Neutral Citation Number: [2015] EWCA Civ 8

Case No: B3/2013/1020 and 1020(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HHJ Moloney QC
No. 0CF07459

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 21st January 2015

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE TOMLINSON
and
MR JUSTICE NEWEY

- -

Between :

Anita Border	**Appellant**
- and -	
Lewisham and Greenwich NHS Trust (formerly South London Healthcare NHS Trust)	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Derek Sweeting QC and Leslie Keegan (instructed by **Leo Abse and Cohen Solicitors**) for the **Appellant**
Claire Toogood (instructed by **Kennedys Solicitors**) for the **Respondent**

Hearing date : 16 December 2014
Judgment
As Approved by the Court

Lord Justice Richards :

1. This is an appeal against an order of His Honour Judge Moloney QC, sitting at Central London County Court, by which he dismissed the claimant's claim for damages for clinical negligence. Permission to appeal was granted on a single ground, which relates to the issue of the claimant's consent to a particular medical procedure, namely the insertion of a cannula into her left arm for the purpose of intravenous ("IV") access.

2. The circumstances of the case are summarised as follows in paragraph 1 of the judgment below:

> "1. This is a clinical negligence claim based on the events of the afternoon of 15th October 2008. The claimant, then aged sixty-four, was brought into the Accident & Emergency department, specifically the resuscitation room, of the Queen Elizabeth Hospital in Woolwich. She had a suspected broken right humerus. The senior house officer on duty, Dr Prenter, was unable to put an IV into her right arm for the obvious reason that that was or appeared to be the broken arm and was therefore unsuitable. He proposed to put an IV line, a cannula, into the left arm, as would be the normal practice in that situation; but the claimant said to him words to this effect (and I am summarising for the purposes of clarity): 'No, don't do that. I've recently had a left mammectomy and axillary node clearance' (she probably did not use those words, but she explained that she had had her lymph nodes cleared) 'in the left arm and you mustn't cut that arm or I might get an oedema'. The doctor, however, did decide for reasons that I shall consider further to put the IV in her left arm. Unfortunately for all concerned, the worst happened. She did get an infection on the site of the cannula and the consequence has been a permanent and fairly serious case of oedema in her left arm which has caused her a permanent and material level of disability in her left arm. Unsurprisingly in these circumstances, she has now sued the hospital."

3. The claim was brought in negligence alone and the judge directed himself by reference to established principles governing such claims, specifically that (i) the standard of care is that of a reasonable doctor of the level and in the position of the doctor in question and (ii) the doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of doctors skilled in that branch of the profession, subject to the exception in *Bolitho v City and Hackney Health Authority* [1998] AC 232 where the relevant body of opinion is shown not to be capable of withstanding logical analysis. The focus of the case was on whether Dr Prenter had acted in accordance with accepted practice in inserting the cannula when he did. Little significance was attached at trial to the issue of the claimant's consent to the procedure, but the judge made a finding on it which, as I will explain after summarising his judgment, has assumed a central place in the appeal.

4. In the course of his account of the facts, the judge said at paragraph 8 of his judgment that both the claimant and Dr Prenter struck him as entirely honest witnesses; where their recollections differed, he preferred Dr Prenter's recollection as a general proposition but there were one or two exceptions to which he would refer later in his judgment.

5. He went on to describe the claimant's presentation when brought in to A&E. He said that one of the first things Dr Prenter did was to prepare the IV insertion, and at that point the claimant gave him the warning already described (see the passage quoted at paragraph 2 above). Dr Prenter knew what she was talking about: the risk of oedema if the arm is pierced after a mammectomy and axillary clearance is well known to A&E doctors.

6. The judge then dealt at paragraph 10 with the issue of consent:

> "10. There was a disputed issue – and this is the point where I prefer, broadly speaking, Mrs Border's evidence to Dr Prenter's – as to how much Dr Prenter said to Mrs Border about his decision to insert the cannula, notwithstanding her warning, and whether she consented expressly or impliedly by word or gesture to his decision to insert it into her left arm. I note, in particular, that there is nothing in his December note to suggest that she either consented or co-operated. He said that he checked to see whether there was anywhere else that he could insert it. He had excluded the right arm for reasons of breakage, he was being asked to exclude the left arm and there was obviously a cogent reason to do so if a third site could be found. The obvious site was the legs. He examined her legs, but because of her general physical condition it was very difficult to find a suitable vein in her legs to make the insertion. He therefore decided that he would have to go ahead with the left arm, notwithstanding the possibility of oedema. My conclusion on the balance of probabilities is that this was a quick and silent calculation on his part, but that it was made. I do not accept that he communicated it to Mrs Border in any detail. He probably said little more than 'I'm sorry, but we really need to put it in the left arm' or words to that effect. There was not any direct evidence on this, but, I think, if he did say anything to her, it would not have been much more than that. I do not accept his suggestion that she positively consented by holding her arm out in a co-operative manner. I prefer her evidence which is that she hardly realised until, as she said, 'Bang, it was done'. So he took the decision and he acted upon it in the conditions of a resuscitation room. That is not of itself a matter of great criticism."

7. The judge found that Dr Prenter, having inserted the cannula, did not use it straightaway, for example to give an IV painkiller or to administer fluids (instead, he gave the claimant an oral painkiller). The claimant was examined and sent down for X-ray. At the same time her vital signs were taken and were broadly speaking normal. On her return Dr Prenter saw her again briefly.

8. As the judge recorded, Dr Prenter explained his decision to put an IV line into the left arm despite the claimant's warning on the basis that it was a standard and important practice when working in the resuscitation room to do this in order to gain control of any situation which may develop. If one has an IV line in place, one can respond to emergencies and to severe pain, which he considered to be the presenting sign here. Without an IV line delay would follow, which might be serious. He considered the risk of oedema and acted on it in various ways. Because of it, he did not take the claimant's blood pressure. He considered but, as already mentioned, dismissed alternative locations for an IV line.

9. The judge then considered the evidence of the two expert witnesses, Dr Evans for the claimant and Mr Hayworth for the defendant, before turning at paragraph 16 to his conclusions on liability:

> "16. … Dr Prenter found himself in a genuine doctor's dilemma. He had good reasons for wishing to put an IV in, but there was no viable alternative site for the IV line than the left arm. But there was also a good reason not to insert an IV line in that left arm, a recognised medical condition of which he was expressly warned by the patient herself. His choice really was simply: to use the left arm now and make an immediate insertion; or to wait and see whether it would be necessary to use the left arm in a future moment if the situation warranted it. There is no evidence before me that he gave any serious consideration to 'wait and see', but, looking at it from the stand point of the expert evidence, it would be a brave decision for a Senior House Officer not to follow the standard practice – which, I think, both of the consultants accepted – that an IV line should, if possible, be inserted in the early stage. The logic is clear: in an uncertain and potentially dangerous situation it is better to be ready, even if there is a slight risk of an adverse known side effect."

10. The judge went on to say that a highly experienced A&E consultant like Dr Evans might well feel able to take that calculated risk and wait and see, but it would be a very bold decision for a senior house officer lacking that experience and instinct to take. Whilst the consultant might feel justified and might not be negligent in adopting such an approach, it did not follow that a senior house officer would be justified in adopting it. The judge accepted the implication of Mr Hayworth's evidence that he would have put the IV into the left arm immediately, accepting the slight risk of oedema as preferable to the unknown risk of a really serious consequence that might occur in the near future. The judge accepted that this position represented a very substantial school of thought and that Dr Prenter was acting in the way in which many (perhaps the great majority of) responsible A&E doctors would have done. Dr Prenter's decision to insert the cannula was not negligent even though it proved not to be strictly necessary and to have serious consequences for the claimant.

11. For those reasons the judge found in favour of the defendant. He went on to express provisional views on damages in case he was wrong to reject the case on liability.

The rival submissions on the appeal

12. The claimant is represented on the appeal by Mr Sweeting QC and Mr Keegan. She was represented in the proceedings below by Mr Keegan alone. The claimant's case on appeal is materially different from that before the judge.

13. Mr Sweeting submits in summary that the judge reached a clear finding of fact that Dr Prenter did not obtain the claimant's consent before inserting the cannula, but the judge did not follow that finding through to its necessary consequence. Dr Prenter's failure to obtain the claimant's consent before inserting the cannula was itself a breach of duty: the necessity to obtain a patient's consent is a basic feature of professional practice. The fact that Dr Prenter acted otherwise in accordance with accepted practice in inserting the cannula immediately rather than adopting a "wait and see" approach does not meet this point. It was for the patient, not the doctor, to make the choice between the alternatives of immediate insertion and "wait and see". The judge should therefore have found that Dr Prenter was in breach of duty and have gone on to consider whether the breach of duty was causative of the claimant's loss and damage. The issue of causation can and should be decided in the claimant's favour by this court: it can be seen from her evidence at trial that if she had been given the choice she would not have consented to the insertion of the cannula and would not therefore have suffered the injury she did. But if that finding cannot properly be made by this court, the case should be remitted to the judge to make a finding on the issue of causation.

14. As a pragmatic alternative way of dealing with the consequences of the claimant's lack of consent, Mr Sweeting seeks permission to amend the particulars of claim so as to introduce for the first time in these proceedings a claim of trespass to the person. He submits that the insertion of the cannula without consent was a technical assault. The additional cause of action is said to be simply an alternative legal characterisation of the same facts but with the advantage that it avoids any need for analysis of the causative effect of the claimant's lack of consent.

15. For the defendant, Miss Toogood accepts that patient autonomy is paramount and that *if* there was an absence of consent it should lead to a finding of breach of duty, though liability would depend on the further issue of causation. She submits, however, that in paragraph 10 of his judgment the judge found that the claimant impliedly consented to the procedure: when Dr Prenter informed the claimant that he needed to insert the cannula and then performed the procedure, she did not "positively" consent but her consent was implicit. The judge was conveying the rapidity with which the insertion followed the advice but he was not finding an absence of consent. The judgment should also be read in the context of the arguments and evidence at trial. It was always the defendant's case that the claimant consented. It was for the claimant to prove an absence of consent, yet the judge was not asked to find that Dr Prenter went ahead without her consent. Even the relevant ground of appeal does not assert in terms that the judge made a finding of absence of consent.

16. In the alternative to those submissions, the defendant seeks by way of a respondent's notice to uphold the judge's order on the basis that the judge was wrong to prefer the evidence of the claimant to that of Dr Prenter in relation to the matter of consent and that the judge ought to have accepted the evidence of Dr Prenter that he advised the

claimant that obtaining IV access in the left arm was the best option and that she held her arm out for him to carry out the procedure, evidencing her consent.

17. If, contrary to the above, the judge made and was entitled to make a finding that the claimant did not consent to the procedure, Miss Toogood submits that this court can and should find that the claimant would have consented to the procedure if, in the light of a fuller explanation of the risks involved, she had been given a choice between immediate insertion of the cannula and "wait and see". The judge found that Dr Prenter gave no serious consideration to "wait and see" and that it would have been a brave decision for him to adopt the approach of "wait and see" rather than following the standard practice. On Mr Hayworth's evidence, accepted by the judge, the justification for the practice included that if there was a subsequent collapse it could be very sudden and could cause shrinkage of the veins into which the IV line had to be put, making its insertion much more difficult; and the risk of an oedema was a slight one and of less potential severity in its adverse consequences. Dr Prenter would therefore not have advised that "wait and see" was possible but would have given fuller reasons why it was necessary to insert the cannula immediately. There is no good reason why, if given that advice, the claimant would have refused it.

18. Miss Toogood opposes the claimant's application to amend the particulars of claim to introduce a claim of trespass to the person. She does so on the ground that it is much too late and that matters would have been dealt with differently at the trial if such a claim had been pleaded at the time. She also submits that a claim of trespass to the person would require consideration of the same issue of causation as arises in relation to negligence and that it would therefore not simplify matters as contended by Mr Sweeting.

Discussion

19. The starting point must be the judge's finding in relation to consent. As to that, I consider there to be only one tenable reading of para 10 of his judgment, namely that he found that Dr Prenter went ahead with the insertion of the cannula without obtaining the claimant's consent, express or implied. The disputed issue under consideration in that paragraph is set out in the first sentence, namely how much Dr Prenter said to the claimant about his decision to insert the cannula, and whether she consented expressly or impliedly, by word or gesture, to that decision. Reference to the transcript of evidence at the trial shows that there was a clear-cut factual dispute between the claimant and Dr Prenter on that issue. The claimant said that the doctor did not discuss the matter with her; "he just went, 'I don't have any choice', bang, in it went without me having any more to say". Dr Prenter said he gave her a substantial explanation that insertion of the cannula was the safest option and that he took her holding her arm out for him as agreement. It is clear that on this particular issue the judge preferred the evidence of the claimant: this was the exception, or one of the exceptions, referred to in paragraph 8 of his judgment. He concluded that Dr Prenter said very little to the claimant about the decision to go ahead, which was "a quick and silent calculation", and that he did not communicate it to the claimant in any detail, saying not much more than words to the effect of "I'm sorry, but we really need to put it in the left arm". The judge did not accept Dr Prenter's evidence that she positively consented by holding her arm out in a co-operative manner. He preferred the claimant's evidence that she hardly realised until "Bang, it was done". In my

judgment, this was plainly a finding that the claimant neither gave express consent nor gave implied consent by the gesture of holding out her arm.

20. I reject the contention raised by the respondent's notice that the judge was wrong to prefer the claimant's evidence on this issue. The judge saw and heard both witnesses. He found that they were both entirely honest. Whilst he expressed a general preference for Dr Prenter's recollection where their recollections differed, he gave an adequately reasoned basis for preferring the claimant on this particular issue. I do not accept that he failed to take account of relevant matters: he did not need to refer in his judgment to every part of the evidence touching on the issue and there is no reason to doubt that he had the evidence as a whole well in mind. The contention that the finding was not reasonably open on the evidence does not get off the ground. There is simply no basis for an appellate court to interfere with the finding.

21. Having made a finding of absence of consent to the procedure, the judge took the issue of consent no further but moved on to consider whether the immediate insertion of a cannula, rather than "wait and see", was in accordance with accepted practice. The judge's approach can be explained in large part by the way the case was argued before him, but the judge himself seems to have been under the misapprehension that, because all this was happening in the resuscitation room, what mattered was whether the insertion of the cannula was "the right thing to do", in the sense of being in accordance with accepted practice, and that the issue of consent was not relevant. There is a strong hint of that at the end of paragraph 10 of his judgment, where he says that Dr Prenter "took the decision and he acted upon it in the conditions of a resuscitation room" and that this was "not of itself a matter of great criticism". But the point emerges more clearly in the trial transcript. For example, the judge made the following interventions:

> "Can I say this, I am looking at counsel here: my sense in this case, but you can correct me if you want, is that consent or no consent or indicated consent is not really the issue here. The doctor gave the advice and the doctor did it in an emergency situation. That may or may not have been within the permitted range of options …" (day 1, page 82).
>
> "But, as I have indicated, I do not regard the consent issue as important in this case. I stand to be corrected if I am wrong about it. It is an emergency room and the question is whether or not it was a right thing to do …" (day 3, page 39).

In a medical emergency, when the patient is incapable of giving consent, a doctor may proceed without consent provided that he or she is acting in the patient's best interests (see, for example, *St George's Healthcare NHS Trust v S* [1999] Fam 26 at 45B). The judge may have had that principle in mind. On the evidence, however, this was not such a case of medical emergency. The claimant was in the emergency room – the resuscitation room – but she was fully conscious and capable of giving or withholding her consent. The judge was therefore wrong to regard the issue of consent as unimportant.

22. From the passage immediately following the first of those quotations it is apparent that the judge was concerned to obtain confirmation from the defendant's counsel that

the *defendant* was not saying that the claimant's consent would be a defence to the claim if the course of treatment was otherwise negligent. Such confirmation was given. But on those and other occasions the *claimant's* counsel had an excellent opportunity to correct the judge if the absence of consent was being relied on as an important part of the claimant's case. Counsel did not do so, and it is clear that he did not do so for the simple reason that the issue was *not* viewed as an important part of the claimant's case at the time. It was not addressed in the claimant's skeleton argument at the commencement of the trial or in the claimant's closing submissions. Thus the judge was right to consider that neither party was attaching importance to the issue at the trial.

23. The issue of consent was, however, within the scope of the claimant's pleaded case in negligence. Paragraph 18(vi) and (vii) of the particulars of claim, under the heading "Detailed allegations of negligence", alleged "Failing to heed the warning given by the Claimant that she should not have any injections into her left arm …" and "Proceeding to place an intravenous cannula into the Claimant's left arm when the Claimant objected to this". From an observation early in the trial (day 1, page 4), it is clear that the defendant's counsel understood the pleadings to contain the suggestion that Dr Prenter acted without the claimant's consent. The issue was, moreover, addressed in the evidence, giving rise to the factual dispute between the claimant and Dr Prenter on which the judge made the relevant finding.

24. In those circumstances it seems to me to be open to the claimant to contend on the appeal that the finding that the procedure was carried out without the claimant's consent should have led the judge to find a breach of duty on the part of Dr Prenter even though that was not the way the claimant's case was being advanced at trial. And if the contention is open to the claimant, it must succeed. A finding of absence of consent to the insertion of the cannula leads inexorably in this case to a finding of breach of duty in inserting it. Miss Toogood concedes as much. The duty to obtain the patient's consent to treatment is a fundamental tenet of medical practice and is inherent in the case-law concerning the duty to take reasonable steps to warn a patient of the risks of treatment so that the patient can make an informed decision about whether to consent to it (see, for example, *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134). I have already explained why the judge did not take his finding of absence of consent to its logical conclusion. His error is understandable in the circumstances but can and should be corrected by this court.

25. There remains, however, the question of causation. Because of the way the claimant's case was pursued at trial, the judge did not need to, and I am satisfied that he did not, make any finding as to whether the claimant would have consented to the insertion of the cannula if Dr Prenter had given her a fuller explanation of the reasons for its insertion and of the relative risks of inserting it and of not inserting it. Both parties contend that we can make such a finding ourselves but they advance diametrically opposite contentions as to the actual finding we should make. In my judgment, this is pre-eminently a finding that should be made by the trial judge, not by us. It depends on an assessment of the claimant that is best made by someone who has seen her in the witness box and heard her give evidence. The ultimate question appears to be a subjective one, whether the claimant would have consented, albeit regard can and should be had to objective considerations in answering that question, given the peculiar difficulty of the exercise (see *Smith v Barking, Havering and Brentwood*

Health Authority [1994] 5 Med LR 285 at 288-9). On the issue of negligence, therefore, I would remit the case to the trial judge to determine the outstanding issue of causation on the footing that a breach of duty is established for the reasons given above.

26. Mr Sweeting's application for permission to amend the particulars of claim so as to add a claim of trespass to the person seeks a short-circuit to liability based on the judge's finding of absence of consent. I do not need to consider Miss Toogood's argument that the same issue of causation would arise and that the amendment would not therefore lead in practice to any short-cut. In my judgment, it would be wrong in any event to allow such an amendment at this late stage in the proceedings. I accept Miss Toogood's submission that matters would have been dealt with differently at trial if a claim of trespass to the person had been advanced at the time. The issue of consent would inevitably have assumed a central importance. It would have been necessary to put in terms to Dr Prenter that he committed a battery on the claimant by inserting the cannula without her consent, and there is a real possibility that the defendant would have been permitted to adduce additional evidence on the issue, notably from the nurse and paramedics who were present at the time. Thus the claim of trespass to the person is not simply a different legal characterisation of the same facts. One cannot exclude the possibility that different findings of fact might have emerged if the claim had been included at the outset. To allow the claim to be included now would be a clear injustice to the defendant and to Dr Prenter himself.

27. Accordingly, I would refuse the application for permission to amend the particulars of claim and I would dispose of the appeal by (i) granting a declaration that Dr Prenter was in breach of his duty of care by inserting the cannula without the claimant's consent and (ii) remitting the matter to Judge Moloney to determine the outstanding issue of causation and, if liability is thereby established, to reach a final determination with regard to damages.

Lord Justice Tomlinson :

28. I agree.

Mr Justice Newey :

29. I also agree.