AMPERSAND

ADVOCATES

Clinical Negligence: Case Law Update

Scott Clair, Advocate
Ampersand Advocates

28 September 2023

Pleadings in Hunter v Hanley cases: *McGraw v Greater Glasgow Health Board* [2022] CSOH 83

- The pursuer sought damages, alleging negligence on the part of three clinicians: a pathologist, a surgeon and a radiologist.

- The defenders challenged the relevancy and specification of the pleadings directed against the radiologist.

- Those averments were, *inter alia,* to the effect that CT and MRI scan reports prepared by the radiologist were wrong and he was therefore negligent in preparing them.

Pleadings in Hunter v Hanley cases:
McGraw v Greater Glasgow Health Board [2022] CSOH 83

"Explained and averred that the MRI scan did not show tumour extension into the lateral wall of the orbit or suspicion of malignant dural involvement. *The scans were reported to a standard below that to be expected of an ordinarily competent Consultant Radiologist exercising ordinary reasonable care*."

Pleadings in Hunter v Hanley cases:
McGraw v Greater Glasgow Health Board [2022] CSOH 83

- At debate, the defenders argued that the averments in respect of breach of duty did not comply with the well-known formula in ***Hunter v Hanley*** 1955 SC 200, per L.P. Clyde at 204-205.

- It was argued no indication given of the manner in which the radiologist was negligent.

- Pursuer accepted that the specific form of wording used in ***Hunter v Hanley*** was not used but argued that they did offer to prove the radiologist's conduct fell below the requisite standard.

Pleadings in Hunter v Hanley cases: *McGraw v Greater Glasgow Health Board* [2022] CSOH 83

- Central issue of whether the pursuer's averments on breach of duty *"require to follow the precise wording articulated as the legal test in [**Hunter v Hanley**] and, if not, whether the wording as expressed by the pursuer equiparates sufficiently with that test."* (per Lord Clark at [14])

- The Court held: there is no "absolute requirement" for the pleadings to mirror the wording in ***Hunter v Hanley*** exactly, but that "*It is no doubt undesirable and indeed risky"* to deviate from the wording of that test. (at [14]).

Pleadings in Hunter v Hanley cases: *McGraw v Greater Glasgow Health Board* [2022] CSOH 83

"[…] A test which is lower will not do. But it is possible to express the test as a standard and make it clear that falling below that standard will be a breach of duty […] That standard is what is referred to in Hunter v Hanley; it is what all ordinarily competent consultant radiologists exercising ordinary care require to meet. There is no suggestion in the pursuer's pleadings that any such consultant would not be negligent if his reporting fell below that standard. The pursuer is therefore not averring that some lower standard than that stated in Hunter v Hanley is to be applied."

(at [19])

Pleadings in Hunter v Hanley cases: *McGraw v Greater Glasgow Health Board* [2022] CSOH 83

- Court took opportunity to remind parties that deviating from the language used in ***Hunter v Hanley***, whether in pleadings OR an expert report, runs the serious risk of not corresponding with its meaning.

- However, in this case, it was sufficient that the relevant test had been expressed in an "alternative fashion" (at [21]).

- Case is perhaps a reminder of the flexibility that will be given to pursuers regarding the particular manner in which they express their case.

The Relevance of Guidelines:
O'Brien v Guy's and St Thomas' NHS Trust [2022] EWHC 2735 (KB)

- Negligent administration of medication case brought by the brother of a deceased person.
- Doctor had prescribed a high dose of an antibiotic to the deceased, who had impaired renal function, and did so in the knowledge of a risk of damage to his hearing.
- Claimant alleged the deceased was given a negligently excessive dose of antibiotics, which caused the deceased "ototoxicity" side-effects, leading to balance issues requiring care.
- Claimant accepted the claim stood or fell on whether: (i) the doctor's prescription of the antibiotic at lunchtime and the administration of it in the evening of 4 March 2017 were negligent; and (ii) that a non-negligent lower dose would not have caused the ototoxicity.

The Relevance of Guidelines:
O'Brien v Guy's and St Thomas' NHS Trust [2022] EWHC 2735 (KB)

	Claimant	Defendant
(i)	Doctor ignored the deceased's condition and simply applied medication in accordance with the defendant's in-house dosage guideline, which was inconsistent with national and other in-house guidelines.	Doctor's decision was justified given the deceased's worsening infection and was supported by both in-house guidelines and expert opinion, which were both reasonable.
(ii)	Even if the doctor had calibrated his dosage to the deceased's condition, the defendant had failed to justify a departure from national guidelines.	Irrespective of the in-house guidelines, departure from other guidelines was justified.
(iii)	In any event, the doctor's choice of dose, even though supported by the defendant's expert, was illogical and unreasonable.	Doctor's choice of dosage was supported by expert evidence and was not negligent.

The Relevance of Guidelines:
O'Brien v Guy's and St Thomas' NHS Trust [2022] EWHC 2735 (KB)

- Was the prescription and/or its later administration negligent in accordance with ***Bolam v Friern Hospital Management Committee*** [1957] 1 WLR 582?

- Question of the relevance of (non-)compliance with clinical guidelines (both national and 'in-house') to ***Bolam***-negligence.

- Court took starting point: *"Guidelines are not a substitute for expert medical evidence on liability […] and so will rarely - if ever – be wholly determinative."* (per Tindal J at [5])

The Relevance of Guidelines:
O'Brien v Guy's and St Thomas' NHS Trust [2022] EWHC 2735 (KB)

- Court recalled that whether a clinician's conduct fell within a ***Bolam***-compliant clinical body of opinion/practice at the time can be determined by a "*wide body of evidence, including expert opinion and medical textbooks etc, even if NICE has not produced a guideline*." (at [77]).

- However: "depending on their relevance to the particular context, authoritativeness, comprehensiveness and whether they are 'satisfactory' (as Green J put it in *Cumbria),* **national clinical guidelines may *evidence,* or even sometimes *constitute,* a *Bolam*-compliant body of clinical opinion or practice**." (at [77]).

The Relevance of Guidelines: *O'Brien v Guy's and St Thomas' NHS Trust* [2022] EWHC 2735 (KB)

- What about in-house guidelines?

- Court held not of the same status as national guidelines; they may *reflect* a wider reasonable '***Bolam***-compliant' body clinical opinion, but are unlikely by themselves to *constitute* one, for three reasons:

i. Standard of care in negligence is not subjective but objective;
ii. Resources and data available locally in an NHS Trust are not the same as those available to national bodies such as NICE; and
iii. It is debateable whether 'in-house' guidelines carry the same regulatory obligations for an individual clinician under GMC guidance as NICE and other national guidelines do.

The Relevance of Guidelines:
O'Brien v Guy's and St Thomas' NHS Trust [2022] EWHC 2735 (KB)

"However, none of this is to say that even a national guideline relieves any clinician of their responsibility to exercise their own clinical judgement. No guideline, however comprehensive, can ever be a substitute for clinical judgement in the particular circumstances of the particular patient at the particular time." (at [80]).

The Relevance of Guidelines:
O'Brien v Guy's and St Thomas' NHS Trust [2022] EWHC 2735 (KB)

"*Compliance* with a 'reasonable body of clinical opinion' which can be logically supported (which as noted a clinical guideline could in principle constitute or evidence, depending on the circumstances) on the *Bolam/Bolitho* test is not negligent. But it does not logically follow that *non- compliance* with a guideline amounting to such a 'reasonable body of clinical opinion' (which can be logically supported) is negligent. This is because there may be a *different* 'reasonable body of clinical opinion' from the clinical guideline at the time which can also be logically supported and so not negligent." (at [83]).

The Relevance of Guidelines: *O'Brien v Guy's and St Thomas' NHS Trust* [2022] EWHC 2735 (KB)

Court extrapolated five principles (at [88]) from the relevant authorities:

i. Even national clinical guidelines are not a substitute for clinical judgement in an individual case;

ii. It follows that even national clinical guidelines are not a substitute for expert evidence about that impugned clinical judgement (but may still inform expert evidence);

iii. Departure from national guidelines is not necessarily *prima facie* evidence of negligence, but is likely to call for some explanation;

iv. Compliance with a national guideline may be *prima facie* inconsistent with negligence if the guideline *constitutes* a ***Bolam***-compliant body of opinion or practice; **however, these points do not apply to 'in-house' guidelines**; and

v. What matters is whether the conduct fell within a ***Bolam***-compliant practice in the usual way; guidelines are no substitute for the Bolam/Bolitho approach; however, as clinical guidelines are relevant, practitioners and experts should consider whether any national clinical guidelines were applicable.

The Relevance of Guidelines:
O'Brien v Guy's and St Thomas' NHS Trust [2022] EWHC 2735 (KB)

- On the facts, the Court held that the clinician, despite departing from the relevant national guidelines, made a *"Bolitho-logical, Bolam-compliant clinical judgment in accordance with a sound body of practice confirmed by [the defendant's expert]"* (at [105]).

- In other words, the decision to prescribe and administer the antibiotics was not negligent and the clinical judgment was justified in order to control the deceased's worsening sepsis.

The Relevance of Guidelines:
O'Brien v Guy's and St Thomas' NHS Trust [2022] EWHC 2735 (KB)

- The case is a timely reminder on the place and significance of clinical guidelines.
- Clear distinction to be drawn on their value depending on their source.
- Reasserts the importance of the clinician's own clinical judgment.
- Guidelines cannot be followed slavishly.
- Claimants *may* be able to use non-compliance as a 'sword', but clinicians will not necessarily be able to rely on compliance (particularly of in-house guidelines) as a 'shield'.

Whose surgery is more urgent?
Middleton v Frimley Health NHS Foundation Trust [2022] EWHC 2981 (KB)

- Claim for clinical negligence brought by the widow of a deceased man.
- Alleged negligent delay in surgical revascularisation of the deceased's right leg, which caused him to suffer additional symptoms and require further surgery.
- Two issues in relation to breach of duty: (i) whether the deceased's symptoms mandated urgent revascularisation at an earlier point in time; and (ii) whether another patient ("Patient 2") who was taken in immediately before the deceased was a more urgent case than him.
- Interestingly, the records of Patient 2 were produced to the Court.

Whose surgery is more urgent?
Middleton v Frimley Health NHS Foundation Trust [2022] EWHC 2981 (KB)

- In the event, negligence was not established, so it was not necessary to consider question (ii).
- However, Mr Jonathan Glasson, KC (sitting as a DHCJ) took the opportunity to set out his thoughts on the matter, indicating that he would not have considered the deceased to have been a more urgent case than Patient 2.
- The case is perhaps interesting as a reminder that the Court may, when required and central to a case, examine the (redacted) records of other patients to determine priority.
- However, the case is also a timely reminder that the Court will take a realistic and reasonable view on the pressures on the finite resources of the NHS.
- Cases require to be considered in the context of what was happening in the hospital at the time and establishing that a claimant should 'jump the queue' can be difficult.

What is the value of an estranged relative?
Paterson v Lanarkshire Health Board 2023 SLT 67

- Fatal (suicide) case brought by the mother, siblings and children of a deceased person, who died aged 35.

- The parties advanced, *inter alia,* claims under Section 4(3) of the Damages (Scotland) Act 2011.

- Most recent reported case on "loss of society" awards.

- Provides some judicial guidance as to how the Court may approach more challenging family dynamics in assessing the value of such awards.

What is the value of an estranged relative?
Paterson v Lanarkshire Health Board 2023 SLT 67

- Awards made to the deceased's mother (£100,000) and children (£70,000), whilst perhaps indicative of the ever-increasing upward trend in such awards, were broadly consistent within the range of what was to be expected in such a case.

- However, there was evidence of estrangement on the part of the deceased's siblings: a brother and a step-sister.

What is the value of an estranged relative?
Paterson v Lanarkshire Health Board 2023 SLT 67

Factors which appeared to have been relevant to the Court's assessment of the siblings' awards:

- Relationship with the deceased described as "very distant";
- The deceased had been ostracised by her siblings and other family members;
- One of the siblings was unable to recall when the deceased actually died; and
- The other had lived with the deceased for a very short period and there was a 16-year age gap between them.

What is the value of an estranged relative?
Paterson v Lanarkshire Health Board 2023 SLT 67

- The deceased's siblings were each awarded £5,000.

- Cf. ***McCulloch v Forth Valley Health Board*** [2020] CSOH 40 (quantum agreed at £25,000 to sister; and £40,000 to twin brother).

- Cf. ***McArthur v Timerbush Tours*** [2021] CSOH 75 (£45,000 awarded to a half-sister who had an "extraordinarily close and loving" relationship with the deceased).

What is the value of an estranged relative?
Paterson v Lanarkshire Health Board 2023 SLT 67

- Case is a reminder that the Court will closely scrutinise the nature of the relationship between the relative and the deceased in loss of society claims.

- Awards in respect of siblings can be highly variable and difficult to predict.

- However, even where there is evidence of long estrangement, the Court may still make a more than nominal award.

Thank You.

Scott Clair, Advocate
Ampersand Advocates