Novus Actus Interveniens: a critical analysis of Jenkinson v Hertfordshire CC [2023] EWHC 872 (KB)

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Introduction

1. *Jenkinson v Hertfordshire CC* [2023] EWHC 872 (KB*)* represents an intriguing change in clinical negligence law. Baker J has challenged the long-standing notion of the 'specific rule' in medical negligence cases. The ruling has sparked debate regarding the existence and applicability of the *novus actus interveniens* doctrine in this area.

2. This article aims to examine the origins of the specific rule and provides a critical analysis of Baker J's decision.

Factual background

3. *Jenkinson* involved a Claimant who suffered a severe fracture to his right ankle after stepping into an uncovered manhole or drain gully. The Defendant, Hertfordshire County Council, admitted liability for breaching the Highways Act 1980. However, a dispute arose over the subsequent surgical treatment of the Claimant's injury. The fixation of the Claimant's fracture failed within a few days. The Defendant's expert, Mr Machin, argued that the surgery was performed negligently. He concluded that "*had the initial surgery been carried out to the correct standard, then Mr. Jenkinson, in all probability, would have been able to return to work within 3 to 6 months post injury. He would have returned to the same job with minimal restriction and whilst he would have experienced some minor stiffness and ache this would not have prevented him carrying out his normal activities".* The Defendant sought to amend its Defence to include the *novus actus interveniens* treatment, contending that the chain of causation was broken by negligent treatment. Although this application was refused at first instance by DJ Vernon, Baker J in the High Court permitted this amendment for the reasons explored below.

The 'so grossly negligent' rule

4. Traditionally, the prevailing view in clinical negligence law is that subsequent medical negligence to an original tort could only break the chain of causation if it was deemed to be *'so grossly negligent as to be a completely inappropriate*' response to the original injury. In *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588, a majority of three to two in the House of Lords held that inappropriate treatment operated as a novus actus. Lord Reid, dissented. In his dissenting judgment Lord Reid considered that only a '*grave lack of skill and care'* in the provision of intervening medical treatment could serve to break the chain of causation. The editors of Clerk and Lindsell preferred Lord Reid's dissenting view and submit that *'only medical treatment so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant should operate to break the chain of causation.' (see paragraph 2-124).*

5. Lord Reid's approach was later affirmed by the Court of Appeal in *Webb v Barclays Bank pl*c [2002] PIQR P8. In *Webb*, the Claimant, an employee of Barclays Bank, stumbled and fell over a protruding stone in one of its forecourts. In the fall, she hyper-extended her left knee, which was affected by the consequences of polio she had contracted as a child. The knee was left in a grossly unstable condition. She received an above-the-knee amputation, based upon a recommendation which was negligently given as, in this factual matrix, amputation should only have been recommended as a last resort. Barclays had pleaded that the amputation and subsequent problems related to it were not caused or contributed to by their negligence but were solely due to the intervening negligence of the Claimant's treatment from the hospital.

6. The Court of Appeal disagreed with the Defendant finding that the negligent advising of the amputation did not *'eclipse the wrongdoing'* as it was not a '*completely inappropriate'* response, despite the clinician's conduct still arguably satisfying the conventional test for negligence. *Webb* was therefore considered a helpful framework for Claimants, sparing them from investigating every instance of medical negligence to pursue their claims.

DJ Vernon's decision

7. At first instance, DJ Vernon relied on *Webb* to conclude that only grossly negligent medical treatment could sever the chain of causation between the Defendant's original negligence and the Claimant's subsequent injuries. As DJ Vernon was of the view this had not occurred, he found that the Defendant had not shown a real prospect of establishing a

necessary ingredient of the proposed defence. Permission to amend the Defence was therefore refused.

Baker J's challenge

8. In the High Court, however, Baker J challenged the existence of this specific rule. He considered that the normal rules of causation should apply to clinical negligence and that the chain of causation also applies according to standard principles. Baker J opined that there was no logical justification or policy reason for creating a distinct rule in cases of negligent medical intervention. He argued that the continuation of such a rule would lead to 'litigation within litigation,' as determining when treatment becomes a grossly inappropriate medical response would be an unnecessarily onerous and complex task.

9. In order to arrive at this conclusion, Baker J examined the authorities and disputed the proposition that a specific rule of law existed to medical treatment being 'so grossly negligent' as to constitute *novus actus interveniens*. Expanding on his reasoning Baker J provided that: '*Without the constraint of the 'specific rule' as a principle of law, in my judgment there is a real prospect on the basis of Mr Machin's opinion, if accepted at trial, of a finding that the claimant's initial injury, admittedly the result of the defendant's negligence, was so badly mistreated that the defendant ought not, in fairness, to be considered responsible for the consequences of that mistreatment.'*

10. Baker J's decision is arguably more consistent with the approach taken in *Rahman v Arearose* [2001] QB 351, a case decided a month before *Webb*. In *Rahman*, the Claimant experienced an assault during the course of his employment for which his employer was held responsible. The Claimant suffered a fracture to the orbital wall of his right eye. Surgery carried out by way of bone graft (to prevent the eye from sinking in its socket) was performed negligently which resulted in blindness in that eye, as well as psychiatric consequences due to both the assault and loss of sight. It was agreed that the negligent execution of the surgery, causing blindness, for which only the NHS Trust was responsible for.

11. Laws LJ stated that '*it does not seem to me established as a rule of law that later negligence always extinguishes the causative potency of an earlier tort...The law is that every tortfeasor should compensate the injured claimant in respect of the loss and damage for which he should justly be held responsible.*'

12. It was further stated in *Rahman* that there was '*nothing in the way of a sensible finding that while the second defendant obviously (and exclusively) caused the right-eye blindness, thereafter each tort had its role to play in the Claimant's (psychological) suffering*.' The Court therefore found that the first defendant was held responsible for some of the damage beyond that which the Claimant would have suffered in any event had the surgeon not acted negligently.

13. As Baker J noted, *Rahman* in the Court of Appeal was not, however, a decision against the Specific Rule since the point was not taken.

14. The amendment of the Defence was therefore permitted. In his ruling, Baker J effectively reframing the test, suggesting that the focus should be on whether the Claimant was '*so badly mistreated'* that it would be unfair to hold the Defendant responsible for the consequences of that mistreatment. This revised test aims to assess the severity and appropriateness of the medical intervention, rather than relying on arbitrary standard of gross negligence.

Implications

15. Unless successfully appealed, Baker J's decision has far-reaching implications for practitioners. Critics argue that his departure from the established 'so grossly negligent' rule disregards the need for a clear standard in determining when medical treatment breaks the chain of causation. However, others are of the view that the High Court decision '*must be correct'* and that there is no genuine reason as to why clinical negligence law should have its own special category.

16. In light of this decision, practitioners in the future will need to consider any subsequent medical treatment undertaken by the Claimant in greater detail. In the short term, one may see a flurry of applications, for example with the Defendant applying to amend their Defences in cases where the issue of Novus Actus Interveniens had not previously been taken and Claimants applying to join the medical profession as a Second Defendant.

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