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Ethics and Loss of Chance in Medical Causation

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To many people the connection between the law and ethics is an obvious one. For laypersons, if asked to name a law most would instantly refer to the 'big ones'. In criminal law this would be Rape, Murder, Assaults and Theft and in civil this would most likely be Negligence, all of which have an ethical basis. For those who give further thought, laws pertaining no ethical basis become clear, for example the offence of selling a lottery ticket to a minor. The majority of these laws are based on regulation and preventing a social harm. The situation is far more difficult to justify, however, where there is an ethical basis behind the law but the law takes the opposite view.

An extremely succinct example is provided by Brazier and Cave[1]. Doctors and Nurses are under no legal duty to provide assistance if they witness a road accident, they can pass by without a fear of legal sanction. However, if they were to do so they have breached the ethical principle of beneficence. Thus it is clear that legally a far lower standard is expected of them.

Causation, Loss of Chance approach and the Gregg v. Scott decision

The law of causation is extremely complex and by far beyond the ambit of this polemic to discuss in full. Rather I will look at one aspect of causation within the context of Clinical Negligence. In this context of causation, it must be shown that a medical professional's breach of duty of care was either the cause of the injury or a significant factor bringing about that injury. It must be shown as both a factual and a legal cause. Factually it must be shown that 'but for' the breach the injury would not have occurred and legally that the damage suffered was not too remote.

Causation is never a straightforward element for a claimant to prove in an action for Clinical Negligence. It must be 'more likely than not' that the doctor brought about the harm rather than it being something that would have happened anyway. This brings us onto cases where the harm suffered is claimed to be the 'loss of chance'. Quite simply this means that the claimant has lost the opportunity to have been treated differently. The majority of the cases on this point arise where a doctor's misdiagnosis deprives his patient of the chance to recover from his ailment. The law stems from the Court of Appeal decision in *Hotson v. East Berkshire AHA*[2] in which it was held that a claimant must establish that there was a greater than 50% chance of complete recovery had the defendant not been in breach.

In 2004 a 'loss of chance' case reached the, as it was then, UK House of Lords. The case was *Gregg v. Scott*[3] and involved a GPs failure to diagnose his patient's lymphoma. In the delay of one year before being treated the patient's survival chances dropped from 42% to 25%. Their Lordships found, by a majority of three to two, in favour of affirming the *Hotson* decision and that the claimant had to prove that on a balance of probabilities the breach of

duty was the cause. Lord Hoffmann of the majority stated that to adopt 'possible causation' would be such a radical change as to require legislation.

It is submitted that their Lordships for the majority were misguided in their decision for the following reasons. It appears at first as though the decision is one based in law rather than ethics. It certainly is not an ethical decision, as will be discussed below, but nor is it of sufficient basis in law. First, the decision fails to take into account the thin skull rule (essentially 'you must take your victim as you find him' [4]), which is another element of causation. A doctor is now allowed to negligently misdiagnose any patient that confronts him with a sub-50% chance of survival. He can now say, if an action is brought against him, "I could not have been negligent, even if he has suffered a drop in his survival prospects, as it was more likely than not that he would die before I misdiagnosed him".

Second, the claimant's case, and therein the doctor's duty owed to him, rests solely on his pre-existing condition. The claimant can recover not on the basis of the harm suffered but on the state of his ailment at the time of the negligence. The effect being that a patient suffering a 10% drop in survival chances from 90% has a claim whereas a patient suffering a 40% loss of survival chances from 45% has no claim. This is so despite the fact that both have suffered harm and in truth the loss to the latter is far, far greater. One may perceive the law as backwards in this respect. It treats those less likely to survive as having no chance and thus any loss of chance as insignificant. Whereas in reality the less likely one is to survive the more important each per cent of chance will mean to that person.

Third, it is unclear why the balance of probabilities is required to apply to that aspect. It, in practice, fails to prove that harm is attributable to the actions of the doctor. The culpability of the doctor's actions could have been assessed by asking whether on a balance of probabilities the failure to diagnose caused the loss of X% chance of survival. One may argue that this would significantly increase NHS liability but this would be in error. It would still need to be established that the doctor was in breach of his duty and it is submitted that that is a better method of determining liability than finding breach but requiring a probability of survival beforehand.

The dissenting judgment of Lord Nicholls is an extremely powerful one, clearly he finds the decision as absurd as many commentators do, describing the approach as "irrational and indefensible". Due to the 'all-or-nothing' nature of causation, a claimant is either able to prove the breach was a significant cause or he cannot and thus has a claim or has not. His Lordship condemned the use of the approach in hypothetical cases, where the breach has precluded factual circumstances from materialising. It is submitted that if an approach whereby a 'balance of probabilities' had to be included, the correct approach would have been to require a loss of at least 50% (though this would still prove unjust).

What would the state of the law be had the case been decided ethically?

Rather obviously the doctor has failed to act beneficently; his negligence has caused harm to the patient regardless of the definition of that harm. Furthermore, the ethical principle of non-maleficence has not been followed. Even on the 'balancing' approach to non-maleficence, where harm is weighed against the benefit it gives, it is impossible to justify. It

may even be said that in failing to provide the correct diagnosis at the time the patient's autonomy has been compromised. The negligence of the doctor prevents the patient from ever making a decision as to treatment at that time. Instead he can only make a choice when circumstances have changed.

Therefore, arguably, the three most important principles directing the actions of medical professionals have not been followed. Were the law to approach the issue in this way, *Gregg v. Scott* would undoubtedly have been decided in favour of the claimant? Even if we accept that the law need not hold a standard as high as is held ethically, it is hard to justify there being no redress for the claimant.

Conclusion

The approach adopted in relation to these 'loss of chance' cases is clearly controversial. For the reasons discussed I believe this is because it lacks merit. Not only is it in practice absent of the legal basis it claims to have, it also permits ethical 'wrongs'. The unfortunate consequence of the decision is that doctors no longer owe a duty to correctly (as in 'non-negligently') diagnose those with less than a 50% prospect of recovery; and that patient is unable to claim redress for any breach of the fictional duty.

Adopting a measure of quantifying the loss in order to calculate damages in relation to the injury would not be so radical as to require legislation. It could be used relatively easily and the law would instantly be far more 'fair'. If Parliament were firmly opposed to the change they would be in a position to draft legislation to remove the ruling and it seems unlikely that they would reinstate a law that is clearly unjust. We would be afforded the best possible law.

Though ethics do not necessarily come into every piece of law, where they are present they should be taken account of. Actions which are clearly unethical in numerous ways should not be condoned, they should be outlawed, and it is the duty of the judiciary to do so. Failing to do so and hiding behind the mask of legal confines is merely opportunistic. In this writer's view, the Supreme Court should be praying for the chance to hear another 'loss of chance' case as soon as possible so that the majority is allowed an opportunity to make up for their error.

References

[1] Brazier, M. & Cave, E. *Medicine, Patients and the Law* 4th Ed. (Penguin Books: London 2007) at page 53

[2] (1987) 1 AC 750, see: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/1988/1.html&query=hotson+and+v.&method=boolean>

[3] [2005] UKHL 2, see: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2005/2.html&query=hotson+and+v.&method=boolean>

[4] Smith v. Leech Brain and Co. (1962) 2 QB 405