OTHER JOURNALS IN BRIEF

A selection of abstracts of clinically relevant papers from other journals.
The abstracts on this page have been chosen and edited by John R. Radford.

LITIGATION

When might an operative complication be regarded as acceptable? Part 1: Surgical factors that influence courts when finding fault during litigation

Wheeler R, Blackburn S *et al. Ann R Coll Surg Engl* 2015; **97:** 98–101

and

When might an operative complication be regarded as acceptable? Part 2: Judicial factors that influence the finding of fault during surgical litigation

Wheeler R, Blackburn S *et al. Ann R Coll Surg Engl* 2015; **97:** 180–183

Will the 'professional duty of candour' influence the number of claims for negligence?

Causation is explored in the first paper. In the second paper by the same authors, the judicial view of surgical errors is examined. Neither of these papers are straightforward, both peppered with legal argument. Although the cases cited are from general surgery, the principles apply to dentistry.

When considering causation (for example, *Hendy v Milton Keynes Health Authority (No 2)* [1992] 3 Med LR 119–127), the surgeon pleaded that the ureter was ligated erroneously because it was placed in an abnormally lateral position. However, the 'but for' test was met ('but for the defendant's act, would the harm have occurred?') when it was shown at a reparative operation, together with other evidence, that the ureter was sited normally.

The importance of making clear and contemporaneous clinical notes is asserted in the second paper. It is 'extraordinary' if a detailed analysis of an untoward event is not made in the clinical notes [*Tagg v Countess of Chester Hospital NHS Foundation Trust* [2007] EWHC 509 (QB)]. Although such notes may not alter the outcome of litigation, it may dissuade the claimant from pursuing the case.

The relationship between negligence and candour is touched upon. Seminal inquires such as *...children's heart surgery at the Bristol Royal Infirmary 1984-1995: learning from Bristol* and *The Mid Staffordshire NHS Foundation Trust Inquiry* have placed the 'professional duty of candour' (Openness and honesty – the professional duty of candour – Professional Standards Authority) at the forefront of medical ethics. Reporting of adverse incidents and the Confidential Reporting System for Surgery (CORESS, http://www.coress.org.uk/) are tools that can be used to facilitate candour. It is noted that a court concluded it was unacceptable *(Fenech v East London and City Health Authority* [2000] 1 Med LR 35–40) that there was lack of frankness by a surgeon after a broken needle tip remained in the patient's tissues. This fact emerged some 34 years after the event.

When supervising trainees, the burden is with the consultant to be satisfied that the trainee not only has sufficient experience, but that this skill has been practised recently (*Greenhorn v South Glasgow University Hospitals NHS Trust* [2008] CSOH 128).

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SHARING OF INFORMATION JUDGMENT

Montgomery (Appellant) *v* Lanarkshire Health Board (Respondent) (Scotland)

The Supreme Court. *Hilary Term [2015] UKSC 11 On appeal from: [2013] CSIH 3; [2010] CSIH 104*

Also see PRESS SUMMARY (the full judgment is 37 pages).

'It would therefore be a mistake to view patients as...incapable of understanding medical matters...'.

The Supreme Court has unanimously allowed this appeal. Central to this judgment is that there is an increasing culture of autonomy that include considering the 'values' that a patient ascribes to that particular medical procedure. But additionally, patients now accept there are risks associated with all treatment options. The doctor must 'take reasonable care to ensure that a patient is aware of material risks that are inherent in treatment'. A risk is 'material' when a reasonable person attaches any significance to such treatment, or if a doctor considers their patient should attach significance to such treatment.

As background to the clinical issues, the appellant Nadine Montgomery, gave birth to her baby in 1999 at Bellshill Maternity Hospital, Lanarkshire. Sadly, her baby was born with serious disabilities. If women have diabetes, they are more likely to have large babies with a 10% risk that the shoulders of the baby are too wide (shoulder dystocia) for a vaginal delivery. Mrs Montgomerie has diabetes. Dr McLellan was responsible for the care of Mrs Montgomery. It was the policy of Dr McLellan not to advise routinely diabetic women about shoulder dystocia. It was her view that Mrs Montgomery would have chosen a caesarean section. However, 'Dr McLellan ought to have advised Mrs Montgomery of the substantial risk of shoulder dystocia' (PRESS SUMMARY). The risks of a caesarean section for mother and baby are very small.

As background to the law, it was judged that the *Bolam test* ('whether the omission was accepted as proper by a responsible body of medical opinion') was inapposite as this case departed from purely medical matters. 'Values' should be taken into account during the decision making process, particularly when considering issues such as pregnancy.

When the case was first heard, both the Lord Ordinary (any judge in the Outer House Court of Session) and the Inner House of the Court of Session held that Mrs Montgomery had not shown that, had she been advised of the risk, she would have elected to undergo a caesarean section.

But when appealed to The Supreme Court of the United Kingdom, Lord Kerr and Lord Reed argued that before any treatment, a doctor has a duty to inform the patient of any 'material' risks. The therapeutic exception, whereby the doctor is exempt for disclosure because such would pose a serious threat to the patient, 'should not be abused'.

Dr McLellan was 'an impressive witness'.

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