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ABC v St George's Healthcare Trust and Ors: A new duty of care?

A. INTRODUCTION

In modern medicine it is increasingly common for patients to undertaking genetic testing for particular disorders. The results of these tests can have life-altering implications for patients and their relatives. A significant ethico-legal dilemma exists here, with regards to balancing the potential liability of healthcare professionals ("HCPs") to disclose such information to those who may be affected, and the duty of confidentiality owed to patients. In other words: to what extent do HCPs owe a duty of care to their patient's family to disclose a hereditary disease? An important decision bearing on this issue is *ABC v St George's Healthcare NHS Trust & Ors*.[1] The judgment does not go so far as to answer the above question, however it provides a degree of clarification on the scope of that duty and the circumstances in which it would apply. In a compassionately worded judgment Yip J held in the case of that 3 NHS trusts were not negligent in not disclosing to ABC ("the claimant") that her father ("XX") had been diagnosed with Huntington's Disease ("HD"). Interestingly, while Yip J held that two of the defendants did not owe a duty of care to the claimant, she found that South West London and St George's Mental Health Trust ("the second defendant") owed the claimant a duty of care to ABC, but that this duty had not been breached. The latter development of duty of care to a patient's relative, and the lack of breach found therein, are the subject of discussion in this case note.

B. THE FACTS

The circumstances surrounding this case are, as Mrs Justice Yip commented in her ruling, "tragic and unusual."[2] In 2007, the claimant's father killed her mother, and was found guilty of manslaughter by diminished responsibility. Pursuant to a hospital order he was placed in the care of the second defendant. Consequently, XX's family were offered family therapy. The reasons for XX's symptoms were also investigated, and from early in his admission it was suspected that he had HD: a neurodegenerative disorder, the clinical features of which include psychiatric and cognitive problems, and abnormalities of movement. This disease is

[1] *ABC v St George's Healthcare NHS Trust & Ors* [2020] EWHC 455 (QB) ("*ABC*").
[2] Ibid, para 6.

incurable, and markedly reduces life expectancy. There is a 50% chance that the offspring of someone with HD will also inherit the disorder, as it is an autosomal trait.[3] In 2009 ABC fell pregnant. By the time that XX's diagnosis was confirmed and made known to XX, her pregnancy was beyond the 24-week stage (the limit on abortion, except under exceptional circumstances).[4] Throughout the investigations, several discussions took place across XX's clinical teams regarding the effects that his diagnosis may have on ABC, including her decision on whether to continue her pregnancy. XX maintained throughout that he did not want to tell ABC about his diagnosis. In 2010, ABC was informed of her father's diagnosis by his clinician. This was a breach of XX's confidentiality.

ABC tested positive for HD in 2013. ABC brought a claim both in negligence[5] and argued that if she had been informed of her father's condition, she would have undergone a test for HD. As that test would have been positive, she would have terminated her pregnancy. She sought damages for the continuation of her pregnancy, psychiatric damage, and consequential losses. This case was initially struck out by Nicol J in 2015 on the grounds that there was no reasonable cause of action.[6] However this ruling was overturned by the Court of Appeal.[7] Next, it was heard by Yip J in the High Court.

C. THE DECISION

(i) Overview

Yip J outlined the legal and factual issues at hand as follows: (i) did any of the defendants owe a duty of care to the claimant?; (ii) If so, what was the scope and nature of that duty?; (iii) did any duty exist that required ABC be given information be given sufficient information to allow her to undergo genetic testing and termination of her pregnancy?; (iv) if a duty of care was owed, was that duty breached by failing to give that information?; and (v) if there was a breach, was there sufficient causation here, ie did it cause the continuation of ABC's pregnancy when it would have been terminated otherwise?[8]

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[3] Ibid, para 9.
[4] See the Abortion Act 1967, section 1(1).
[5] She also brought a claim under the Human Rights Act 1998 for a breach of the European Convention on Human Rights, Article 8. This was rejected as it did not add to the claim. See *ABC*, paras 254-8.
[6] [2015] EWHC 1394 (QB).
[7] [2017] EWCA Civ 336.
[8] *ABC,* para 24.

Yip J was clear from the outset that she would not attempt to define the limits of a duty of care owed by doctors to those who are not their patients. Citing *Kent v Griffiths*,[9] she emphasised that she was only required to determine whether a duty was owed to ABC, on the facts of this case. [10] Three potential routes to a duty of care were identified: (1) ABC was owed a duty by virtue of a doctor-patient relationship between her and the defendants; (2) by providing family therapy and treatment to ABC's father, the second defendant had assumed responsibility for ABC's welfare; (3) otherwise, that this case was a "novel claim" and established principles should be applied to the facts of the case by incremental extension.[11] Yip J found that a duty of care could not be found via routes (1) or (2) above, and thus, her consideration turned to point (3).

(ii) A Duty of Care

To expand on route (3) - on which this case turned - in *Caparo* Lord Oliver applied the view of Brennan J in the case of *Sutherland Shire Council v Heyman*, which was that: "the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care…".[12] Yip J agreed that this case was a "novel claim" in relation to which a duty of care had not previously been recognised by the courts,[13] and thus her consideration turned to question of whether a relevant duty should be recognised here.

Yip J noted that the courts have been willing to recognise that a doctor or health authority can owe a duty of care to persons other than their primary patient, but only where there is a close proximal relationship between them.[14] As her deliberation unfolded, she indeed found that there was a close proximal relationship[15] between ABC and the second defendant because of the "factual matrix" of the case.[16]

[9] [2001] QB 36, para 37.
[10] *ABC,* paras 34-5.
[11] See *Caparo Industries plc v Dickman* [1990] 2 AC 605; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4.
[12] *Sutherland Shire Council v Heyman*, 60 A.L.R. 1, paras 43-44.
[13] *ABC*, para 156.
[14] Ibid, para 170.
[15] See *Caparo; Thake v Maurice* [1986] QB 644; *McFarlane v Tayside* [2000] 2 AC 59; *Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 139.
[16] *ABC*, para 173.

Next, citing *Montgomery*[17] Yip J gave some weight to the submission that the recognition of such a duty would not be "novel", but rather a "modest incremental step" as recognising that duty was in line with professional guidance.[18] Yip J thus concluded that it was "fair, just and reasonable"[19] to "impose on the second defendant a legal duty to the claimant to balance her interest in being informed of her genetic risk against her father's interest in preserving confidentiality in relation to his diagnosis and the public interest in maintaining medical confidentiality generally".[20] A duty of care was thus established between the second defendant and the claimant. The limits of that duty were also made clear, however:

> [T]he law is not imposing a new obligation on doctors or hospital trusts. Rather, the legal duty recognises and runs parallel to the professional duty to undertake a proper balancing exercise which all the experts in this case agreed already exists. The legal duty is likely to arise only in limited factual circumstances where there is close proximity between the at-risk person and the medical professionals. Even where such a duty does arise, it seems to me that the circumstances in which it will give rise to a cause of action will be rare…[21]

(iii) No Breach

Once a relevant duty had been established, the next question for Yip J was whether that duty had been breached. On this matter, Yip J emphasised that if that balancing exercise has been conducted properly, then the defendant's duty had been discharged.[22] Her evaluation of the second defendant's "balancing exercise"[23] here included an evaluation of the principle of confidentiality, which is not absolute.[24] Her judgment on this matter took into account, and arguably rested on, the clear lack of consensus among medical experts before her.[25] She thus concluded that:

> this was a difficult decision which required the exercise of judgment. The relevant guidelines for psychiatrists made it clear that confidentiality should not be breached unless the doctor was certain that this was in the public interest…. There was room

[17] *Montgomery v Lanarkshire Health Board* [2015] AC 1430.
[18] *ABC*, para 186.
[19] See *Caparo.*
[20] *ABC*, para 188.
[21] Ibid, paras 195-6.
[22] Ibid, para 193.
[23] See *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
[24] *ABC*, para 38; *W v Egdell* [1990] 1 Ch. 359.
[25] See *Bolitho v City and Hackney Health Authority* [1998] AC 232.

> for reasonable disagreement as to how the judgment should be exercised. That is demonstrated by the lack of consensus in the medical opinion before me. The claimant has not demonstrated that the views of the defendants' experts are illogical. I therefore conclude that the decision not to disclose was supported by a responsible body of medical opinion and cannot be considered to have amounted to a breach of the duty I have identified.[26]

Overall, Yip J held that the second defendant owed the claimant a duty of care to balance her interest of being informed of her father's diagnosis, with her father's interest and the public interest in maintaining confidentiality. Interestingly, Yip J made known that this duty applies to all HCPs in all settings regarding confidential information which could be disclosed to prevent serious harm.[27] However, she was clear that this duty was neither freestanding, nor a broad duty to all relatives regarding genetic information.[28] As the above balancing exercise had been carried out properly, however, that duty was held to not have been breached. Yip J also held that even if there had been a breach, ABC's claim would have not succeeded because causation could not be established, as "the claimant ha[d] not proved that she would have undergone a termination if notified of the risk [of HD] during pregnancy".[29]

D. A NOVEL CLAIM, A NOVEL DUTY OF CARE?

No clear inference can be drawn from this judgment regarding whether doctors have a duty of care to disclose genetic disorders to the relatives of their patients. Indeed, this judgment tells us little about whether a duty of confidence should be overridden by concerns of risk to others; it is clear that this judgement can only apply to very limited circumstances. This is not necessarily a negative outcome, however. Any more may have "eroded dangerously"[30] the duty of confidentiality. While this decision was not momentous in and of itself, the case was underpinned by an incredibly complex ethical and legal discussion that dates back years,[31] and it may have implications for years to come. The considerations in this judgment are noteworthy for the dual emphasis on patient confidentiality, and the importance of properly assessing potential harm to relatives when withholding genetic information. While the duty of

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[26] *ABC*, para 231.
[27] Ibid, paras 188-192.
[28] Ibid, paras 195-6
[29] Ibid, para 253.
[30] D Sokol, "ABC of medical confidentiality" (2020) *BMJ* 368.
[31] See for example G Laurie, *Genetic privacy: a challenge to medico-legal norms* (CUP, 2002).

care found is very limited in scope, it shows that the individualistic nature of tort in relation to confidentiality was undoubtedly strained by familial nature of genetic information in this case. [32] Indeed, as Dove commented on the Court of Appeal decision: "it demonstrates an appreciation of the nuances of social relations in the family and the practical difficulties clinicians face in the ethically fraught area of medical genetics."[33]

From Yip J's considerations, we can glean that there is indeed a duty for medical professionals to conduct a balancing exercise between the patient's and public's interest in maintaining confidentiality, and the interest of the patient's genetic relative(s) in being informed of a genetic disorder, where certain people outside of the doctor-patient relationship are at risk. While this duty clearly does not extend to a direct "duty to warn" relatives, however, it may do so if the balancing exercise (having been properly conducted)[34] falls in favour of the relative. HCP's discretion to do this is not novel; this decision in fact brings the law in line with current professional guidelines.[35] The judgment thus provides some legal clarity to HCPs, in that in the contexts where a question arises regarding whether to disclose confidential information to prevent serious harm, a proper balancing exercise must be conducted, the outcome(s) of which should be acted upon. This decision may thus be framed as confirming a "duty to consider" which, if anything, may enable HCPs to exercise their discretion more confidently without fear of legal action.[36] Importantly, this should not put any increased pressure on HCPs: Yip J noted "the pressures of day-to-day clinical practice" and that courts "will afford considerable latitude to clinicians taking difficult decisions in that context".[37]

E. CONCLUSION

[32] N Hawkins and T Hughes-Davies, "Striking a balance: resolving conflicts between the duty of confidentiality and duties to third parties in genetics" (2018) 38 Legal Studies 4 645, 655.
[33] E S Dove, "*ABC v St George's Healthcare NHS Trust and Others*: should there be a right to be informed about a family member's genetic disorder?" (2016) 44 Law Human Genome Review 91, 93.
[34] See *Bolam* and *Bolitho.*
[35] General Medical Council, *Confidentiality: good practice in handling patient information* (2017).
[36] See ES Dove, V Chico, M Fay, G Laurie, A Lucassen and E Postan, "Familial genetic risks: how can we better navigate patient confidentiality and appropriate risk disclosure to relatives?" (2019) 45 Journal of Medical Ethics 504 at 507.
[37] *ABC*, para 196.

The decision in *ABC* remains important insofar as it establishes a new duty of care, but its scope of application is limited by the unusually close proximity between the second defendant and the claimant. Arguably the degree of discretion afforded to HCPs here makes it unlikely that a breach will be found in the future. With that said, the applicability of these unusual circumstances to future actions in the England, Scotland, or elsewhere remain to be seen.

Catriona McMillan
University of Edinburgh