C v County Durham & Darlington NHS Foundation Trust

Newcastle-upon-Tyne County Court 1 October 2018 Before HHJ Freedman

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Case Note Focussing on Application of Montgomery to Inadequate but Non-Defective Administrative Systems in the Context of Failure to Diagnose Crohn's Disease/Failure to Inform Patient of Diagnosis.

The Claimant sought damages from the Defendant Trust arising out of (i) their failure to diagnose Crohn's disease, a serious condition causing inflammation of the digestive tract, prior to receipt of the results of a highly-raised faecal calprotectin sample or in the alternative (ii) their failure to inform the Claimant or his GP of that diagnosis subsequent to receipt of those results at which point the diagnosis was all but certain.

The failure to diagnose and/or inform the Claimant of the diagnosis led to the development of a fistula requiring emergency surgery.

The Claimant had a history of colicky pain. In September 2011 he suffered a severe episode of diarrhoea with abdominal pain whilst on holiday in Turkey. On his return he attended his GP who referred him to the Defendant Trust's Rapid Access Medical Assessment Centre ("RAMAC"). RAMAC proceeded on the basis of suspected Crohn's Disease, rather than bacterial infection, and prescribed steroids. He was referred to gastroenterology.

The Claimant was seen on 29th November 2011 by a consultant gastroenterologist, Dr M, who arranged a colonoscopy and took a biopsy. A diagnosis of early Crohn's or possibly a healing enteric infection was made. The Claimant was seen again by Dr M on 28th December 2011. Again a differential diagnosis of either acute self-limiting infective ileitis or possibly Crohn's disease was made. The steroids were reduced. The Claimant's expert gastroenterologist believed that Crohn's disease should have been diagnosed on this occasion. The Defendant's expert gastroenterologist argued that although the raised inflammatory markers were consistent with Crohn's "*It is not possible to totally rule out infective ileitis*".

The Claimant re-attended Dr M's clinic on 29th February 2012. On this occasion the Claimant was well. He was told that he probably did not have Crohn's disease as there was no evidence of granulomas on the biopsy. The gastroenterology experts were agreed that the absence of granulomas was irrelevant in the diagnosis of Crohn's disease. In any event, he was given a sample pot for faecal calprotectin and told to contact his GP if there were any further problems. The Trust claimed that a further follow-up appointment was made for 30th May 2012. The Claimant denied receipt of the appointment letter.

On 3rd March 2012 the Claimant was very unwell. He was suffering diarrhoea and rectal bleeding and attended the Trust's Urgent Care Centre. On a date during March, the Claimant could not recall when, he rang, he said, Dr M's clinic on three occasions where, he alleged, he was fobbed off by the secretary and told that Dr M was "*not concerned*". The Trust did not keep records of such calls and denied that those words would have been used.

On 5th March 2012 the Claimant took the sample pot given to him by Dr M to outpatients. The results were reported at the end of March 2012 and sent to Dr M. They showed a highly-raised, 10 fold increase in faecal calprotectin. This was all but determinative of Crohn's disease in the context of the Claimant's clinical history, a fact that the expert gastroenterologists were agreed upon.

On receipt of the results, Dr M moved forward the appointment for 30th May 2012 to 24th April 2012. The computer records of the Defendant's central booking department demonstrated that letters were sent out both in relation to the original appointment on 30th May 2012 and the expedited appointment on 24th April 2012. The computer records further demonstrated that the Claimant rang the central booking department on 10th April 2012 cancelling the appointment on 24th April 2012 and that no further appointment was required. The Claimant denied cancelling any appointments.

The Claimant's evidence was that he was experiencing so much pain at that time that he would have made every effort to attend the hospital appointment and would not have cancelled it. The Claimant did not thereafter attend his GP for intestinal symptoms for several months. His evidence was that he had formed the view that the pain he was suffering was in his head so much so that his GP referred him for cognitive behavioural therapy. In the event, by February 2014 he developed an intestinal fistula (an abnormal connection) between the terminal ileum and the umbilicus which required surgery. Crohn's disease was definitively diagnosed. The gastroenterology experts were agreed that he had been suffering Crohn's disease from the autumn of 2011.

The matter proceeded to trial at the County Court in Newcastle-upon-Tyne on 1st October 2018 before HHJ Freedman. The Claimant's claim was advanced on the following bases:

1. A failure by Dr M to diagnose Crohn's at the latest by the appointment in February 2012, ie before receipt of the highly-raised faecal calprotectin sample. This was an issue primarily for the medical experts applying the *Bolam* test.

2. Failing to make a further appointment for the Claimant after attendance at clinic in February 2012 and/or cancelling that appointment (in the context where the Claimant denied receiving appointment letters and denied cancelling the

appointment in April 2012). This was an issue of fact to which the *Bolam* test would clearly not apply.

3. Even if the Claimant had cancelled his appointment and requested no further appointments, a failure by the Trust to inform the Claimant or his GP of the results of the highly-raised faecal calprotectin sample and that, accordingly, a diagnosis of Crohn's disease was all but certain. This was an administrative issue which, it was argued, was more akin to a *Montgomery* test rather than a *Bolam* test.

During evidence Dr M agreed that on receipt of the results of the faecal calprotectin sample it is highly likely that the Claimant had Crohn's disease. This was, after all, why he had moved the appointment forward. He stated, however, that he was unable to communicate this important information due to the Claimant cancelling the appointment without letting his department know.

The system operated by the Trust at the time was that if a patient cancelled an appointment via central booking then the consultant would not be informed. The patient, in such a situation, would simply disappear from the consultant's list of appointments for that day.

Dr M gave evidence that if the Claimant had failed to attend his appointment on 24th April 2012, rather than cancelling it through central booking, then he would at the least have written to his GP informing him of the now almost certain diagnosis. In addition, Dr M stated that if the Claimant had rang the gastroenterology department rather than central booking then again, he would have contacted the Claimant's GP and/or offered a further appointment.

In his witness statement, Dr M had stated that it would be inappropriate to chase a patient who had cancelled via central booking by offering another appointment. However, at trial he gave evidence that had he known that the booking had been cancelled then he would have written to the Claimant's GP. He stated that he would not have wanted to lose the Claimant from the system and, by necessary implication, made common cause with the Claimant in criticising the Trust's policy of not informing consultants of a centrally-cancelled appointment which policy had subsequently changed.

The Court heard from the manager of the central booking department, Mrs H. Mrs H stated that at the time consultants were not informed of cancellations made centrally but that this had now changed for all patients but primarily for child safeguarding reasons (so guardians were not able, without consultants' knowledge, to cancel an appointment for a child). She was unable to state what the rationale of the previous system was and agreed, on questioning by the judge, that the system was somewhat arbitrary. She confirmed that there was no significant cost attached to informing consultants of cancelled appointments since the computer would automatically generate such letters if set up in that way.

Before the expert gastroenterology experts were due to give their evidence the judge heard submissions on the issue of whether, even assuming that the Court found that the Claimant had cancelled his appointment, the Trust were in breach of duty by failing to inform the Claimant of the diagnosis of Crohn's disease which Dr M agreed was appropriate on receipt of the highly-raised faecal calprotectin sample.

HHJ Freedman gave judgment for the Claimant on that issue. He held that in all likelihood the Claimant had cancelled his appointment but that he had then fallen out of the system and that no letter had been sent either to him or his GP informing him of his serious condition. The judge noted that Dr M said that it was his intention to inform the Claimant of the nature of the problem but the system had deprived him of this opportunity.

The judge held, with reference both to *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 and to *Spencer v Hillingdon Hospital NHS Trust* [2015] EWHC 1058 (QB) that the question to be asked is **what would a reasonable patient expect to be told.** There came a time when Dr M knew what the diagnosis was and the hospital had a duty to take reasonable steps to inform the Claimant. It was no answer to say that the Claimant had cancelled his appointment as the Claimant did not know of the diagnosis at the time he cancelled his appointment. Breach was therefore made out. Causation was conceded and damages were awarded to the Claimant at the previously agreed sum of £15,000.

Comment

In the event, the judge did not need to hear from the gastroenterology experts. The decision was made purely on the basis of the illogicality of an administrative system which, although not defective, failed to inform consultants of cancelled appointments. As the judge observed, in many cases this would make no difference but in the Claimant's case after many months of symptoms but no diagnosis he had formed the impression that he was worrying needlessly, that his symptoms were partly psychological and that he should attempt to get on with his life. In the event, the diagnosis remained within the hospital.

The case demonstrates a variation on the *Montgomery* principle. It is self-evidently not a clinical decision as to whether the Claimant should have been informed of the diagnosis but rather, as expressed in *Spencer v Hillingdon Hospital NHS Trust* at paragraph 68 "*I ask myself the question, would the ordinary sensible patient expect to have been given the information contended for; put another way I ask myself, would such a patient feel justifiably aggrieved not to have been given on discharge the information contended if appraised of the significance of such information*.".

The advantage of presenting a case on such a basis is clear. The *Bolam* test places professional decision-making centre stage. It can prove difficult to demonstrate that the actions of a medical expert would not be accepted as proper by a responsible body of medical men skilled in that particular art and judges demonstrate reluctance to criticise medical professionals.

The more patient-centred *Montgomery* principle allows a broader enquiry into the relationship between patient and health provider than allowed by *Bolam* with no necessity for the Court to criticise individual medical practitioners in the exercise of their profession. The instant case succeeded because Dr M agreed with the Claimant that the information that had not been provided should have been. Although fact-specific there are many cases where there can be justified complaint about the provision or non-provision of information whether complications, possible treatments, procedures or

diagnoses. It is clear that allegations concerning such issues should now be dealt with on the basis of what the ordinary sensible patient would expect to be told.

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