional state, which was communicated to Dr Carlos, and so a reasonable patient in his particular position would want to know of the risks of future surgery and associated emotional distress. This case differed from the situation in *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307,

where it was common ground that the risk of developing chronic pain was not common knowledge at the time.

b. Applying the "exceptional" principle of causation in *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134, though the risks which eventuated in this case were found to be inevitable, rather than as a result of negligence, Anton's right to make an informed choice had been violated irrespective of whether he would have deferred the surgery or not, and so his injury should be regarded as having been caused by the failure to warn of the material risks of undergoing surgery. *Duce v Worcestershire Acute Hospitals NHS Trust* [2018] EWCA Civ 1307 not followed.

Factual Background

2. The Respondent had planned to get married to his fiancée, Bella, in the summer of 2018. He decided he wanted to undergo surgery in advance of his wedding day due to a longstanding concern about the appearance of his nose.

3. In recent years, the Respondent had developed severe Obstructive Sleep Apnoea as a result of the structures of his nose beginning to collapse, a problem which the Respondent's GP indicated would worsen without surgical intervention.

4. On 20 October 2017, the Respondent was referred by his GP to a Plastic Surgeon, Dr Paula Carlos. Given the Respondent's history of injury to the nose, she proposed a combination of rhinoplasty and septoplasty. Dr Carlos also advised him that there were risks involved with the procedure, including risks of bleeding, scarring, pain and discomfort following surgery, possible dissatisfaction with the appearance of the nose, infection, and poor wound healing. Dr Carlos also provided the Respondent with a leaflet regarding further information to read at home.

5. The Respondent glanced at the leaflet, but had been largely reassured by the consultation with Dr Carlos and by her experience with other patients. The leaflet in fact contained a more detailed list of risks than Dr Carlos mentioned in the consultation, including a very small risk (in the region of 1-2%, even where surgery is not performed negligently) of septal perforation, which can affect the aesthetic appearance of the nose, and which may require further surgery or may sometimes be impossible to repair.

6. The Respondent underwent surgery on 10 November 2017. He recovered well with minimal pain and swelling; however, he was not happy with the appearance of his nose. On examination, Dr Carlos informed him that there was a small perforation to the septum. She explained that it was possible that the hole would grow with time, requiring further surgery, and that the appearance of his nose might always be affected if revision surgery was unsuccessful. To date, his wedding has been postponed, and he has felt unable to undergo revision surgery.

7. The Respondent brought a claim against the Middle England University Hospital NHS Trust in negligence. At first instance, Holding J found that (i) the surgery had been performed with skill and care (ii) applying the test from *Montgomery,* the Respondent had given his informed consent to the procedure and (iii) due to his condition, the Respondent would have undergone the surgery in any event.

8. The Respondent appealed to the Court of Appeal. He appealed on two grounds, as detailed in Paragraph 1 above.

9. The Court of Appeal allowed his appeal. The Appellant now appeals to the Supreme Court on the grounds that the Court of Appeal erred in both respects.

The First Ground of Response: Material Risks and Informed Consent

Holding J's statement of the test from Montgomery

10. The Court of Appeal was correct to hold that Holding J had erred in her statement of the test in *Montgomery*. The judgment of the Supreme Court was entirely clear and unambiguous as to what is the proper test in relation to informing a patient of the risk of injury involved in treatment, namely that 'the doctor is […] under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment…The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it' (Lord Kerr and Lord Reed, para 87.)

    a. The Court made it explicit in *Montgomery* that the *Bolam* standard had no application in the context of informing a patient of the risk of injury involved in treatment, describing such an analysis as 'unsatisfactory' (para 86) and stating that the duty to disclose material risks was an absolute one (bar the therapeutic exception) that fell on all doctors, regardless of their particular abilities or circumstances: 'even those doctors who have less skill or inclination for communication, or who are more hurried, are obliged to pause and engage in the discussion which the law requires' (para 93.) This position is reiterated at para 33 of *Duce.*

    b. In this context, Holding J's finding that Dr Carlos' advice was in line with the advice which one could expect from a medical professional operating under time constraints and would be supported by a body of surgeons was wholly erroneous, and out of step with the current law.

Septal perforation and further surgery as material risks

11. The Court of Appeal was correct to hold that septal perforation and the resultant risk of further surgery constituted material risks, per the test established in *Montgomery*. The test, properly understood, combines elements of the objective and the subjective, requiring a doctor to consider to what risks a reasonable person in the patient's position would be likely to attach significance, and to what this particular patient would be likely to attach significance. Considering both the objective and subjective aspects, it is clear that the risks the Respondent faced were material risks, of which he should therefore have been informed.

    a. Although the magnitude of the risk was relatively low, at only 1-2%, the Court made clear in *Montgomery* that the assessment of whether a risk is material cannot be reduced to percentages (para 89.) Lord Kerr and Lord Reed identified a range of factors that should be taken into account when assessing the materiality of a risk, including the nature of the risk, the effect of its occurrence on the life of the patient, and the importance to the patient of the benefits sought to be achieved by the treatment.

    b. The Respondent's primary motivation for undergoing rhinoplasty and septoplasty was to address the appearance of his nose. Any other benefits that the treatment would bring, such as improving the Respondent's Obstructive Sleep Apnoea or reducing the resulting strain on his relationship with his fiancée, were merely secondary benefits that 'ideally', he would experience. Given that improving the appearance of the nose was the Respondent's primary aim in agreeing to treatment, a risk of septal perforation (which can affect the aesthetic appearance of the nose) and of further surgery (which may be unsuccessful at altering the appearance of the nose) were risks to which the Respondent would be likely to attach great significance.

    c. Holding J effectively found the Respondent to be in a precarious emotional state at the time that he sought surgery, and this was something that Dr Carlos was or should have been aware of. Accordingly, it would or should have been apparent to Dr Carlos that should septal perforation occur and corrective surgery be necessary, it would have a seriously adverse effect on the Respondent. In this way, it was clear that the Respondent would attach great significance to the risks of septal perforation and further surgery.

    d. It is accepted that, per Hamblen LJ in *Duce*, Dr Carlos was not required to warn of risks of which he could not reasonably be taken to be aware. However, Dr Carlos was both aware of the risk of septal

perforation and the need for further surgery, and (as detailed above) aware of the fact that the Respondent would attach great significance to these risks. The present case can therefore be distinguished from *Duc*e.

Leaflet as insufficient

12. The Court of Appeal was correct to hold that merely giving the Respondent a leaflet containing information regarding the risk of septal perforation and the resultant need for further surgery was insufficient to make him aware of these material risks.

    a. The Supreme Court in *Montgomery* emphasised the need for a 'dialogue' (para 90) or 'discussion' (para 93) between doctor and patient in the context of disclosing risks. As such, the Court emphasised the need for the patient to be an active participant, rather than a passive receiver, in the exchange of ideas and information which constitutes the conversation about risk. As stated by Green J in *Thefaut*, 'the issue is not so much the means of communication but its adequacy' (para 58.) Any communication, no matter its form, must enable there to be an adequate dialogue about risk.

    b. The leaflet that the Respondent received, and which identified the risk of septal perforation and further surgery, was therefore an insufficient method of making him aware of these risks, because it did not allow a dialogue between the Respondent and Dr Carlos. The leaflet would have been acceptable as a starting point for a discussion about risks and consent, but was improperly used by Dr Carlos as its end point. As such, mere lip service was paid to the notion of true informed consent, as required by *Montgomery.*

    c. Further still, giving the Respondent a leaflet containing information regarding these risks was insufficient as a means of communicating this information, because it was likely that the Respondent would disregard the leaflet as simply summarising the conversation that he had already had with Dr Carlos. Even if the Respondent did take the time to read the leaflet, he was likely to conclude that the information about risks contained therein was not relevant or significant in his case, because Dr Carlos had failed to mention these risks during the consultation, which he could reasonably expect to be more comprehensive and tailored to him. Green J found a letter to be an insufficient method of informing a patient of material risks for similar reasons in *Thefaut*, as explained at para 72.

The Second Ground of Response: Application of the "Exceptional" Principle of Causation in Chester v Afshar [2004] UKHL 41; [2005 1 A.C. 134

Dr Carlos' failure to warn the Respondent about the potential risk of developing a perforated septum caused his injury

13. Following on from the first ground of this response, it is clear that the requirement to properly warn the Respondent of the risk of septal perforation developing as a consequence of the surgery was within the scope of Dr Carlos' duty. Advice is the foundation of consent, and it must be imparted fully in order to protect patient autonomy.

14. The Respondent submits that there was a clear nexus between Dr Carlos' failure to warn about the potential risk of developing a perforated septum and his injury, thus establishing causation. During the consultation with Dr Carlos on 20 September 2017, she specifically advised the Respondent that there was a risk of 'possible dissatisfaction with the appearance of the nose'. This statement overlooked the particular risk of septal perforation, which if suffered from, the aesthetic appearance of his nose may never be repaired.

15. Had the Respondent been warned of this risk, he would not have undertaken surgery on 10 November 2017. His primary concern was to correct the appearance of his nose rather than risk causing permanent disfigurement. The Respondent had also made clear expressions regarding the worsening nature of his symptoms relating to the quality of his breathing and sleep as well as stresses related to his now postponed wedding.

16. Dr Carlos' failure to warn violated the Respondent's right to make an informed choice: she should have communicated the potential risks of surgery to him in full, or should have made explicit directions as to the relevant parts of the leaflet containing the information. Such a reference would have allowed the Respondent to provide proper informed consent. The negligent failure to warn of the particular risk of septal perforation arising from surgery was intimately connected to the duty to warn – as a result, the injury is to be regarded as being caused by the breach of duty to warn (Lord Hope in *Chester v Afshar*, at para 87).

Public policy regarding patient autonomy favours a modified approach to causation

17. In the context of attributing legal responsibility, it is necessary to identify the protected legal interests at stake. Over the years, there has been a shift from medical paternalism towards patient autonomy in the context of disclosure of pre-operative risks. This ensures that due respect is given to the autonomy and dignity of each patient (Lord Steyn in *Chester v Afshar*, at para 18).

18. In light of this, the public policy will reflect the reasonable expectations of contemporary society: that a patient's right to an appropriate warning from a surgeon when faced with surgery ought normatively to be regarded as an important right which must be given effective protection whenever possible (Lord Hope in *Chester v Afshar*, at para 17).

19. In such a case where the ordinary principles of causation will not assist an innocent claimant, public policy will favour a (modest) departure from traditional principles. The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty will fail to protect the patient and thus to fulfil the only purpose which brought it into existence (Lord Hope in *Chester v Afshar*, at para 87).

20. On these facts, causation can be established on the basis of a normative rather than a causative conclusion. Given the importance of patient autonomy in the context of informed consent, this value can only be protected if it can be shown that Dr Carlos is liable. As the facts indicate that the surgery was not negligently performed by Dr Carlos, she did not *cause* the injury per se; rather, she *ought* to be liable.

21. The development of septal perforation was inevitable rather than as a result of negligence. Since the inherent risk to the Respondent was the same regardless of when the operation took place (1-2%), it is improbable that the septal perforation would have been sustained during a later surgery, on the balance of probabilities (Lord Hope in *Chester v Afshar*, at para 62). In any event, it is irrelevant whether the Respondent would have considered deferring the surgery to a later time – he had not been presented with the full implications of the risks to his health to begin with.

22. Therefore it is submitted that Dr Carlos' failure to warn the Respondent of the risk of septal perforation led him to consent to surgery without being fully informed, and this caused his injury. If no remedy is found here, a doctor's duty to inform their patient of any material risk of injury will be a hollow one. From a policy perspective, this is undesirable, as it would leave claimants in the Respondent's position without an adequate remedy, despite infringements of their decision-making autonomy.

Conclusion

23. In relation to Grounds 1 and 2, it is submitted that the decision of the Court of Appeal should be upheld.

24. It is for these reasons that the Respondent invites the court to dismiss the appeal.

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