MEDICAL TREATMENT AND MITIGATION OF LOSS

Tom Panton, June 2017

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The problems

Clinician (treating or medico-legal) recommends medical treatment which Claimant does not want to undergo

C seeks out medical treatment not advised (or against advice)

Uncertain impact of treatment in future

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Refusal of treatment – principles

Morgan v T Wallis Ltd [1974] 1 Lloyd's Rep 165

- Was refusal **unreasonable**?

- An **objective** test – what would 'the reasonable man' have done in the circumstances

- A question of **fact** for the trial judge

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Refusal of treatment – cases

Morgan (back injury)

- If operation had been done then on balance would have been back at work already

- Refusal based on friends' stories, no 100% guarantee, fears of surgery…

- *Unreasonable* refusal and damages reduced accordingly

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Refusal of treatment – cases

McAuley v LTE [1957] 2 Lloyds Rep 500

"If he received medical advice to the effect that an operation will have a 90 per cent chance of success, and is strongly recommended to undergo the operation and does not do so, then the result must be, I think, that he has acted unreasonably" (p505)

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Refusal of treatment – cases

Singh v Lyons Maid plc (1981, CA, unreported)

- subjective approach rejected

Thomas v Bath DHA [1995] PIQR Q19

- not unreasonable to wait whilst children grew
- what would happen 5-6 years in future?
- Judge **not** compelled to find C should then have surgery

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Refusal of treatment – cases

Selvanayagam v University of the West Indies
[1983] 1 WLR 585 (PC)

- Neck surgery recommended and medical opinion that ~6 months thereafter C would have been back at work
- but… "*it is for the patient to decide...*"
- C was diabetic
- C's decision was reasonable (even with him, as was thought, having the burden of proof)

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Refusal of treatment – cases

Geest plc v Lansiquot [2002] 1 WLR 3111 (PC)

- Burden of proving unreasonable refusal is on Defendant (resolving dispute on this)

- "Clear duty" of pleading

- No doctors ever quantified prospects of success, advised her of risks, etc, etc…

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Refusal of treatment – Geest contd.

"There is nothing in the evidence to suggest that she was put in a position to make so momentous a personal decision in a rational way, still less that it was **unreasonable of her to prefer to bear the ills she had than fly to others that she knew not of**"

→ D could not prove failure to mitigate

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Refusal of treatment – relevant factors

- Age
- Potential complications (weight, thrombosis)
- Nature of treatment (how invasive?)
- Advice (relevance, strength, unanimity)
- Prospects of success
- *Consequences* of success and of failure
- Risks (failure, infection)

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Claimant's decision to have treatment

C seeks invasive treatment contrary to opinions of clinicians (including amputation in cases of severe limb pain)

- Was/will the treatment be **reasonable**?
- If reasonable, compensate in full
- If not, compensate to time of treatment (or as if treatment hadn't occurred?)

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Claimant's decision to have treatment

If the Court decides C **will** have treatment

- Future costings (discounted for early receipt if necessary)

- Weigh up likely outcomes (prospects of success, no change, failure)

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NHS treatment

s2(4) Law Reform (Personal Injuries) Act 1948

"… there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under [the NHS]"

But…

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No treatment = no compensation

s2 doesn't stop D arguing C will in future probably use the NHS:

- Harris v Brights Asphalt Contractors Ltd [1953] 1 QB 617

- Woodrup v Nicol [1993] PIQR Q104 – C cannot recover the cost of future medical treatment if, on the balance of probabilities, private facilities are not going to be used

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Uncertain future impact

"You can prove that a past event happened, you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100%: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51% and a probability of 49%"

Davies v Taylor [1974] AC 207 at 213 *per* Lord Reid

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Uncertain future impact

Past fact – balance of probabilities

- Morgan – '*if he had had the treatment he would have been back at work*' → cut off for lost earnings

Future hypothetical – percentage prospects or discounting

- Thomas – '*if she has the operation in future, she may improve*' → 10% discount to PSLA and reduced multiplier

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Guidance

1. Avoid making assumptions
2. Explore reasons for decisions, in depth
3. Comorbidities and counterfactuals
4. Involve experts early

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