

Causation in clinical negligence – common law and HRA

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Montgomery and after

- In *Montgomery* C's evidence was that she would have chosen a c-section if the risk of shoulder dystocia sufficient to cause a nerve palsy or severe hypoxic damage had been raised.
- Dr McLellan's evidence was the same
- SC overturns Extra Division and finds causation is established

Diamond v Royal Devon (2019 CA)

- Confirms the but for test applies to causation in consent cases
- C fails because facts showed she would still have opted for mesh-based hernia repair if properly advised
- Failing to warn of a risk does not give rise to damages

AH v Greater Glasgow Health Board (2018)

- 4 lead cases in Scottish vaginal mesh litigation
- No C had specified which alternative treatments were reasonable in her case or which she would have chosen if properly advised
- Distinguishes *Webb v Barclays* (not necessary C to give evidence and court can draw inference re alternative)
- So go forward only on no treatment basis

AH

- Discussion of explanation of risk/s and causation.
- *Moyes v Lothian*: C needs to be warned of total risks inherent in operation where risk of single injury
- Cf *Wallace v Kam*: a number of different risks of different injuries – scope of liability for breach is limited to particular risk/injury, and policy is do not compensate for PI where C was prepared to undergo risk

Section 8 HRA

- S8(3) no award of damages unless, taking into account all the circumstances any other circumstances including any other relief or remedy or order and the consequences of any decision in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made
- So no right to damages (cf common law)

Van Colle v Chief Constable Herts (2009) (HL)

- HL reminds us that *‘As Lord Bingham pointed out in R (Greenfield) v Secretary of State for the Home Department [2005] 1 WLR 673, Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights....’*

Breach but no damages?

- Damages will not be awarded unless it is necessary to do so (see *R (Greenfield) v SSHD* [2005] 1 WLR 673)
- A declaration may be just satisfaction
- Especially where e.g. a regulation 28 letter has been sent and common law damages are recovered

Re P (2007) CA

- C not consulted when child removed into care
- Declaration of breach alone is sufficient for just satisfaction

DSD v Commr Police Metropolis [2018] UKSC 11

- Victim of rapist had had damages from rapist and money from CICA
- No bar to separate damages under HRA for failures in state investigation and breach of A3 because “geared principally to the upholding of standards concerning the discharge of a state’s duty” (and although no common law police liability)

Halford v UK (1992) EctHR

- Police tap Assistant Chief Constable's phone
- Breach A8 and A13
- £10,000 for non-pecuniary loss: serious infringement but “no evidence stress ... directly attributable to interception of calls”. £10,000 is just and equitable. Kemp suggests “woolly” re causation, manner of breach is relevant

Sarjantson v Chief Constable of Humberside Police (2014)

- C1 is attacked by men with baseball bats, slow response by police, C2 is his partner
- Claims under A2 and A3
- Lord Dyson '*A finding that a response would have made no difference may mean that there is no right to damages*'

Title

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