Case No: B90BM161

Neutral Citation Number: [2016] EWHC 817 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Royal Courts of Justice
Strand, London,
WC2A 2LL

Date: 15th April 2016

Before :

HIS HONOUR JUDGE MCKENNA

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Between :

(1) CONNOR SMITH **(By His Mother and Litigation Friend Nicola Smith)** **(2) NICOLA CLAIRE LOUISE SMITH** **(who sues as personal representative of the Estate of Callum Smith, deceased)**	**Claimants**
- and -	
UNIVERSITY OF LEICESTER NHS TRUST	**Defendant**

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Simeon Maskrey QC (instructed by **Irwin Mitchell Solicitors LLP**) appeared for the **Claimant**
John Whitting QC (instructed by **Browne Jacobson LLP**) for the **Defendant**

Hearing dates: 21st March 2016

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JUDGMENT

His Honour Judge McKenna:

Introduction

1. Neil Caven suffers from Adrenomyeloneuropathy (AMN) which is a complex relatively longstanding genetic disease which adversely impacts upon the myelin or white matter of the brain.

2. Connor Smith is, and Callum Smith was, a second cousin of Mr Caven. Connor suffers from Adrenoleukodystrophy (ALD) the childhood version of AMN, as did Callum until his death on 26th April 2012 of a cardio-respiratory arrest consequent upon ALD, their diagnosis having been made in 2006.

3. The Defendant, University Hospitals of Leicester NHS Trust, is responsible for the Leicester Royal Infirmary and for the diagnostic, medical and other services provided by that hospital.

4. Connor Smith, who was born on the 1st September 1997, brings a claim against the Defendant through his mother and litigation friend Nicola Claire Louise Smith, who also sues on behalf of the dependants of Connor's brother, Callum Smith (who was born on 20th October 1999) for a bereavement award pursuant to the Fatal Accidents Act 1976 (as amended) and on behalf of Callum's estate.

5. In summary, what is said on behalf of the Claimants is that the condition suffered by Mr Caven should have been diagnosed by the Defendant earlier and this would, in turn, have led to an earlier diagnosis of the condition in both Callum and Connor leading to a significantly better outcome for both boys.

Factual Background

6. On 19th March 2003 Mr Caven was seen by Dr Yousef Rajabally, a Consultant Neurologist at the Leicester Royal Infirmary. As part of the diagnostic work up, Dr Rajabally requested testing of very long chain fatty acids (VLCFA). This test was not in fact undertaken at the time and Mr Caven did not undergo such testing until after his second cousin, Callum Smith, was diagnosed with ALD following an acute admission on 23rd March 2006.

7. In March 2006, Callum was 6 years old and was admitted to hospital suffering from a high temperature, vomiting, loss of vision and was unsteady on his feet. He underwent testing and was diagnosed as suffering from ALD. Following Callum's diagnosis, his brother Connor underwent testing for the condition and he too was diagnosed as suffering from ALD. By the time of the diagnosis, the symptomology so far as Callum was concerned was too far advanced for haematopoietic stem cell transplantation to be of any benefit to him. He received treatment with Lorenzo's oil but his neurological condition deteriorated rapidly and he died on 26th April 2012.

8. Following the diagnosis of both Callum and Connor, Mr Caven was seen by Dr Rajabally in clinic who told him that his first cousin (his mother's sister's daughter, Nicola Smith (mother of Callum and Connor Smith)) had been identified as a carrier

of ALD and that her three sons had been identified with the condition "early in life". It was at that point that Dr Rajabally noticed that the VLCFA test had not been performed previously on Mr Caven and he again ordered that the test be performed.

9. On 11th August 2006 Mr Caven was informed that the VLCFA result was abnormal and consistent with a diagnosis of the adult form of ALD.

10. Genetic testing was ordered which confirmed the diagnosis. The genetics report dated 11th September 2006 advised:-

"other members of his family are at high risk of this disorder. We strongly recommend referral to the genetic counselling services where the implications of this report and testing of other family members if required can be discussed."

11. Connor's diagnosis was made following, and because of, that made in respect of his brother. Unlike his brother, however, he was not demonstrating any clinical signs or symptoms of the disease and because the disease was not so advanced in him, he was considered suitable for bone marrow transplantation, which he underwent on 25th September 2006.

12. On 28th February 2007 and 1st June 2007 Connor received two additional leukocyte infusions. He has also been treated with hydrocortisone and Lorenzo's oil.

13. It would appear that his general health is now satisfactory. Neurological function is reasonably normal although there are significant intellectual and neuropsychological problems. His adrenal impairment is managed satisfactorily and there has been no material deterioration since 2007.

The Claim

14. The Claimants allege that the Defendant was in breach of its duty of care in failing to perform the VLCFA test on Mr Caven when it was ordered in 2003. It is said that had it done so, it would have been positive, as it was in July 2006, and a positive test would have led to testing of the wider family (as was recommended in the report of 11 September 2006) which would have included the Claimants. This in turn would have led to their diagnosis some two and a half to three years earlier than was in fact the case and such an earlier diagnosis would have led to a materially improved outcome for both Callum and Connor.

The Application

15. The Defendant applies to strike out the Particulars of Claim as disclosing no reasonable cause of action pursuant to CPR Part 3.4 and/or in the alternative for Summary Judgment under CPR 24.2.

16. CPR Part 3.4 provides that:-

ii) *The court may strike out a Statement of Case if it appears to the court that*

a) the Statement of Case discloses no reasonable grounds for bringing or defending the claim;

17. CPR Part 24.2 provides that:-

> *The court may give Summary Judgment against a Claimant or Defendant on the whole of the claim or on a particular issue if –*
>
> *a) It considers that –*
>
> *i) The Claimant has no real prospect of succeeding on the claim or issue; and*
>
> *b) There is no other compelling reason why the case or issue should be disposed of at a trial.*

18. The Defendant's application is supported by a witness statement from Lorna Rosalind Hardman, the Defendant's solicitor, and is opposed by the Claimants who rely on a witness statement filed by their solicitor Eleanor Frances Parkin.

19. In essence the Defendant argues that it did not owe the Claimants a duty of care on the basis that it would not be fair just and reasonable for such a duty to be imposed in circumstances where the Defendant was treating Mr Caven and not his wider family and that where the scope of the alleged duty is effectively to inform a third party of a diagnosis reached in respect of a patient, there is insufficient proximity between the parties for such a duty to be imposed.

Discussion and Conclusions

20. It was submitted on behalf of the Defendant that this was a novel claim which raised a fundamental issue of law. I was referred to the tripartite test for a duty of care identified by the House of Lords in Caparo Industries PLC v Dickman and others [1990] 2 AC 605. For the purposes of this application the Defendant was prepared to proceed on the basis that the Claimants would be able to establish at trial that injury would have been reasonably foreseeable but argued that in the circumstances where the Defendant was treating Mr Caven and not his wider family, there was insufficient proximity between the parties. Furthermore it was contended that it would not be fair just and reasonable to impose such a duty.

21. In support of these submissions I was referred to a number of authorities all of which, it was said, supported the Defendant's position in this case. Thus in Powell v Boladz [1998] Lloyds Rep. Med 116, the Court of Appeal found that there was no duty owed by the Trust to the parents of one of its patients. That decision followed the ruling of the House of Lords in X v Bedfordshire County Council [1995] 2 AC 633 where claims brought by the parents of children who had been taken into care following what was said to be negligent abuse assessments by the defendant were struck out. Similar claims were also struck out by the Supreme Court in D v East Berkshire NHS Trust [2005] 2AC 373.

22. More recently, the Defendant relies on the decision of Nicol J in ABC v St Georges Healthcare and others [2015] EWHC 1394 (QB) a decision which I was told has been the subject of a successful application for permission to appeal with the substantive appeal being listed for hearing in March 2017. In that case the claimant's father had been diagnosed with Huntington's Disease a genetic condition in which there is a fifty

per cent chance that the child of a sufferer will also have it. The defendant wished to disclose the diagnosis to the claimant but her father refused to give permission and so they did not. The claimant brought a claim for psychiatric harm to herself (she later found out the diagnosis by chance) and for a potential claim for wrongful birth.

23. Mr Justice Nicol concluded that the duty of care contended for was entirely novel and, having considered the various authorities referred to above, he struck out the claim as disclosing no reasonable cause of action. At paragraph 27 he concluded as follows:-

"*In my judgment, therefore, this is not a case where the Claimant can show that a novel duty of care would be but an incremental development from some well established duty. It would, on the contrary, be a radical departure to impose liability in circumstances such as these. It would be an example of the "giant step" which Lord Toulson in Michael v Chief Constable of the South Wales Police [2015] UKSC 2 at paragraph 102 contrasted with the proper development of the common law of negligence by incremental steps".*

24. Leading Counsel for the Claimants sought to distinguish the facts of ABC from the present case submitting that what was of crucial importance in that case was that the patient had refused to give the defendants permission to alert his daughter to the fact that he was suffering from Huntington's Disease. It was the existence of a duty of confidentiality that meant that it was not fair just and reasonable to impose on the defendants a duty of care to alert the family to the existence of the condition. That was not, it was submitted, a surprising conclusion and thus Nicol J was not laying down a general rule that there was never a duty on an NHS Trust to inform third parties of a disease or illness suffered by its patient.

25. By contrast in the instant case, there was no evidence to suggest that Mr Caven would have refused to allow the fact of his AMN to be communicated to his wider family, had he been alerted to the existence of the diagnosis. Rather as his witness statement makes clear he would in fact "have ensured the news filtered through the family". Indeed of the nine reasons put forward by Mr Havers QC in ABC as to why it was not fair just or reasonable to impose a duty of care, five related to the confidentiality of a patient's medical records, whilst the others also fell away given the fact that the Claimants did not have to establish that the Defendant owed a positive duty to inform the family given Mr Caven's witness evidence.

26. Furthermore it was said that in the instant case the Claimants have expressly pleaded (contrary to the position in ABC) a voluntary assumption of responsibility (albeit it was submitted that such an assumption of responsibility need not be express but could be inferred) and in those circumstances it was said that it would be necessary for the court to analyse the circumstances in which the Defendant's clinical genetics services would investigate pedigrees and the process by which it would go about it so that it would be impossible for the court to determine, at this stage of proceedings, whether the Defendant did in fact assume any responsibility to the relatives of Mr Caven and the nature and extent of that responsibility. Those issues would have to await disclosure of documents and exchange of witness statements and the like.

27. Reliance was placed on the case of Selwood v Durham County Council and others [2012] EWCA Civ 979 where the Court of Appeal allowed an appeal against a strike out order made in a personal injury claim brought by a social worker against her

employers and two National Health Service Trusts with whom she collaborated in the course of her work. She had alleged that all three Defendants had been negligent and that as a result she was exposed to danger in the course of her employment from a man who was mentally disturbed. The two National Health Service Trusts had argued that they did not owe the social worker any duty of care in respect of a third party. The Court of Appeal concluded that it would be open to a trial judge, on the facts, to conclude that the two Trusts had assumed responsibility to do what was reasonable in the circumstances to reduce or avoid any foreseeable risk of harm taking into account the particular relationship between the parties, to conclude that it was fair just and reasonable to impose a duty of care on the two NHS Trusts concerned. It can readily be seen that the factual matrix is very different from the case with which this court is concerned.

28. Finally it was submitted that so far as the third limb of Caparo was concerned policy considerations actually weighed in favour of there being a duty of care in circumstances where the Defendant had a clinical genetics service that investigates pedigrees in order to identify relatives at risk. The class of those who might be injured by a failure to diagnose such a genetic condition is defined and ascertainable and the scope of the duty alleged is to take reasonable steps to provide the patient with an accurate diagnosis that would enable relatives to seek genetic testing. Thus there was no compelling reason to the contrary.

29. Whilst it is true to say that there were clearly issues of confidentiality in ABC which do not apply in the instant case that cannot, of course, be said in respect of the other cases relied on by the Defendant. Moreover, the judgment of Mr Justice Nicol was not, as it seems to me dependent on those issues. The claim was struck out, expressly, because it was found that there was no duty between a doctor/hospital and someone who is not a patient; in other words a third party cannot recover damages for a personal injury suffered because of an omission in the treatment of another. Exactly the same considerations apply in this case. To extend the duty of care to a patient's second cousins (even though on the particular facts of the case there was the potential for them to be affected by an omission in the treatment of that patient) is to go well beyond the existing law and fails therefore the test of what is "fair just and reasonable" since it would be the "giant step" referred to by Lord Toulson in Michael v Chief Constable of the South Wales police. The settled policy of the law is opposed to granting remedies to third parties for the effects of injuries to other people and what the Claimants seek in this case is to introduce an exception to that approach. Whenever a party has sought such an exception in the past, the authorities demonstrate that it has failed.

Conclusion

30. In my judgment this is a novel claim where it would not be fair just and reasonable on policy grounds to impose a duty of care on the Defendant in respect of those who are not its patients.

31. It follows that the Statement of Case should be struck out on the basis that it discloses no reasonable grounds for bringing the claim.