Schembri v Marshall [2020] EWCA Civ 358

A judge was entitled to find that the Claimant's wife would not have died if she had been referred to hospital, despite having made a specific finding that the Claimant had not proved the precise train of events by which her death would have been prevented. So held the Court of Appeal in Schembri and Marshall, upholding a decision of Stewart J[1] that raised some eyebrows last year.

The Claimant's wife had died of an untreated pulmonary embolism on the morning of 26 April 2014. The previous afternoon, she had consulted her GP with chest pain and breathlessness. She had a history of previous PE. It was accepted that the GP was in breach of duty by failing to refer her directly to hospital. It was common ground that had she attended hospital, she would have been diagnosed with a PE and given anticoagulant treatment. The argument in relation to causation centred on whether she would have received treatment in time to prevent the massive PE that killed her.

At trial, Stewart J considered a large amount of medical literature and evidence on that issue and found that the Claimant had not shown, on the balance of probabilities, that the deceased's condition would have led to the prescription of a specific anticoagulant, alteplase, at any time before she went into cardiogenic shock, and could not prove that she would have been amongst the 64%-75% of those who, according to the medical literature, survived cardiogenic shock.

However, he went on to say at [128] of his judgment: "*As is accepted, the Claimant has the burden of proving causation. Yet the Claimant needs to prove no more than that Mrs Marshall would probably have survived had she been admitted to hospital. The Claimant does not need to prove the precise mechanism by which her survival would have been achieved."* He then decided the question of causation, he said, by looking at the evidence overall. The statistical evidence and the experience of the experts was that deaths from PE in hospital were very unusual. Finding in the Claimant's favour, the judge said at [145] and [146]:

"Thus the expert medical evidence to which I have referred and the statistical evidence demonstrate that at the time when Mrs Marshall should have presented at hospital, anybody rating her chances of survival would have put them at being very high. Tragically, she did in fact die out of hospital. In the situation which occurred, detailed analysis of such evidence as we have cannot lead the court to find that by such and such a mechanism, or at any particular stage, the course of events would probably have been different. This is overwhelmingly because of a large number of unknowns.

The court, in looking at the evidence as a whole, must take a common sense and pragmatic approach to that evidence, in circumstances where it is equivocal. The court must also be wary of relying on the statistical evidence in the literature which has a number of variables. Had the statistical evidence, in conjunction with the expert evidence, have led to the conclusion that Mrs Marshall's chances of dying would have been assessed on presentation as only slightly better than 50-50, I would have found for the Defendant. However, the above evidence of

[1] (*Marshall v Schembri* [2019] EWHC 283 (QB)

Professor Empey and Doctor Gomez, in conjunction with the medical literature, drives me to the conclusion that on the clear balance of probabilities she would have survived."

The Defendant appealed, arguing that having found, on the basis of a detailed analysis of the evidence, that the Claimant had not proved that the deceased would have survived had she been admitted to hospital, the judge should have held that the claim must fail; he had been wrong to pose a separate overriding question or based his findings on causation upon a general analysis that most people do not die from PE in hospital.

The Court of Appeal held that the judge's approach was appropriate. He had first considered whether the Claimant had established a specific train of events that would have saved the deceased. Having determined that question in the negative, it was legitimate for the judge to "pause for thought" in the light of statistical evidence that was highly favourable to the Claimant and consistent with the proper role of statistical evidence. It was also legitimate because of the "large number of unknowns" to which the judge referred and because the reason why the actual outcome is not known is that the admitted negligence prevented it becoming known (see paras [51] to [52] of the judgment).

The judge had been right to take a "pragmatic and common sense view" of "the evidence as a whole". That was not to say that statistics were determinative of causation issues; it had not been a case where statistics were used to transpose a strong case for the Defendant into a case in the Claimant's favour (see paras [53] to [55] of the judgment).

Although some commentators considered the original decision surprising, it may be that the most surprising aspect of it was the judge's conclusion that, despite the statistical evidence and his findings that the deceased had not been in a cohort that was particularly likely to have a bad outcome, he could not be satisfied on the balance of probabilities of the train of events that would have saved her. This point was raised by way of cross-appeal, and given the result of the appeal, the Court of Appeal did not have to decide it, but the comments at para [60] of the judgment suggest that McCombe LJ, and many judges, might have reached a different conclusion on that point.

What the judgment emphasises is that despite the caution advocated in *Gregg v Scott*[2] about the use of statistics as a guide to what would have happened in any given case, that case in fact supports the appropriate use of statistical evidence. Further, the Court of Appeal held that the judge's approach was consistent with the approach advocated by Toulson LJ in *Drake v Harbour,*[3] where he had said:

"[W]here a claimant proves both that a defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the claimant is unable to prove positively the precise mechanism. That is not a principle of law nor does it involve an alteration in the burden of proof; rather, it is a matter of applying common sense. The court must consider any alternative theories of causation advanced by the defendant before reaching its conclusion about where the probability lies. If it concludes that the only alternative suggestions put forward by the defendant are on balance improbable, that is likely to fortify

[2] [2005] 2 AC 176 – the parties had relied on paragraphs [27]-[28] and [32]
[3] [2008] EWCA Civ 25 at [28]

the court's conclusion that it is legitimate to infer that the loss was caused by the proven negligence."

The decision will be encouraging for claimants, but as the Court of Appeal emphasised, every case is fact specific. The case does not give claimants a *carte blanche* to assert that causation is proven simply on the basis of a survival rate of 51% or better for the undiagnosed or untreated condition.

Case note by Alice Nash, Hailsham Chambers
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