

HAMISH THOMPSON (A MINOR) V DR H R BRADFORD

Court of Appeal (Waller LJ, Jonathan Parker LJ and Sir Christopher Staughton)

For the Claimant: Martin Spencer QC (instructed by Leigh Day & Co)

For the Defendant: John Grace QC (instructed by Berryman Lace Mawer)

It is not often, in the field of clinical negligence, that a case is decided on the issue of reasonable foreseeability, but that is what occurred in *Thompson v Bradford*, where the Court of Appeal held that the Defendant General Practitioner, whom the judge had found was negligent in the advice he gave to the patient's parents so that those parents consented to their child undergoing a procedure which they would otherwise have refused, was not liable for damage arising out of that procedure because such damage was not reasonably foreseeable.

The facts were that the Claimant, aged 8 weeks, was brought to the GP's surgery for two reasons. First, he was suffering from a perianal abscess, the second such abscess which he had suffered since his birth. Secondly, he was due to undergo his routine immunisations which included inoculation against polio. Perianal abscess is an extremely rare presentation in an infant: neither of the experts had seen it before, nor had the Defendant in a child this age. The Claimant was examined by the Defendant and he correctly diagnosed perianal abscess (for which he prescribed antibiotics), but otherwise did not find the Claimant to be systemically unwell. In particular, he did not find anything about the Claimant to contraindicate immunisation, and when asked by the Claimant's parents whether the immunisation could proceed, he told them that it could. However, he failed to inform them of two things which the judge found he should have told them: first, that the presentation of recurrent perianal abscess was unusual; secondly that the abscess might require surgery within a few days. The judge further held that if the parents had been told these matters, they would not have proceeded with the immunisations that day, but would have waited to see what would have happened with the abscess (ie whether it cleared up with the antibiotics, or progressed to requiring surgery). The Claimant was accordingly immunised, and within a few days, the abscess had worsened. He was brought back to the surgery, referred to the hospital and there he underwent surgery for excision and drainage of the abscess. Although this procedure was uneventful, a few days later the Claimant fell seriously ill and became paralysed. It emerged that he had contracted Vaccine Acquired Paralytic Polio ("VAPP") and he has been left severely physically disabled.

The medical evidence obtained on behalf of the Claimant from an eminent virologist, Professor Banatvala, asserted that the surgery and the contraction of VAPP were associated with each other through a process known as "provocation polio". Hence, it was the Claimant's case that, but for the alleged negligence, the damage would not have occurred as the immunisations would have been

postponed, and would have occurred at a later time, after the Claimant had fully recovered from the abscess and the associated surgery. For the Defendant, it was alleged that there was no such causal connection and that what had happened was the manifestation of a rare, but recognised, risk of inoculation against polio. This would have meant that the two extremely rare events suffered by the Claimant – perianal abscess in an infant and VAPP – were coincidental. The judge rejected this coincidence and held that the one was consequent upon the other. However, although VAPP is in general terms reasonably foreseeable as a consequence of inoculation, being a recognised risk, it was accepted on behalf of the Claimant that it was not reasonably foreseeable to the Defendant that the Claimant would contract VAPP as a result of being inoculated whilst suffering from a perianal abscess. Indeed, the standard guide for GPs in respect of immunisation, known as the “Green Book”, specifically stated that surgery was not a contraindication to inoculation, advice which Professor Banatvala felt should be withdrawn in the light of what had happened in this case, but advice upon which the Defendant could reasonably rely at the time. Despite this, the judge found in the Claimant’s favour. But for the Defendant’s negligence, the parents would not have proceeded with the inoculation when they did, and had it been postponed, the VAPP would have been avoided. It was not necessary that the mechanism whereby VAPP was contracted should be reasonably foreseeable, so long as the outcome was foreseeable in general terms.

The Court of Appeal reversed the decision of the judge and found in favour of the Defendant. Waller LJ, giving the judgment of the Court, identified the primary legal issue to be whether the breach of duty in respect of which the judge found negligence to be established was a “relevant breach of duty” in relation to the damage alleged. He held that it was not because the Defendant could not reasonably have foreseen VAPP as the consequence of his failure to explain the two matters which he should have explained. He stated:

“[No] competent GP could have foreseen that, if Dr Bradford failed to explain the unusual nature of the perianal abscess and the risk of surgery, and if that failure led to there not being a postponement, the result would be a contraction of VAPP or even an increased risk in the contraction of VAPP. The maximum any competent GP could have foreseen was that if Hamish had an adverse reaction to the vaccination he would have a greater degree of discomfort as a result of possible surgery.”

In so holding, the Court relied upon and applied a dictum from the judgment of Beldam LJ in *Brown v Lewisham Health Authority* [1999] 11 Rep (Med) 110 at page 117:

“[A doctor] must take care in the examination, diagnosis and treatment of his patient’s condition to prevent injury to his health from risks which a competent practitioner would foresee as likely to result from his failure to do so. He is not a clairvoyant not if he tells his patient that he can find

nothing wrong is he liable if his patient has a condition which was not discoverable by competent examination. The public policy of limiting the liability of tortfeasors by the control mechanism of foreseeability seems to me necessary in cases of medical as in any other type of negligence. ... it must be shown that the injury suffered by the patient is within the risk from which it was the doctor's duty to protect him. If it is not, the breach is not a relevant breach of duty."

Because VAPP is a very rare, but nevertheless foreseeable, consequence of polio vaccination, it was broadly foreseeable that the Claimant would contract VAPP in that he was, as a result of the breach of duty, being subjected to a procedure whereby he might contract VAPP. Without the vaccination, he could not do so. What was not reasonably foreseeable was that the Claimant was more likely to contract VAPP then, ie as a result of being vaccinated when he was suffering from a perianal abscess which might require surgery, as opposed to later, after the perianal abscess had healed. Should this degree of foreseeability be necessary or should it be the case that a doctor who, as a result of a breach of duty to provide information, leads a patient (or, as here, the patient's parents, the patient himself being too young to consent) to undergo a procedure which that patient would not otherwise have undergone, thereby takes upon himself such risks of that procedure as are factually increased as a result of the procedure occurring then rather than later? Whether the Court of Appeal's answer to this question is a final one must await the Claimant's petition for leave to appeal to the House of Lords. In *Brown*, Beldam LJ said: "In short it must be shown that the injury suffered by the patient is within the risk from which it was the doctor's duty to protect him." The question is whether, as a matter of legal principle, that risk should encompass any consequence of the vaccination proceeding then rather than later where the risk of that consequence was increased as a result of the vaccination occurring then and not later, whether or not the fact that the risk was greater was itself reasonably foreseeable at the time. What is or is not a relevant breach of duty may also be regarded as a matter of legal policy and thus depend, among other things, on the importance accorded to the right which is being protected. In this regard, given the elevation of this particular right by the House of Lords in *Chester v Afshar* [2005] AC 134, there may be some hope for the unfortunate Claimant, unless a differently constituted House of Lords has a change of heart.

Martin Spencer QC