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THE APPROACH TO EVIDENCE – A LEGAL UPDATE

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Introduction

The Court has recently considered the approach to be taken to oral evidence in a number of cases.The interplay between that evidence and the contemporaneous medical records has also arisen. I have looked at 4 cases decided in the last 12 months.These cases provide helpful judicial guidance and commentary on a number of issues including:

(i) The passage of time and the fallibility of memory
(ii) Inconsistency and the impact that this will have on reliability
(iii) The accuracy of consistent medical records
(iv) The absence of medical records
(v) Remote evidence

Richins v Birmingham Women's and Children's NHS FT [2022] EWHC 847

HHJ Emma Kelly considered this claim seeking damages for losses arising out of the stillbirth of the Claimant's son on 7 July 2008. Only liability was in dispute, damages having been agreed subject to liability in the sum of £145,000 gross of CRU, but net of a compromise over a limitation dispute on a 50/50 basis.

Facts – the Claimant had been admitted as a high-risk patient with a potential need for early delivery. She alleged that at 5pm on Sunday 6 July 2008 she began to feel unwell. She informed the midwife who took her blood pressure and performed a CTG, no problems were identified. At 6pm the Claimant complained of epigastric pain. Paracetamol was administered but the Claimant's urine was not tested. At 9pm the Claimant complained of ongoing pain, breathlessness and heartburn. The Claimant was given Gaviscon. Despite further complaints to the midwife a review was not performed. At 11pm the Claimant had deteriorated further but was again given paracetamol.
At approximately 6.45am on 7 July 2008 the Claimant suffered a massive placental abruption and her son's intrauterine death was recorded at 7.10am.

It was alleged that with appropriate care the Claimant would have been referred for obstetric review and transferred to the delivery suite on the evening of 6 July 2008, with a subsequent diagnosis of pre-eclampsia. It was said that the Claimant's son would have been born alive and psychiatric illness would have been avoided.

The Defendant did not agree with the factual case advanced by the Claimant, but averred that, regardless of the preferred factual case, the death of the Claimant's son was unavoidable.

Decision – breach of duty was established for failing to refer the Claimant for obstetric review on multiple occasions, failing to test her urine, failing to make adequate records and failing appropriately to review the Claimant overnight.

However, causation was not made out. Although a degree of *Keefe* benevolence could be applied where the Defendant's breach had deprived the Claimant of the evidence required to show when there would have been evidence of proteinuria, this could not provide a bridge to causation in the face of the Claimant's own expert evidence.

It was repeatedly stated by HHJ Kelly that it is not appropriate to rely on Claimant benevolence when the Court has before it reasoned expert evidence addressing the contentious aspects of causation [see §139 and §146].

Comment – 14 years had elapsed between the events complained of and cross examination. Central to breach of duty and therefore the analysis of causation was the witness' memory of events.

HHJ Kelly made a number of comments on the approach to assessing lay witness reliability that are worth reading in full.

She reminds us that it is an error to suppose that the stronger and more vivid the feeling or experience of recollection and the more confident a person is in their recollection, the more likely the recollection is to be accurate following Leggatt J, as he then was, in *Gestmin v SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm). (However, see below where the extent to which Gestmin can be relied upon is queried in the context of a clinical negligence claim.)

What can be drawn from the authorities relied upon by HHJ Kelly is the need to approach the assessment of witness evidence alongside contemporaneous documentary evidence having in mind the fallibility of memory and that witnesses' evidence may be affected by the conscious or sub-conscious reconstruction of events.

Further, that simply because a document is apparently contemporaneous, that does not absolve the court of deciding whether it is a reliable record and what weight can be given to it. This is derived from *Synclair v East Lancashire Hospitals NHS Trust* [2015] EWCA Civ 1283 per Tomlinson LJ

HHJ Kelly commented that whilst there had been changes in the Claimant's evidence with time, the consistent tenor of her account was that she had become increasingly unwell, and the midwives had been preoccupied and generally dismissive of her complaints.

In respect of the approach to medical records – The starting point for HHJ Kelly, but no more than the starting point, was that the contemporaneous entry made by a medical professional is likely to be a correct and accurate record. This must then be considered with reference to all the other evidence. The circumstances in which the note was created do not prevent it from being established by other evidence that the record is inaccurate.

In this case it was the Defendant's own evidence that there were shortcomings in the medical notes such as a failure to record administration of medication and a failure to record observations. As such the records were approached with caution and ultimately the Claimant's evidence was preferred.

The third point is the case of Keefe which arises in the context of causation. The Claimant was unable to say that she would have had proteinuria at 6pm or thereafter since her urine was not tested. To what extent should the judge be benevolent in its approach to the evidence on causation where it is the Defendant's breach that has prevented her from having data necessary to support her claim?

In *Keefe*, a noise induced hearing loss claim, the defendant failed to measure noise levels but asserted that the noise levels would not have been excessive. Longmore LJ held that:

> *If it is a defendant's duty to measure noise levels in places where his employees work and he does not do so, it hardly lies in his mouth to assert that the noise levels were not, in fact, excessive. In such circumstances the court should judge a claimant's evidence benevolently and the defendant's evidence critically*

HHJ Kelly reviewed the case law that has subsequently considered the applicability of that approach.She held that:

> *It is one thing to apply a benevolent approach to the existence of signs and symptoms but another to use it to construct the planks of causation when not supported by the expert evidence.*

Where there is evidence in the form of medical records and/or expert evidence on the point, the notion of Claimant benevolence does not undermine the reasoned explanation provided by the expert evidence.

However, it will have a role where a Claimant has been deprived of data that would support a claim by the breach of duty of the Defendant, and where there is supportive expert evidence on one side and the other side is equivocal, presumably providing that the supportive expert evidence is credible and persuasive [see §140].

The concluding remarks emphasise difficulties that a Claimant can face:

> *The need to establish causation on the balance of probabilities can be a cruel concept in cases of medical negligence.Loss of a chance of something that was not the probable outcome will not suffice.*

Johnson v Williams **[2022] EWHC 1585**

Jeremy Hyam QC considered this claim in relation to the alleged negligent performance of knee surgery.

Facts – Mr Johnson was a professional footballer who suffered a meniscal tear to his left knee when he was training. A first operation performed by the Defendant, a specialist knee surgeon, appeared to go well but unfortunately the Claimant subsequently developed signs of infection.

At a second surgery to remove infective material in the left knee it was alleged that iatrogenic damage was negligently caused to the tendon in the form of a 3cm rupture or tear in the tendon that crosses the knee joint on the medial side of the patellar (the medial retinaculum).

It was averred by the Claimant that the only possible and likely cause of the tendon rupture was surgical error by the Defendant. Further, that the alternative causes put forward by the Defendant, namely infection and failure to follow post-operative instructions, were so remotely unlikely that they could be rejected.

The Defendant alleged that the damage occurred subsequent to surgery and that, whilst the burden of proof lies on the Claimant and he did not have to prove anything, the explanations that he had offered were entirely plausible causal mechanisms.

Decision – after a fairly scathing review of the expert evidence, Jeremy Hyam QC held that [§76]:

> *Overall, I considered the chances of a large hole in the retinaculum having been caused by use of the shaver and then missed by the Defendant while undertaking the synovectomy on a single occasion as very unlikely but possible. But to have made the hole during surgery, have missed it, and then failed to observe the defect both on washout on the 17th March and again on washout on 19th March when large amounts of fluid are pumped under pressure into and around the joint over a relatively long period (many minutes) and any defect should have been immediately obvious because of extravasation of fluid through the defect seems to me to be highly improbable.*

It was highly improbable that such failure to observe an obvious defect occurred repeatedly, on at least three occasions.

The Claimant argued that even if very unlikely or ' remarkable ' that the defect was missed that is, on balance, what happened because, the competing causal mechanisms put forward by the defendant were so remotely unlikely that they could effectively be ruled out, thus leaving surgical error on the day as the only realistic causal mechanism for the Claimant's injury.

When considering the burden of proof, the judge referred to the case of *Rhesa Shipping Co. SA v. Edmunds* [1985] 1 WLR 948 in which the Popi M ship had sunk in calm seas. Competing theories were advanced as to how the ship came to sink. One of these was that it had come into collision with a submerged submarine.Bingham J, as he then was, expressed his conclusion on the theory as follows:

> *I think it would be going too far to describe a collision between the vessel and a submarine, rupturing the shell-plating of the vessel, as impossible. But it seems to me so improbable that, if I am to accept the plaintiffs' invitation to treat it as the likely cause of the casualty, I (like the plaintiffs' experts) must be satisfied that any other explanation of the casualty can be effectively ruled out.*

Lord Brandon went on in *Popi M* to reject what he described as "the Sherlock Holmes fallacy" that *once you have eliminated the impossible, whatever remains, however improbable, is the truth.*

A similar conclusion was reached in Johnson, while the Judge was not able to say that it was impossible that a 3cm diameter tear had been caused at the time of surgery, it was highly improbable. It is not for the Defendant to suggest and seek to prove some alternative cause of loss.

As was the case in Popi M, it was open to the Court to find that the cause of loss, even on the balance of probabilities, remains in doubt, with the consequence that the Claimant had failed to discharge the burden of proof.

Comment – this case acts as a stark reminder that just because the Court cannot find an explanation for injury does not mean that an extremely improbable cause will be adopted as the likely cause.

It further impresses on parties the importance of credible expert evidence. The Claimant was not helped in this case by the lack of concessions made by his expert.Whilst both side's experts were criticised the Claimant's expert was undermined by his inflexibility in refusing to consider, even as a possibility, alternative explanations for the tear.He was found to be less than compelling [§65].

The Defendant's expert also materially changed his position having heard the evidence of the Defendant himself. This was found to undermine his credibility and reliability. This serves to emphasise the importance of ensuring that our experts are fully cognisant of the case being advanced by the factual witness when acting for the Claimant or the Defendant.

Toombes v Mitchell [2021] EWHC 3234 (QB)

This case was a claim relating to a child born with a form of spina bifida which was heard in two parts.

In 2020 Lambert J considered a preliminary issue regarding whether, what was essentially a wrongful birth case, could be brought by the Claimant in her own right, rather than by the parents. It was found that the Claimant could bring the claim because her position was that, if advice had been provided to her mother about folic acid, pregnancy would have been delayed and so a different child, without disability, would have been born. As such, she had a lawful claim for damages for personal injury arising from her disability, if she could establish the basis for that claim.

In late 2021 the trial came before HHJ Coe QC to consider the narrow factual issue that remained. Namely, what was said in a consultation with the Defendant in February 2001.

Facts – the Claimant was born on 19 November 2001 with a form of spina bifida which was not identified before her birth. There was no negligence in this failure.

Prior to conception, the Claimant's mother attended at her GP for pre-conception advice, she wished to know how long she should delay conception having been on the contraceptive pill and whether she should take Folic acid.

The Defendant GP had no recollection of the consultation but was alleged to have advised the Claimant that she did not require folic acid.Whilst the Defendant accepted that, if that was right, it would be negligent. He averred that he would have acted in accordance with his standard practice which was to advise prospective mothers of the link between folic acid supplements and prevention of spina bifida and to take folic acid every day prior to conception and for the first 12 weeks of pregnancy. It was also averred by the Defendant that, given the time of the Claimant's birth, her mother must have already been pregnant at the time of the consultation.

The Defendant averred that, first the Claimant's account had changed and "improved" over the years such that her current account was wholly incompatible with that advanced in the Letter of Claim. Secondly, there had been significant delay in bringing the claim with 4 years passing after the Letter of Response and a change in the formulation of the claim thereafter. Thirdly, that the documentary evidence suggested that the Claimant was in fact taking folic acid following the consultation in any event.

Decision – HHJ Coe QC held that the Defendant should have advised about taking folic acid daily before conception. This had been raised by the Claimant's mother with the Defendant who had told her that, if her diet was good enough, folic acid was not required. She was not told the reason for taking folic acid. Had she received appropriate advice, she would have followed that advice and waited to conceive until she had established a folic acid supplementation regime. Accordingly, conception would have been delayed and (as determined at the preliminary issue hearing) any subsequent conception would, on the balance of probabilities, have resulted in a normal healthy child being born.

Comment – notwithstanding inconsistency in the Claimant's evidence, she was found to be a clear and credible witness.

I note that, in respect of that inconsistency, it was found not to relate to the underlying facts which were held to have remained consistent but to the basis on which the claim was advanced.

The inconsistency arising from pre-action correspondence was considered to reflect an investigation/enquiry that was ongoing to see whether or not there was a claim in negligence which could be properly pursued. It was entirely *explicable and understandable* that a case will evolve during the course of those investigations.

A second point to note is that, whilst this case is fact specific, where a Defendant practitioner is relying on contemporaneous medical records rather than recollection, it is best to ensure that those records are not deficient. The judge commented that the Defendant GP:

…acknowledged that his note is inadequate. I formed the view that he was attempting to reconstruct a conversation/consultation on the basis of that inadequate note which required him to speculate or make assumptions above what was said. I find therefore that his evidence was not as reliable as it would have been if the note has been as complete as it should have been.

Freeman v Pennine Acute Hospitals NHS Trust **[2021] EWHC 3378 (QB)**

This case also includes a very helpful review of the authorities in relation to the approach to evidence. Including discussion about whether it is appropriate to apply *Gestmin*, a commercial case, in the context of clinical negligence. It also considers whether remote evidence should be used where credibility is in issue.

In December 2021 HHJ Tindal considered this claim in respect of a severe brain injury suffered by the Claimant's son following a placental abruption during birth.

Facts – the Claimant alleged that during the morning of the birth she was out shopping with her husband when she experienced sudden, intense abdominal pain. Her husband telephoned the Defendant's maternity unit who advised that the Claimant go home and take paracetamol. It was accepted that, if the phone call had been made, then it was negligent not to advise the Claimant to attend the hospital immediately. Further, that if the Claimant had attended her son would have been born within an hour of attendance and would not have suffered brain injury.

The Defendant averred that no phone call was made, there being no record of it, and that no reasonable midwife would have given that advice to a woman who was 36 weeks' pregnant since sudden intense pain is a warning sign of placental abruption.

Decision - it was held that the issue over whether a telephone call had been made turned on the evidence given by the Claimant and her husband. The absence of a record of any telephone call (while not negligent in itself) was not evidence that no such telephone call had been made.Neither could it be inferred from the absence of records that such a telephone call was made.

Despite the Defendant demonstrating a number of inconsistencies in the Claimant's oral evidence, they had been clear on the essential point that a phone call had happened because the Claimant was in pain.It was therefore found that, on balance, the phone call had been made. Whilst the Claimant's husband accepted that he has not mentioned the severity of the pain, he should have been questioned about the pain and would have described it as intense had he been asked. The failure to ask about the severity of the Claimant's pain was, in itself, negligent.

Comment – HHJ Tindal considered an application for both the Claimant, who was vulnerable, and her husband, to give evidence remotely pursuant to CPR 32.3.Of note are the positive comments made in respect of remote evidence even in cases where credibility and reliability are central issues. Comparison was made to the Crown Courts where video link is widely used in trials of sexual allegations.

Whether to permit evidence remotely was a matter for the court's discretion in light of the overriding objective, fairness and efficiency and the need for equality of arms between the parties under ECHR art. 6.

The Claimant was considered to be vulnerable on health grounds due to a heart condition and the risk of contracting Covid-19 and her husband acted as her carer and would put the Claimant at risk should he pass Covid on to her. Further, it was felt that the fear and worry associated with the risk of inadvertent transmission should the Claimant's husband attend to give evidence, might interfere with the quality of the evidence.

This was another case where the Claimant sought to rely on the case of *Keefe* on the basis of the absence of the record of the telephone call. HHJ Tindall adopted the approach in *Shaw-Lincoln v Neelakandan* [2012] EWHC 1150 (QB) as developed in *McKenzie v Alcoa* [2020] PIQR P6.

Namely that, whether it is appropriate to draw an adverse inference will depend on the particular circumstances of the case including the proximity between a breach of duty and the unavailable evidence, the effect of other evidence before the court and what other evidence might have been available but is not before the court. Failure to adduce relevant documents may convert evidence on the other side into proof but may depend on the explanation given for the absence of the witness or document.

In this case, the reason for the failure to adduce relevant documents is that they were not made. It could not be inferred from that, that a call had been made a report of intense pain given – *that would be a complete logical leap* from all of the evidence and inconsistent with the unchallenged evidence of the midwives.The furthest that the inference would go was that the absence of a log of the call did not mean that no such call was made. However, this did not require *Keefe* since it was logical. There was *no short cut in this case.*

The third issue is the approach to the evidence.As with Richins a detailed review of the approach to evidence is set out and should be read in full. This includes comment over whether *Gestmin* can properly be applied to clinical negligence claims as a commercial case and one where there was no dispute about the accuracy of the written contemporary evidence [§26].

HHJ Tindall relied on *Synclair* when assessing the consistency of oral evidence with actual clinical records reminding himself that the proposition that a contemporaneous clinical record is inherently likely to be accurate does not create a presumption in law that has to be rebutted.

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Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.