Medical Law Reports

2016 highlights: the best of our Medical Law Reports coverage
2016 saw a variety of noteworthy cases which raised important issues in medical law. Below is a summary of those cases of particular interest which were covered in Medical Law Reports. Each Report features a detailed headnote analysing the key issues raised in the action, alongside the full verbatim court judgment and commentary, putting the case into context and highlighting its importance for future litigation.

Reaney v University Hospital of North Staffordshire NHS Trust [2016] Med LR 23 provides important guidance in a difficult area, namely how to define and assess liability where a claimant who suffers a negligently caused injury has already sustained a previous injury or is likely to do so in future. But in the realm of personal injury law, where answers tend to spring from a mixture of principle and pragmatism, it is uncertain whether this decision represents the solution or simply a springboard for further debate.

The decision in Williams v The Bermuda Hospitals Board [2016] Med LR 65 was eagerly awaited by clinical negligence practitioners. Although a decision of the Judicial Committee of the Privy Council is of persuasive authority only, it could have heralded a narrowing of the doctrine of material contribution and set a direction of travel to be followed in subsequent appeals. In the event, it has done nothing of the sort. By so clearly supporting the ratio of Bonnington Castings Ltd v Wardlaw [1956] AC 613, as explained in McGhee v National Coal Board [1973] 1 WLR 1; [1972] 3 All ER 1008, the Privy Council ensured that doctrine of material contribution – as currently understood – is here to stay.

In R (Claire Dyer) (By Her Mother and Litigation Friend Catherine Dyer) v The Welsh Ministers [2016] Med LR 185 Mr Justice Hickinbottom returned to the vexed issue of limited state resources, ruling against the claimant’s challenge to the failure of Welsh NHS bodies to provide medium secure accommodation within Wales for those with autistic spectrum disorder and learning disabilities.

In General Medical Council v Adeogba; General Medical Council v Visvardis [2016] Med LR 221 the General Medical Council brought appeals against two factually unconnected decisions of the Administrative Court that had held that Fitness to Practise Panels of the Medical Practitioners Tribunal Service had been wrong to have proceeded to hear cases against respondent practitioners in the absence of their cooperation and attendance.

Harman (A Child Proceeding By His Mother and Litigation Friend Joanne Harman) v East Kent Hospitals NHS Foundation Trust [2016] Med LR 305 raised the only too common conflict between a claimant’s parents, who wanted certainty of funding for the education for their seriously injured child, and the tortfeasor health authority, which asserted that the local education authority had the duty to provide the facilities needed by the child for education, and that therefore the defendant should not be liable to pay damages for private funding in this regard. It is notable in this case that funding was being provided by the local authority and that it would probably continue. As a postscript the judge made some remarks about the presentation of some of the expert evidence, and suggested that it would be more helpful to the court if there was less by way of narrative and more critical analysis. This is not the only potential problem with expert evidence in this area, and the courts could consider taking tighter control over the presentation of expert evidence, particularly on issues of quantum.

Re A (A Child) [2016] Med LR 427 sounds a second cautionary note from the Court of Appeal against the mechanistic use of balance sheet exercises and the failure to apply the appropriate weight to more important factors when assessing best interests.

At first sight, it is surprising that the claimant in DS (By Mother and Litigation Friend FS) v Northern Lincolnshire and Goole NHS Foundation Trust [2016] Med LR 339 did not succeed on causation. The claimant, DS, who was born by emergency caesarean section, had suffered a prolonged acute total hypoxic episode after the placental abruption and until the restoration of adequate circulation following a difficult resuscitation after his delivery. The claimant, acting by his mother and litigation friend, claimed damages for injury and loss caused by
the defendant’s alleged negligent mismanagement of his birth. The defendant denied liability. It denied that its midwives or obstetrician acted in breach of their duties or that they delayed any appropriate and reasonable step in the mother’s care. The defendant defended causation on the basis that even if DS had been born 6 to 9 minutes earlier, he would have suffered essentially the same injury in any event. The claimant failed on causation in this case because as the evidence emerged, it did not support his pleading of material contribution. The court, therefore, treated his injury as one that was “divisible”, where the question on causation is whether on consideration of all the evidence, the claimant has proved that the defendant is responsible for the whole or a quantifiable part of his disability; and the question of quantification may be difficult and the court only has to do the best it can on the evidence. Consequently, on the facts of the case, causation had to be approached on the basis of the traditional “but for” test, and therefore allowed the finding that delivery three minutes earlier would probably have made no difference to the outcome. There is inherent difficulty in proving that a short reduction in the overall period of a brain damaging insult would probably result in a markedly better outcome. In such cases, claimants will be better advised to channel their efforts into fortifying their evidence to the effect that there is no logical or evidential basis to apportion injury between that which was caused by the “non-negligent” insult, and that which resulted from the “negligent” insult, and that it would be mere speculation or guesswork to do so. If the evidence persuades the court of that, the injury will be an indivisible one to which the doctrine of material contribution will continue to apply.

Carder v The University of Exeter [2016] Med LR 562 concerned the liability of a defendant whose breach of duty had caused a small, but nevertheless material contribution to a disease process, asbestosis. Unlike many other diseases or medical conditions, asbestosis is a “divisible” disease that can be divided into the proportions that are attributable to different exposures to asbestos dust. In this case the negligent exposure had contributed only 2.3 per cent to the total lifetime dose of asbestos dust to which the claimant had been exposed. The case highlights the importance of distinguishing between injuries which are “divisible” and “indivisible”.

In El-Huseini v General Medical Council [2016] Med LR 647 the appellant sought to appeal a decision by the Medical Practitioners Tribunal that his fitness to practise was impaired by reason of misconduct and adverse health so that he should be suspended from the Medical Register for 12 months. The General Medical Council contended that the appeal was out of time.

The case of Staffordshire County Council v SRK (By His Litigation Friend SK) [2016] Med LR 398 arose in the context of mental capacity and deprivation of liberty. It is also a significant case for personal injury practitioners in cases involving damages awards which will fund accommodation and care for claimants who lack capacity to consent. This decision means that a welfare order must be sought from the Court of Protection to authorise a deprivation of liberty in the class of cases represented by SRK’s case. The judge stated that this class is “significant”, albeit not a high percentage of the overall number of cases in which a welfare order to authorise a deprivation of liberty should be sought from the Court of Protection. Also, the need for a welfare order and alerting the local authority must be borne in mind at the stage when damages are awarded or approved, when a deputy is appointed, and when damages are paid. This means that those involved in personal injury claims need to be aware of when a deprivation of liberty may arise. As Charles J expressly points out, the need for such steps should be factored into the calculation of damages awards.

The interaction between damages awards and the statutory duties of local authorities and NHS bodies always requires thought. Practitioners will be familiar with the questions which arise where a claimant elects to have future care or services provided privately as is his right under Peters v East Midlands Strategic Health Authority [2009] LS Law Med 229: the local authority may seek to charge for their past provision; and issues may arise as to whether the claimant can or should seek NHS continuing care or NHs-funded nursing care. Richards (By His Deputy and Litigation Friend Minihane) v Worcestershire County Council [2016] Med LR 534 gave rise to a different and distinct problem, and one which will be of interest. At first sight, it might be thought that this decision could encourage a proliferation of claims for re-payment of monies spent by an individual or their deputy on care and associated services if a local authority had a duty to provide them but did not do so. There are, however, two reasons why this is unlikely to follow: first, the facts of this case were exceptional; and secondly, a restitutionary claim for unjust enrichment will be very difficult to establish. This imaginative claim may, therefore, prove to be more of academic interest rather than have practical application.

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