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Medical Liability Briefing: Article 2

“Those who have the privilege to know have the duty to act.” - Albert Einstein

“Ever wondered why some people love Marmite and why some people hate it? Well, now we know, and here’s the science behind the discovery.” – The Marmite Gene Project

ABC v St George’s Healthcare NHS Trust and Ors. [2017] EWCA Civ 336

The Facts

This was a tragic case in many respects. In 2007 the Claimant’s father shot and killed her mother. He was convicted of manslaughter on the grounds of diminished responsibility. He was sentenced to a hospital order under Section 37 of the Mental Health Act 1983.

In early 2009, it was suspected that the father might be suffering from Huntington's Disease. This condition is inherited. The child of a parent with Huntington's Disease has a 50 per cent chance of developing the condition. Huntington's Disease causes damage to brain cells, giving rise to disruption of movement, cognition and behaviour. It typically brings about personality change, irritability, and often aggression. It is incurable and the progress of the disease cannot be reversed or slowed. The condition is fatal.

By late August of that year the Claimant's father had told his brother of the presumed diagnosis, but had not spoken to the Claimant or either of her two sisters as he did not want them to know and informed his clinicians that he wanted it kept confidential.

In September 2009 the Claimant informed her father that she was pregnant. Still, her father did not want her to find out about his, now confirmed, diagnosis "*as he felt [she] might get upset, kill themselves, or have an abortion*".

In April 2010 the Claimant gave birth to a daughter.

On 23 August 2010, the Claimant was accidentally informed by one of her father’s clinicians about the father's diagnosis of Huntington's Disease. She subsequently underwent testing, and in January 2013 was herself diagnosed as suffering from Huntington's Disease. It is too early to determine whether her daughter too suffers with the disease.

The Duty

The Claimant alleged that the particular circumstances of her case mean that the Defendants owed her a duty of care. She says it was critical that she should be informed of her father's diagnosis in the light of her pregnancy. Such a duty was rejected at first instance before Nicol J as, although the first two limbs of the *Caparo v Dickman* [1992] AC 605 test were fulfilled, it would not be fair, just or reasonable to impose such a duty. The claim was struck out by Nicol J as having no reasonable prospect of success but this was reserved by the Court of Appeal who came to

the conclusion that it was arguably fair, just and reasonable to impose such a duty.

It is important to keep in mind that this was an appeal from a decision to strike out the Claimant's claim as having no reasonable prospects of success. The Court of Appeal's decision is simply that the Claimant's case is arguable, and therefore it should be allowed to proceed to trial. It remains to be seen quite how 'arguable' the duty contended for is.

The Appeal

In coming to their conclusion, the Court of Appeal placed much emphasis on professional duties set out by the Royal College of Physicians, the Royal College of Pathologists, the British Society of Human Genetics and the GMC in respect of confidentiality, with particular reference to genetic disorders. The general tone of the guidance referred to was that, although of paramount importance, the duty of confidence was not absolute and may be departed from in certain circumstances. Despite the Defendants arguing that the guidance acts '*as a shield not a sword*' (i.e. it permits disclosures of confidential information in certain situations but does not obligate a clinician to disclose in those situations) the Court found that, where a clinician has carried out a balancing exercise and come down in favour of the information being disclosed, there is then a duty on him or her to disclose it. The question the Court then turned to was whether that duty was actionable; i.e. even though there is a duty would it be fair, just and reasonable to impose a legal obligation in respect of the same.

The Court of Appeal went through each of the Defendant's policy considerations for rejecting the imposition of the duty and found, in each case, the policy consideration did not unarguably bar the imposition of the duty contended for. The policy reasons were as follows:

1. What was put against the public interest in preserving confidence in the present context was not a public interest in disclosure, but the private interest of the Claimant.
2. The Law of confidence allowed a doctor to disclose confidential information in certain circumstances – see for instance *Attorney General v Guardian Newspapers (No 2) [1990] 2 AC 109 (and W v Egdell [1990] CA 359)*. The Claimant was contending for a duty to do so. Consciously or unconsciously, this might encourage doctors to breach confidence where it might not otherwise have been justified.
3. Doctors would be subject to conflicting duties, liable to be sued by their patient if they disclose information which should have remained confidential, liable to be sued by a third party, such as the Claimant, if they fail to disclose information which they should have revealed.
4. If a doctor is subject to a duty of care in some situations to disclose information to third parties, it will undermine the trust and confidence which is so important to the doctor/patient relationship. It may lead to patients being less candid with their doctors. The same point had been made by the European Court of Human Rights in the context of Article 8 of the Convention – see *Z v Finland (1998) 25 EHRR 371 at [95]*.
5. If doctors owed a duty of care to third parties, it may result in doctors putting pressure on their patients to agree to disclosure to avoid the risk of being sued by third parties.
6. Some third parties may not wish to receive information. Yet a doctor may not be able to explore whether this is the case without effectively imparting the information itself.
7. It is possible that the third party may suffer

psychiatric harm if he or she is told the information in question. The doctor will be in a dilemma as to how to explore whether this is the case when the third party is not or may not be his or her patient.

8. Doctors receive a very great deal of confidential information. It would be burdensome to place on them a duty to consider whether any of it needs to be disclosed to third parties. The time and resources committed to this will be a distraction from treating patients.
9. This significant extension of a doctor's duty of care would be contrary to the incremental way in which the law of negligence ought to progress.

The Lessons

The case is a rare example of a duty of care being found to be (arguably) owed to a third party (i.e. not a patient). It also provides some useful and novel analysis of the role of professional guidance in recognising new duties of care and reinforced the idea that the particular facts of each individual case are of the utmost importance.

The nine policy considerations may yet succeed in barring the imposition of the duty contended for at the third stage of the *Caparo* test, but the Court of Appeal stated that expert evidence may well be required to establish their true potency before they can be said to unarguably show that such a duty would be unfair, unjust and unreasonable.

The case is also interesting for the somewhat arbitrary distinction drawn between 'genetic' cases and 'other' cases involving the disclosure of confidential information drawn by Lord Justice Irwin. The distinction was proposed to alleviate 'floodgate' concerns. Lord Justice Irwin's own acknowledgement of the potential criticism of the distinction as being '*insufficiently robust*' seems to be correct, which leads to the question of where the line is drawn. I hate marmite, and without wishing to belittle the serious considerations and tragic facts of *ABC*, I would want to know if my partner had a penchant for the most disgusting of spreads.

By Katie Ayres