

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION) ENGLAND

B E T W E E N:

THE MIDDLE ENGLAND UNIVERSITY HOSPITAL NHS TRUST

Appellant

and

ANTON BANKS

Respondent

MOOT PROBLEM

1. Anton was engaged to be married to his fiancée, Bella. They planned to have a lavish wedding in a chateau in Provence in the summer of 2018. However, Anton had a longstanding concern about the appearance of his nose. Unfortunately, it was broken several times during his university rugby career and it was reset each time with decreasing levels of success. He was very self-conscious about it appearing misaligned. Also, in recent years his breathing quality and as a result, the quality of his sleep, had been drastically affected. Anton's GP Dr Larry Grayson had informed him that he had developed severe Obstructive Sleep Apnoea as a result of the structures of his nose beginning to collapse, a problem which he indicated would worsen without surgical intervention.
2. In addition, Anton was concerned that Bella was affected by his breathing difficulties at night. That was putting strain on their relationship in addition to the stress of preparing for the wedding; an issue which Anton had discussed with his GP on several occasions, as it was causing him to feel very low and was interfering with his ability to concentrate at work. Anton decided that in advance of his wedding day, he would like to undergo surgery to address the appearance of his nose, and ideally the other problems it was causing.
3. After obtaining a referral from his GP, Anton sought the opinion of Consultant Plastic Surgeon, Dr Paula Carlos. Anton saw Dr Carlos at a consultation on 20th October 2017 at the Middle England University Hospital, which lasted approximately 10 minutes, in line with NHS Guidelines and the Trust's policy for NHS patients. During the consultation, Anton informed Dr Carlos of his desire to improve his appearance, his breathing quality, and his sleep, and explained that the pressure of his impending wedding and his worsening symptoms had prompted him to consider surgery.

4. Dr Carlos advised that this history was not unusual. She therefore adopted her standard practice of explaining that relatively straightforward surgery can improve both the appearance of the nose and breathing quality. Given Anton's history of injury to the nose, she proposed a combination of rhinoplasty and septoplasty. She showed Anton some "before and after" photographs from previous patients, and Anton gave her an idea of the type of aesthetic he hoped to achieve. Dr Carlos also advised Anton 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. At the end of the consultation, Dr Carlos asked Anton if he had any further questions; however, being mindful of the time, Anton said that he was happy to go ahead.
5. Dr Carlos asked Anton to sign a pre-prepared form listing these standard risks of surgery, which he did, and she also gave him a leaflet to take home, telling him that this contained some further information. Anton 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, (in the region of 1-2%, even where surgery is not performed negligently) risk 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. On 10th November 2017, 9 months before their wedding, Anton underwent surgery carried out by Dr Carlos. He recovered well with minimal pain and swelling; however, he was not happy with the appearance of his nose, which was not as straight as he had hoped, and he was concerned that he had some subsisting difficulty breathing. 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. Dr Carlos advised Anton that it would be best to wait 3-6 months before deciding whether this was necessary. Anton was understandably very upset that he was likely to require further surgery, and that he would have to postpone his wedding plans as a result. His lack of confidence in his appearance, low mood, and lack of sleep were exacerbated. The wedding was postponed, but to date he has felt unable to undergo revision surgery. Although he is still with Bella, they have not made any plans to rearrange the wedding and their future together is uncertain.
7. Anton brought a claim in negligence against the Middle England University Hospital NHS Trust, claiming damages in respect of the need for an additional procedure, pain and suffering, the financial losses from having to postpone his wedding, and the emotional distress that the negligent procedure has caused. He alleges that:
 - a. His perforated septum was caused by a failure to carry out the surgical procedure with the necessary care and skill;

- b. He was not advised of the material risk of sustaining a perforated septum, the potential risks of future surgery, and psychological distress that this would cause prior to agreeing to undergo the procedure; and
 - c. If he had known of those risks he never would have undergone the surgery when he did and he would have avoided injury.
8. On behalf of the Trust, it was contended that:
- a. The risk of septal perforation is an unfortunate but unavoidable consequence of surgery, and not a consequence of any negligence;
 - b. Anton was made aware of the relevant risks by Dr Carlos, in line with the principles in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430, and of the associated risks of dissatisfaction with outcome, before agreeing to undergo surgery.
 - c. Even if he had not been aware of the risk, which was not admitted, Anton would still have undergone surgery when he did given the clinical need for surgical intervention at that time. On that basis, factual causation could not be established.
9. At first instance, at a hearing to determine liability as a preliminary issue, Holding J dismissed the claim. She found that:
- a. Both parties' surgical experts agreed – and it was accepted by the Court - that the risk of a perforated septum was unavoidable and not necessarily caused as a result of substandard performance of a surgical procedure. In this case, she was satisfied that Dr Carlos had carried out the procedure with the skill and care expected of a reasonably competent Consultant Plastic Surgeon;
 - b. Applying *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] A.C. 1430, Anton had properly given informed consent to the procedure. Dr Carlos had discussed the risks of surgery in a face to face consultation, including the risk of him being unsatisfied with his appearance. The very small risk of septal perforation had been brought to Anton's attention, though indirectly in the form of a leaflet. This was in line with the advice which one could expect from a medical professional operating under time constraints, and would be supported by a responsible body of surgeons under the *Bolam* standard.
 - c. Anton would have undergone the surgery when he did in any event. It was clear that medically his difficulty breathing was worsening and needed timely resolution, and the evidence suggested that Anton's insecurities about his appearance would have led him to undergo surgery promptly in any event. Holding J found that it was not necessary for her to consider *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134 as a result.

10. Anton appealed to the Court of Appeal, arguing that (i) Holding J had misapplied the test for informed consent as stated in *Montgomery*; and (ii) Holding J erred in failing to apply the test in *Chester v Afshar*, which did not require him to establish that he would not have undergone the surgery when he did. The Court of Appeal, in a unanimous decision handed down by the President of the Queen’s Bench Division, Sir Malcolm Marshall (sitting with Ambrose and Walsh LJJ), held that:

- a. Holding J had erred in her statement of the test in *Montgomery*. 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.

11. The Trust now appeal on the grounds that the Court of Appeal erred in both respects.

Moot Problem set by Martin Forde QC and Charlotte Gilmartin

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28 September 2018