COMMON LAW PRACTICE UPDATE 77

Medical Negligence

The infant plaintiff in *ST v Maidstone and Tunbridge Wells NHS Trust* [2015] EWHC 51 (QB) suffered from congenital haemophilia (Swift J) and required regular blood transfusions. He was unwell and taken to hospital, whereupon blood samples were taken which showed his Hb level to be very low. However, a blood transfusion was not administered to him until late the following morning.

Shortly thereafter the plaintiff suffered seizures, leaving him with brain damage and severe and permanent disability.

The defendant admitted fault in failing to admit the plaintiff into care and in the delayed blood transfusion. The plaintiff also claimed that there was negligence in respect of the failure to administer intravenous fluids and instead giving a diuretic drug during the first and second transfusion.

Swift J found that, given the plaintiff's moderate dehydration, IV should have been provided and the use of the diuretic was inappropriate.

As a result, the real issue was causation. The defendants contended that the plaintiff suffered from viral infection, which led to the multiple strokes.

Swift J found that whilst the plaintiff's diagnosed conditions bore certain risks, there was no convincing evidence of the risk of thrombus or emboli. There was no convincing evidence that the hospital's delay in administering a blood transfusion, nor that the dehydration, was causative. Swift J did however find that a failure to transfuse promptly would give rise to a risk, albeit a small risk, of cardiac problems leading to brain injury. This required the court to apply the principle in *Bailey v Ministry of Defence* [2008] EWCA Civ 883 on material causation, where it was said that: "In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the 'but for' test is modified, and the claimant will succeed."

In the absence of authoritative medical literature or research, the court could not be satisfied that the factors operated to cause the plaintiff's strokes. There was no reliable evidence that dehydration, acute-on-chronic haemolysis and/or severe anaemia, whether together or separately, combined with the arteriopathy to cause his strokes. Therefore the plaintiff's fallback position also failed and the plaintiff did not succeed.

Medical Negligence - Ambulance Officers

The plaintiff was the former wife of the deceased in *Hayes v South East Coast Ambulance Service NHS Foundation Trust* [2015] EWHC 18 (QB) (Coe J). The deceased suffered from asthma,

which bore a risk of respiratory arrest leading to cardiac arrest without prompt treatment. On some occasions the deceased had received hospital treatment and his wife had had to perform CPR.

After a game of golf, an ambulance was called and the deceased was given nebulised salbutamol and oxygen. Although this temporarily appeared to improve his condition, the deceased suffered a seizure, respiratory arrest and then cardiac arrest as ambulance officers carried him towards the ambulance. Resuscitation attempts were unsuccessful.

The plaintiff sued, claiming that in breach of the relevant guidelines the ambulance crew failed to administer the correct medication. More than one dose of salbutamol should have been given and adrenaline should have been administered following respiratory arrest. At issue was whether or not these measures would have had a material effect. The ambulance crew's testimony indicated that they did not think they were dealing with life-threatening asthma.

Coe J found that there was a failure to realise how critical the deceased's condition was. Reliance on the deceased's ability to speak alone was negligent. Further, he could not complete sentences. The failure to administer adrenaline was a breach of instructions and negligent. The deceased should have had other medication administered, along with a further dose of salbutamol. The defendant's expert evidence that the appropriate regime would have had "very small" beneficial effect was rejected. The judge accepted alternative expert evidence which estimated the prospect of survival as 60%. On the balance of probabilities but for the negligent treatment, the deceased would have survived. Damages were accordingly awarded to the plaintiff and to their children."

Negligence – Police Officers

In *Michael & Ors (FC) (Appellants) v The Chief Constable of South Wales Police & Anor (Respondents)* [2015] UKSC 2, a claim arose from the murder of the deceased by her former partner, which might have been prevented if the police had promptly responded to her 999 call for help. There was a lack of proper liaison between two police forces.

The police applied for the claims to be struck out or alternatively for summary judgment. At first instance, the trial judge struck out a claim for misfeasance in public office but refused to give summary judgment on the claim in negligence. Nor was he prepared to give summary judgment in respect of a claim under the *Human Rights Act* 1998 for breach of the defendants' duties as public authorities to protect life under Article 2 of the European Convention on Human Rights. The English Court of Appeal reversed this decision in part, holding there should be summary judgment in favour of the defendants on the negligence claim. However the Article 2 claim was allowed to proceed to trial. The claimants, the deceased's parents, and her two young children, appealed in respect of negligence and the police cross-appealed in respect of the Article 2 claim. There had been death threats previously and although the call for assistance on this occasion was given the highest priority, ultimately South Wales Police downgraded its priority. When the deceased called again she was heard to scream and the line went dead. Police then arrived promptly and found she had been stabbed many times and was deceased. On four previous occasions, instance of abuse had been reported to police and entries made in respect of domestic abuse.

The issues were whether police owed a person a duty under the law of negligence to take reasonable care in circumstances where they were aware or reasonably ought to be aware of a threat to an identifiable person or small group. Alternatively, if there is seemingly credible evidence from the prospective victim of a specific and imminent threat to life, do the police owe a duty to take reasonable steps to assess and prevent such threat being executed?

The Court held that police owe a duty to the public at large for the prevention of violence and disorder. In *Hill v Chief Constable of West Yorkshire* [1989] AC 53, no liability was found for errors leading to a failure to apprehend the Yorkshire Ripper before the death of his last victim. In the House of Lords, it had been accepted that there were examples of police liability in negligence, see, for example, *Knightley v Johns* [1982] 1 WLR 349 and *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242. However, Lord Keith of Kinkel in *Hill* said the law did not generally carry with it a private law duty for police towards individual members of the public.

The refusal of courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the approach taken in cases such as *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175. Reference was made to the non-feasance rule in respect of road authorities, which still prevails in England.

As to whether the police should be held to have assumed responsibility to take reasonable care, no assurance was given by the person receiving the 999 call other than that she would pass it on quickly. No promise was made as to how quickly police would respond.

However, the Article 2 claim should be allowed to proceed to trial because it was a question of fact whether the call handler ought to have heard the deceased say her former partner was threatening to return and kill her, and this issue and the consequence under Article 2 should go to trial.