Bartolomucci v Circle Health Group Limited [2025] EWHC 529 (KB)

The issue in dispute

The central issue related to whether the Defendant healthcare organisation was contractually liable to the Claimant for the acts and omissions of two consultants, a consultant orthopaedic surgeon and a consultant anaesthetist, in respect of hip resurfacing surgery performed at the Defendant's private hospital. In short, in the context of this claim, who is liable when a patient is injured by a private consultant's negligence: just the consultant, or is the private hospital liable as well?

The facts in summary

The 19 year old Claimant underwent private hip surgery at BMI The Edgbaston Hospital ("the Hospital") in 2015 and, as a result of suffering a significant period of very low blood pressure while under anaesthesia, suffered a catastrophic brain injury. The Claimant primarily alleged that the anaesthetic care was carried out negligently.

In pre-action correspondence, the orthopaedic surgeon (Mr McMinn) had denied that any injuries had been caused by any breach of duty on his part. A letter of claim had been sent to the consultant anaesthetist (Dr Prasanna), but Dr Prasanna had voluntarily erased himself from the GMC register and appeared to be working in the United Arab Emirates. At the time of the surgery, Dr Prasanna had been a member of the MDU and had shown evidence of his membership to the Defendant in order to be able to practice at the Hospital. However, the MDU responded to the claim against Dr Prasanna by stating that it did not represent Dr Prasanna and had no interest in the claim against him. This presented challenges to pursuing a claim against the consultant the Claimant was alleging was primarily responsible for his brain injury.

The issue of negligence was not a matter for the Court's determination in these proceedings. Instead, and, unusually in clinical negligence litigation, by a Part 8 claim, the Claimant sought a declaration as to the scope of the contractual obligations owed by BMI Healthcare Limited, which subsequently changed its name to Circle Health Group Limited (the Defendant).

The Claimant did not seek a declaration as to any tortious liability of the Defendant.

The Claimant's position was that the services for which the Defendant was contractually responsible included all inpatient surgical and anaesthetic services provided by the Consultants during and in relation to the surgery at the Hospital. The Particulars of Claim also included a positive averment that no contract was made between the Claimant and either of the two Consultants. The Defendant's position was that it accepted that it was responsible for some services provided to the Claimant, including nursing services and provision of food, accommodation and surgical facilities, but denied that its contractual liabilities extended to the provision of services by the Consultants.

The factual background included that the Claimant was a US citizen who had been advised by his US physician to undertake an internationally recognised hip resurfacing procedure which had originated in Birmingham, England. One of the devisors of that procedure, Mr McMinn, was recommended to the Claimant and the Claimant subsequently received email correspondence from the McMinn research centre confirming a consultation between the Claimant and Mr McMinn at the Hospital, with a view to surgery being carried out. The email correspondence included information regarding 'self-pay' payment by the Claimant for the intended surgery and that the Hospital would be providing instructions regarding payment.

Mr McMinn raised a separate invoice for his initial consultation with the Claimant. Payment was requested to be made to the McMinn Centre Ltd.

The contractual documentation between the Claimant and the Defendant was agreed by the parties to include a Covering Letter, a Quotation for the surgery, and the BMI Self-Pay Terms and Conditions. Excerpts from those documents include:

- The Covering Letter stated: "*Following your consultation with Mr McMinn please find enclosed details of our Self-Pay fixed price package for your surgery. This offer is made subject to the Terms and Conditions set out in the enclosed and is subject to pre-assessment. It is valid at BMI the Edgbaston Hospital in Birmingham with Mr McMinn. […] If you wish to go ahead with surgery please sign one of the attached quote form pages and return to us at BMI the Edgbaston Hospital*."

- The Quotation stated the price of the procedure (£14,220) and listed items which were and were not included in the package. Among the items included in the package were "*Consultants' operating fees*". Among the items not included in the package were "*the consultant's fee for the initial outpatient consultation*" and "*convalescence and treatment provided after your consultant has advised you are fit for discharge*".

- The Terms consisted of 25 clauses, of which Clauses 18 - 20 formed a key part of the Court's consideration:

  > *18. All consultants are self-employed and provide their services direct to the patient.*
  >
  > *19. Your quote will state whether the consultant's fees for the procedure and the follow up (but not the initial consultation fee) are included in the quoted price. If the fees are included, the hospital will usually collect the consultant's fees as agent but occasionally, you will receive a separate invoice from the consultant for his portion of the procedure cost. If this occurs, the package price will be automatically reduced by the amount of the consultant's fees.*
  >
  > *20. The initial consultation fee with the consultant is a separate fee (outside the package price) which will be invoiced to you directly by the consultant.*

In addition to the contractual documentation, the Court was referred to the Practising Privileges Agreements by which the Consultants practised at the Hospital. Those agreements (of which the Claimant was unaware) included terms and conditions stating that each Consultant is "*independent contractor and not an employee, agent or servant of the Hospitals. You are therefore responsible for your own actions and those of your employees whilst on the Hospitals' premises*".

The Court's analysis

The legal principles to be applied to contractual interpretation were uncontroversial and effectively agreed.

In essence, the Court was required to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood the language used in the Contract to mean. The task of the Court was to interpret the language that the parties had chosen to use to express their agreement, with the departure point in most cases being consideration of the natural and ordinary meaning of the contractual terms.

All the terms of the Contract had to be considered in order to understand the purpose of the key contractual terms and of the Contract overall.

In summary, Malcom Sheehan KC, sitting as a Deputy High Court Judge, analysed the contractual documentation as follows:

- Were the Covering Letter the only relevant contractual document, then the offer of a fixed price package "*for your surgery*" would indicate that the surgery itself was the subject matter of and included within the services comprised within the Contract. However, the Covering Letter was just one of the relevant contractual documents and was expressly stated to be "*subject to the Terms*".

- The reasonable person with the background knowledge available to the parties would have understood that the scope of the Contract did not include everything that related to the hip resurfacing procedure. The inclusion in the Quotation of a text box that listed what was and was not included within "your package" demonstrated that not all matters that related to the hip resurfacing procedure were included within the scope of the Contract. For example, the initial outpatient consultation was listed as not included in the package included in the Contract even though it related to the procedure itself.

- The list in the Quotation included "*Consultants' operating fees*". It was common ground that fees charged by the Consultants were included within the total sum charged by the Defendant pursuant to the Contract. However, the dispute was

whether the use of the term "fees" had the function of restricting what was included within the scope of the Contract to the payment of such fees rather than including the performance of the services to which those fees related. To determine this issue, the Court had regard to the Terms and Conditions, noting that acceptance of the Quotation was stated to be "*on the terms stated overleaf*".

- Clauses 18-20 of the Terms, when properly interpreted, provided the most detailed explanation of any of the contractual documents concerning whether the provision of surgical services were included within the scope of the Contract.

- In relation to Clause 18, the Claimant was correct that as a matter of law a party to a contract may include within its contractual performance obligations acts to be carried out by a third party to the relevant contract. Therefore, the reference in Clause 18 to consultants being self-employed did not, on its own, give any indication as to whether surgical services being provided by self-employed surgeons were included or excluded from the scope of the obligations undertaken by the Defendant in respect of the Contract.

- However, the second half of Clause 18 stating that consultants "*provide their services direct to the patient*" was significant. The Claimant's argument that clauses 18-19 of the Terms were concerned with providing an explanation of the payment of fees was not consistent with the language of Clause 18 which expressly addressed how the consultant's services were to be provided rather than simply how they would be paid for. The reasonable person reading Clause 18 would consider that it stipulated that the Consultants, rather than BMI (the Defendant), would provide their services to their patients. Further, the words "provide their services direct to the patient" were preceded by the words "all consultants are self-employed". This statement allowed the reader to understand that the consultants did not work for BMI and provided their services independently and separately to BMI. The words that the consultant "provide their services direct to the patient" were only consistent with an interpretation that the consultants do not work for BMI and were providing their services independently and separately to the patient.

- Clause 19 explained that if the consultant's fees for the procedure were included in the Quotation, they would be collected by BMI as agent on behalf of the relevant consultant. This clause was consistent with the Contract not including the provision of the consultant's services for the procedure. If the consultant's services were provided as part of the Contract, then BMI would be entitled to receive payment for those services in its own right as those services would have been provided by BMI under the Contract.

- The practising privileges arrangements between BMI and the Consultants could not be considered as a meaningful part of the relevant facts and circumstances that could be referred to when interpreting the Contract. There was no evidence that the Claimant would have known of the existence of the arrangements.

The Court accordingly found that a reasonable reader of the Contract in its entirety would not consider that the purpose of the Contract included the provision of surgical services by BMI directly to the Claimant rather than by the Consultants themselves.

Reading the Contract as a whole, the purpose of the Contract was instead to provide a fixed price package for the Claimant's hip resurfacing procedure that included within the fixed price the fees charged by the Consultants for their services which were provided directly by them to the Claimant and not via BMI.

The Court also found that there was cogent evidence of a contractual relationship between Mr McMinn (the consultant orthopaedic surgeon) and the Claimant, having regard to the following:

- The Claimant met Mr McMinn to discuss and be assessed for surgery.
- The Contract stipulated that Mr McMinn would provide his services directly to the Claimant.
- Mr McMinn raised an invoice directly with the Claimant in respect of the initial consultation.
- The Claimant was consented for surgery by Mr McMinn and agreed to undergo surgery. There was therefore an offer to provide a service which was accepted.

The position with Dr Prasanna (the consultant anaesthetist) was different but the Court again found that a contract had been formed between the Claimant and Dr Prasanna, having regard to the following factors:

- While there was no meeting prior to the day of surgery, Dr Prasanna consented the Claimant for surgery on the day and the Claimant was aware that he was carrying out the role of a consultant in respect of the anaesthetics to be provided during the Surgery.
- Under the terms of the Contract (with the Defendant), Dr Prasanna would be providing his services directly to the Claimant.
- As with Mr McMinn, there was no need for there to be any discussion as to cost of the services or how the fees were to be paid as these matters had been dealt with by the Contract (with the Defendant).

The existence of contracts between the Claimant and the Consultants was considered by the Court to be relevant as, had the effect of the Defendant not assuming liability in its standard terms been to deprive the Claimant of any remedy in respect of a breach of duty by the Consultants then this would likely be contrary to commercial common sense. However, the Claimant was not left without any legal remedy and could pursue a claim in contract against the Consultants in respect of any breach and would in an event be able to pursue a claim against the Consultants in negligence.

The Court therefore dismissed the claim and found that the Defendant was not contractually liable for the services provided by the Consultants in relation to the surgery.

Comment

This decision provides an important example of the Court's approach to analysing contractual liabilities in the context of private medicine. In particular, it teases out the distinction between any contractual liability owed by a hospital group for private medical care from any contractual liability owed by individual consultants providing medical services where those consultants are engaged as independent contractors.

The Court's finding of a contract between the Claimant and the Consultants is also noteworthy, particularly in respect of the anaesthetist consultant with whom the Claimant had had no contact prior to surgery.

We would suggest that the Court's finding is in line with how most clinical negligence practitioners have long understood legal liability for private medical procedures works in England and Wales: the hospital provides all the services which make the anaesthesia and surgery possible (such as the location, the facilities, the nursing care, the food etc) but the consultants themselves have a direct contractual arrangement with the patient for their services, which services are not provided by or through the hospital, as they would be in the NHS.

The Claimant's claim thus represented an attack on that traditional assumption, but specifically in the context where there had been an "all-in package" price arrangement offered by the Hospital, which price included the consultants' fees. Such arrangements are in our experience not uncommon, although no doubt the wording of the relevant contractual documentation will vary. The Deputy High Court Judge found that, notwithstanding that all-in price package, the contractual documentation still made it objectively sufficiently clear that the Hospital was not providing the consultants' services to the patient. The all-in price package may have been a mechanism of convenience for the patient and the consultants, by reducing the number of payments to be made, but it did not mean that the Hospital was contracting with the patient for the consultants' services.

However, as emphasised by the Deputy High Court Judge, the specific contractual evidence of each individual case will need to be carefully assessed in order to consider who might be liable for the acts or omissions of consultants providing services at a private hospital.

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