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Claims Online
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Welcome to Bevan Brittan's Clinical Risk Team's February 2017 edition of Claims on Line. This month the team take a look at a recent decision on a shoulder dystocia case, the Data Protection Act, circumstances where it is mandatory to seek a second opinion and some recent interesting cases.

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Brachial plexus injury not negligent – High Court decision runs against the trend

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What is shoulder dystocia?

Shoulder dystocia is an obstetric emergency that occurs during an obstructed labour where, after delivery of the head, one of the baby's shoulders becomes stuck behind the maternal pubic bone. Obstetric manoeuvres are required to release the trapped shoulder and deliver the baby. Injury can occur due to damage to the brachial plexus, and the child can be left with severe weakness and lack of mobility in the affected shoulder and arm.

When is negligence found in these cases?

The claimant often succeeds where they establish that the anterior shoulder was caught behind the pubic symphysis. Defendants have found it difficult to argue against a presumption that excessive force must have been used when delivering the baby's head. The defendant often succeeds where they successfully argue that the anterior shoulder was not obstructed and that the injury was not due to negligence, but maternal propulsive forces.

The case of Stevie Lynn Watts

Bevan Brittan acted for the defendant in the case of Stevie Lynn Watts –v- Secretary of State for Health [2016] EWHC 2835.

The **claimant** alleged that during her delivery in 1993 excessive force was used to attempt to dislodge her anterior shoulder, which it was alleged was trapped behind the pubic symphysis, and the McRoberts procedure, an obstetric manoeuvre to aid delivery, was not attempted such that the claimant suffered a permanent injury to her right arm.

Due to the passage of time, apart from the parents, the other witnesses had no recollection of events and depended on the contemporaneous notes. The **defendant** argued that:-

- Based on records made at delivery the right shoulder was posterior and was not trapped behind the pubic symphysis. The likely mechanism of injury was maternal propulsive forces.
- The midwife's evidence was that they would not have applied excessive force to deliver the baby.
- The McRoberts procedure was not employed but was not standard practice in 1993.

The **judge** found:-

- The parents' evidence was honest but he questioned the accuracy of what they now recalled.
- The position of the baby's right shoulder was posterior and the brachial plexus injury was likely to have been caused by maternal propulsion rather than by excessive traction.
- The assumption that for the injury to have occurred, excessive traction must have been applied was not valid.
- The standard of care to be applied was that used in 1993 and it was not standard practice to use the McRobert's procedure then.

Learning from this judgment

- Maternal propulsive forces is still an accepted non negligent mechanism of injury.
- The onus is on the claimant to prove through evidence that excessive force was used.
- If there is factual evidence to support a non-negligent cause of injury, brachial plexus injury claims can still be successfully defended.
- Good note taking and reference to relevant guidance is essential.

When is it negligent not to obtain a second opinion?

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In *XYZ v Warrington & Halton NHS Foundation Trust (2016)* it was alleged that an Orthopaedic surgeon was negligent for performing spinal surgery on a teenage patient suffering from a psychiatric illness without (1) discussing the case with the Claimant's treating psychiatrist and (2) seeking a second opinion from another Orthopaedic surgeon. The Claimant's case was that no surgeon would have operated without first seeking a second opinion and/or discussing the case with the treating psychiatrist and if those discussions had taken place, surgery would not have been performed. The treating psychiatrist said at trial that had she been told that back surgery risked exacerbating the Claimant's psychiatric illness, she would have encouraged an alternative, conservative approach.

The Defendant's case was that the treating psychiatrist had already given her support for surgery in a letter and it was unlikely that a discussion with the psychiatrist would have added anything further. Similarly a second opinion from another Orthopaedic Surgeon would not have added anything to the objective clinical picture because anyone undertaking a second opinion would have had very little time with the Claimant to provide an informed judgement. By contrast the treating orthopaedic surgeon was very familiar with the Claimant and in a far better position to make a truly informed judgment in her case, having treated her for years.

The Trial Judge accepted that whilst there may be a reasonable body of competent medical opinion which would have sought a second opinion equally there would be a reasonable body of competent opinion that would ***not*** seek such a second opinion. The decision as to whether or not to operate was a question of clinical judgment and the treating orthopaedic surgeon was entitled to conclude that he was the surgeon best placed to make any such judgment. He also considered that the treating surgeon had acted reasonably in not contacting the treating psychiatrist because the psychiatrist had already indicated in a letter that surgery should not be delayed and the surgeon was entitled to treat that as a "green light".

If healthcare professionals sought second opinions and contacted other treating clinicians as a matter of course then the system would grind to a halt. Whilst it will be appropriate to seek second opinions and have discussions with other healthcare professionals in some cases, the Claimant has to establish that this would have added something of value to the clinical decision making process. This case demonstrates that it will be easier to defend a decision not to seek a second opinion if the treating clinician has known the Claimant for a long time and the clinical decision in question is one of clinical judgement.

Data Protection Act – Guidance for Trusts

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One of the most important sources of evidence in connection with a complaint or claim is the patient's medical records, and the Data Protection Act 1998 sets out how those records can and cannot be retained and disclosed (the Act calls this "processing") by a Trust.

Medical records come within the scope of "sensitive personal data" as they both identify an individual and may contain information about physical or mental health, criminal record, sexuality and ethnicity or all of those categories. The Data Protection Act sets out more stringent requirements for retaining and processing sensitive personal data than for other sorts of data. These requirements include :

- Data held must be adequate, relevant and not excessive in relation to the purpose for which they are retained
- Data should be accurate, and kept up to date
- Data can only be processed in accordance with the requirements of the Data Protection Act
- Appropriate measures should be taken against unauthorised processing or accidental loss of data

Disclosure

If a patient or their legal representative requests copies of their records, it is essential that the Trust is satisfied the patient has consented to that processing. Trusts should require evidence of that consent when the request is made by a third party, and a standard form of authority is provided for this purpose under the Pre Action Protocol for the Resolution of Clinical Negligence Disputes . This is commonly used by solicitors acting for Claimants to obtain copies of records.

Trusts are also entitled to disclose medical records to their own legal advisors, and in certain situations they can do so without the patient's express consent or even knowledge. This could occur when a Trust wants to take preliminary advice about an incident which could give rise to a claim, and do so of its own volition and before any complaint or claim has been received. Such disclosure is permitted when the following tests are both met:

- The processing is necessary for the purposes of a legitimate interest pursued by the Trust
- The processing is in connection with any legal proceedings (including potential proceedings) or obtaining legal advice

If those tests are met, the patient's explicit consent to the processing of the sensitive personal data is not required. Any relevant updating records can also be provided to the Trust's own legal advisors.

Case Roundup

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Medical records in the "real world"

Jaciubek -v- Royal Free London NHS FT [2016] EWHC 269 (QB)

This case centred on the adequacy of medical notes. The claimant said that the Trust should have detected and acted upon a subarachnoid haemorrhage when she attended A&E. The attendance was early in the morning, the A&E doctor had no recollection of the event and had to rely on just her notes which the judge described as 'not adequate'.

Despite this, the judge commented that it is important to look at what goes on in the "real world" rather than adopting an unrealistically high expectation of notes made in the early hours of the morning in what was probably a busy A&E Department at the end of a night shift. He found that the claimant was 'honest but mistaken' and that the benefit of hindsight may have fogged her memory.

Keeping accurate and detailed medical notes is always important but a combination of a good witness and a trial judge with a realistic understanding of a busy hospital resulted in the claim failing despite the lack of detailed notes.

But Medical Records unsatisfactory despite heavy workload

FE -v- St George's Hospitals NHS Trust [2016] EWHC 533 (QB)

In contrast, to the case above, the judge was highly critical of the medical records and said that the standard of record keeping was unsatisfactory, even taking the high workload into account. This case reinforces again the importance of good quality records and the pitfalls of subsequently altering notes.

Windfall for Claimants continues

Summers v Bundy [2016] EWCA Civ 126

The Court of Appeal rejected an argument that trial judges have a discretion as to whether or not to award the 10% uplift to general damages. In Simmons v Castle [2012] EWCA Civ 1039 and 1288) a 10% uplift to general damages was awarded to compensate the Claimant who, following the Jackson costs reforms, had to pay the CFA uplift to their lawyers out of their general damages. In Summers the Judge at first instance decided not to award this unjustified windfall to this legally aided Claimant who did not have to pay a CFA uplift. The Court of Appeal held that following Simmons the Claimant was entitled to the 10% uplift and the trial judge had no discretion to depart from that. It was recognised that this approach was not going to produce "perfect justice" but the purpose of the Simmons approach was to produce simplicity and clarity.

Case Roundup Continued

This comes as no surprise as it was generally accepted that the 10% uplift applied to all cases post April 2013. That said, it does provide for a windfall for some Claimants and whether the approach to this is revised in future remains to be seen.

Disclosure, how far must we go?

Vilca and others v Xstrata Ltd and another [2016] EWHC 1824 (QB)

In this case the court considered various issues arising out of e-disclosure, but most notably the Claimant's application for an order requiring the Defendants to undertake "an appropriate re-review of their disclosure" by a lawyer independent of the firm representing them. The order was sought on the basis that there was a failure to disclose a "relevant and disclosable" email exchange which brought into question the integrity of the whole disclosure process.

When considering whether the late disclosure of the email in issue was sufficient to justify an independent re-review of the defendants' disclosure exercise, the Judge accepted that such an order was available to him to make despite the fact that such an order would be unprecedented. However, the judge noted that it would be a "most unusual order" to make, pointing in particular to the fact that such an order would impose a costs burden on the Defendants whose solicitors' conduct was the reason of the re-review. It would therefore require "strong grounds" for such an order to be made.

The Judge did not consider that what was, in reality, one (albeit significant) error, corrected quickly, by a law firm in good standing was sufficient to justify such an order in this case.

Clinical negligence & complaint handling

Bevan Brittan is one of eleven firms that acts for the NHS Litigation Authority. This puts us at the heart of claims and complaints brought against acute providers, mental health trusts and community providers throughout England and Wales.

We get involved at the outset, with teams set up to take on new instructions as they happen. Complaints and inquests are handled by our medical law solicitors, recognised for dealing sensibly and sensitively with issues. Clinical negligence claims pass to our specialist litigators for immediate, thorough investigation and a clear strategy for resolution. This all goes towards achieving the overall aim of paying justified claims promptly and fairly and defending unjust claims robustly.

Clients pride us on our ability to provide a high level of support to their commissions: the hospitals, trusts and groups that are being taken to task for their actions or inactions. We make sure that we are contactable and available and that we help manage the potential fallout of accusations being made against individual staff members. So we offer the softer support that enables witnesses to feel far less anxious than they otherwise might about the prospect of giving evidence, for example. We're also able to offer continuity through the lifecycle of a case, from complaint to inquest to clinical negligence claim, through having a dual qualified barrister and solicitor as a key member of our team.

Among those on the NHS LA panel, we are particularly specialist in group litigation and continue to be involved in some of the largest and most high profile joint actions in the UK.

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