



ABC v St George's Healthcare NHS Foundation Trust [2020] EWHC455 (QB)

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TRANSCRIPT

Hello – welcome to this Tort Vlog. I'm Carol Brennan Module Convenor for Tort Law

I'd like to draw your attention today to a recent decision on the duty of care in negligence in the medical context: *ABC v St George's Healthcare NHS Foundation Trust* [2020]. Although it is a first instance decision, it is important both for legal and medical practitioners and illustrates for students the application of a number of key aspects of the negligence calculation. I hope you'll find the ethical and legal conundrum it presents thought-provoking.

The factual background is one of family tragedy. For this reason, the case was covered by anonymity for those directly affected. The father of the claimant (known as XX) killed her mother and was convicted of manslaughter on the grounds of diminished responsibility. While under the care of the St George's Mental Health Trust, XX was diagnosed as suffering with Huntington's disease. This is a hereditary condition of which the children of the sufferer have a 50% chance of suffering as well. It leads to severe physical and cognitive impairment and shortened lifespan; usually not manifesting itself until adulthood. The claimant was the daughter of XX who was in the early stages of pregnancy at the time. Her negligence claim argued that had she been told of this finding in a timely manner (which she was not), she would have undergone the test herself and if found to be so affected (as indeed it transpired was the case) she would have terminated her pregnancy. The hospital's diagnosis was bound by the duty of doctor/patient confidentiality and XX, her father, was adamant that he did not wish his daughter to be notified.

In 2015 the claim was struck out on the grounds that there was no reasonably arguable duty of care to the daughter ABC however the Court of Appeal disagreed and held that it was arguably fair, just and reasonable to impose on the clinicians treating a patient with Huntington's disease a duty of care to disclose his diagnosis to near family members. There was also an article 8 claim under the Human Rights Act 1998 which the court did not pursue. The case was then remitted for trial on the facts, the results of which trial in early 2020 we are discussing today.

One challenging aspect of the case was the inconsistency between the common law and professional guidance. The professional duty of patient confidentiality is not absolute. Guidelines for medical professionals such as that contained in: 'Consent and Confidentiality in Genetic Practice' clearly recognise values of 'family altruism and solidarity' and acknowledge that in some circumstances these can be added into the balancing equation when considering whether or not to impart genetic information in breach of patient confidentiality. The common law has been more restrictive, however, supporting disclosure only when it is in the public interest; which has been interpreted as the protection of a third party from serious violence.

To put it simply, the claimant ABC was arguing for an extension of the professional duty of care to third parties such as herself, for whom the patient's genetic condition might have profound implications. Mrs Justice Yip treated this as a novel situation, that is one which duty could not be determined by means of analogy but rather that the application of the *Caparo* three-part test was appropriate [remember that the case of *Robinson v CC of West Yorkshire* reiterates that the

Caparo test is only appropriate for novel cases]. The first element, proximity, was satisfied by the fact that the claimant was a patient of the mental health trust, as a participant in a course of family therapy; further her personal circumstances and relationship with XX were well known to the defendants. Reasonable foreseeability was present in the form of awareness of her psychological vulnerability and pregnancy – the exact nature of the potential harm did not need to be suggested. The last question, the policy one of whether it was fair, just and reasonable to impose such a duty was the most complicated. When you read the case you will see how Mrs Justice Yip disposes of each of five policy points raised by the defendants. Perhaps the most persuasive might have been that of the floodgates – that is, will geneticists be expected to trace an extensive range of family relations who might be affected? The answer was that this decision only applied to the factual matrix of this case, where there is a high degree of proximity, 'Recognising a duty to her [ABC] is nowhere near the giant leap that might be required to recognise a duty to multiple relatives around the world' according to the judge. She further notes that the serious risk to the claimant is not that different from that of potential violence from a psychiatric patient, for which there is already recognized to be a duty of care to breach confidentiality in some cases. Finally the judge reiterates that the duty only goes as far as the expectation that the interests of the affected third parties will be weighed in the balance, when deciding whether or not to breach confidentiality.

The judge noted that resolution of this case involved detailed consideration of both factual and legal issues. We most frequently read law reports from appeal courts which do not normally involve detailed considerations of the factual perspective but here in *ABC* we can become aware of the way that the evidence is taken and evaluated. When you read the case you'll see the way the judge notes the content of meetings and correspondence between the various defendants, and commenting upon the demeanour and veracity of both medical and ethical experts and multiple witnesses. There are complex matters of procedure, chronology and inter-personal relationships to be evaluated, all of which feed into the final decision.

There is one important distinction between the situation of a geneticist and most other clinical situations. However problematic, and whatever the implications for 'third parties', the clinician usually only has knowledge of medical facts about their existing patient. It is only in the field of genetics that the clinician acquires definite, reliable and critical medical information about a third party, often meaning that the third party will become effectively a patient. It must be noted that geneticists are well-acquainted with the wide-ranging family implications for their work and have devised ingenious methods of conveying certain information to third parties without breaching patient confidentiality.

Having established the duty of care to the claimant, the judge then proceeded to consider the remaining elements of the negligence calculation: breach of duty and causation. The standard of care to be applied was according to the cases of *Bolam* and *Bolitho*: measured by professional guidelines and prescribing that a decision supported by a responsible body of medical opinion will not be considered rather negligent, even though others may have reached a different decision. 'Non-disclosure is the default position and the bar for breaching confidentiality is relatively high' according to the judge and the pressures of day-to-day clinical practice will be recognized. There was found to be clear evidence that there did exist a responsible body of medical opinion which would have made the same decision as the defendants in this case – that is not to disclose - and so the claim failed on the grounds of lack of breach of duty. The judge proceeded to consider in some detail the third element, the causation point, in view of things said and done at the time and resolved that she was not convinced on a balance of probabilities that the claimant would have proceeded with a termination, had she been informed of the Huntington's risk. So despite the main finding of duty, the claimant's action failed on the grounds of lack of both breach and causation of damage.

I hope this discussion has succeeded in interesting you in the case, and maybe the wider field of clinical negligence and that you go on to read it, the reference for which is below, along with that of an American case *Tarasoff* which is seminal in this area, and referenced in *ABC*.

Thanks for listening!