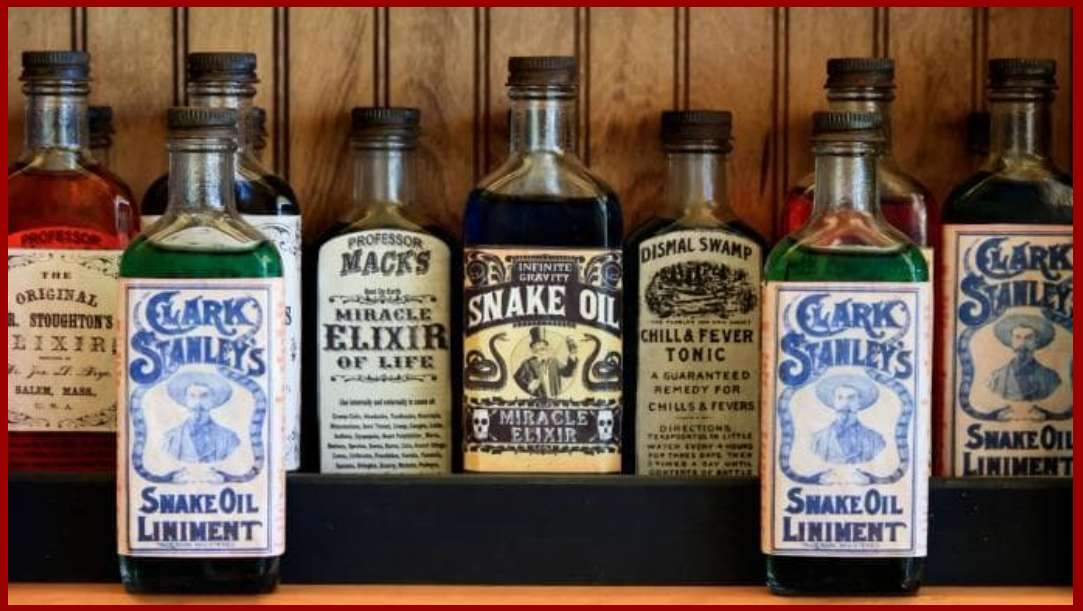

NINESTJOHNSTREET
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Contentious Medical Treatment Post Injury

Matthew Snarr
7.7.21

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Introduction

- Disputatious events post injury
- Predominantly concerning surgery / medical treatment
- Viewed through the prism of elective amputations
- Choice:
  - Novus actus
  - Contributory negligence
  - Mitigation – the touchstone for medical treatment
- Refusing contentious surgery
- Bad advice – the legal consequences
- Actively pursuing contentious surgery / treatment options
- Provisional damages: contentious surgery
- Practical guidance: (contentious) elective amputations

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Choice

"Any customer can have a car painted any colour that he wants so long as it is black."

Henry Ford on the Model T Ford, 1909.

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Choice: Novus Actus – post injury

McKew v Holland [1969] 3 All ER 162

- Mr McKew suffered a left leg injury resulting in intermittent weakness sometimes causing his leg to give way.
- During his claim he descended a steep set of stairs and his leg gave way, with no handrail, he found himself falling and so jumped fracturing his ankle badly.
- HL held his conduct in descending without a handrail and without adult assistance [also (per Lord Guest) for jumping], was a novus actus breaking the chain of causation.
- Lord Reid at 1623 E-I:

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Choice: Novus Actus – post injury

"A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee. What can be foreseen depends almost entirely on the facts of the case, and it is often easy to foresee unreasonable conduct or some other nouvs actus interveniens as being quite likely. But that does not mean that the defender must pay for damage caused by the nouvs actus. **It only leads to trouble that if one tries to graft on to the concept of foreseeability some rule of law to the effect that a wrongdoer is not bound to foresee something which in fact he could readily foresee as quite likely to happen.** For it is not at all unlikely or unforeseeable that an active man who has suffered such a disability will take some quite unreasonable risk. But if he does he cannot hold the defender liable for the consequences."

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Choice: Contributory negligence – post injury

The Law Reform (Contributory Negligence) Act 1945 s.1 provides:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

…

"The line between a set of facts which results in a finding of contributory negligence and a set of facts which results in a finding that the "unreasonable conduct" of the claimant constitutes a novus actus interveniens is not, in my view, capable of precise definition."

Aikens LJ §45 **Spencer v Wincanton [2009] EWCA Civ 1404**

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Choice: Contributory negligence – post injury

Spencer the facts:

- Serious knee injury leading to amputation.
- Automatic car capable of being driven with one good leg but not fully adapted for prosthesis.
- Visit to petrol pump. Car filled standing on 1 leg with no walking aids, trips on manhole edge.
- Serious injury to remaining good leg. Permanently in wheelchair.
- D argues not liable, novus actus and/or contributory negligence.
- Trial judge finds **1/3 contributory negligence.**
- CA **uphold judge's decision**, agreeing with HHJ Bullimore's analysis – see overleaf.

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Choice: Contributory negligence – post injury

Spencer the judgment at first instance [HHJ Bullimore]:

- **"[91] The Claimant was carrying out an everyday task that he had done a number of times before without incident. He was seeking to act without reliance on others; in general terms his determination to live his life as normally as possible is to be commended. His conduct fell far below what could be described as McKew unreasonable. Insofar as the way he went about the task should be taken into account, that is a matter of contributory negligence.**

- **[92] It is accepted that the fact that the Claimant only had one leg was a factor in the accident. Because of that the Claimant was more vulnerable to a trip or slip with his good leg, than a two legged man, who would be better able to recover his footing if he tripped or stumbled. Mr Nolan submits that it was unforeseeable to the Defendants or their driver that the Claimant would fall while hopping round his car, just as it was unforeseeable he would lose his leg, and if it was unforeseeable that is an end of the case. That in my view places too much emphasis on what exactly is to be foreseen. The direct result of the first accident was the loss of the leg. A one-legged man is less stable: it is foreseeable that in going about his daily business a one legged man is more vulnerable to trips and slips than a two legged man. It is quite unnecessary to ask if the Defendant, who would be bound to acknowledge that, could or should have also foreseen the trip occurred when the Claimant was filling his car with fuel.**

- **[93] I have no difficulty in concluding the Defendant ought to be liable for the effects of the second accident. It was responsible for the wrongdoing of the other driver, which led to unexpected but directly caused injury to the Claimant, as a result of which he lost his leg. That factor was a primary cause in the events surrounding the second accident. It is fair and just old the Defendants responsible for that."**

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Choice: Mitigation of loss

- A Claimant is under a **duty to mitigate** the losses resulting form the Defendant's tort.
- Damages are **not recoverable** for such losses as the Claimant has **avoided** by talking action subsequent to the tort.
- The general principle of compensation implies that s/he can claim only for losses actually sustained, this will include losses that might have **reasonably been avoided**.
- **The onus is on the Defendant** to show that the Claimant failed to mitigate and much will depend on what the Court regards, in the circumstances of the case, as reasonable.
- While an injured person must reasonably seek medical care, s/he need not submit themselves to a surgical operation involving some **substantial risk** or of which the outcome is **uncertain**.

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Choice: Mitigation of loss

- Sir John Donaldson MR in **Sotiros Shipping Inc v Sameiet Solholt [1983] 1 Lloyd's Rep 605 at 608**, said:

"A plaintiff is a under **no duty to mitigate** his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss **as is properly to be regarded as caused by the defendants' breach of duty**."

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Elective Procedures: Refusal

Savage v T Wallis Ltd [1966] 1 Lloyd's Rep. 357 (CA)

- The Claimant suffered a fractured skull. He suffered a series of epileptic seizures and mental deterioration.
- The doctors disagreed as to whether a slight operation would get rid of the Claimant's headaches.
- At first instance Sachs J held that he had failed to mitigate his loss by undergoing surgery to stop his headaches.
- Described in the Court of Appeal judgment as 'a small operation (just, I think, to one or two nerves)'. The suggested operation was to ameliorate the effects of cervical spondylosis which were suspected by the Defendant as the cause of the headaches.
- The Claimant's doctor's preference was hypnotism or to wait and see if they wore out over time.
- On appeal it was held that the Claimant in refusing surgery did **not** fail to mitigate his loss.
- The alternative view of his medical expert represented a **reasonable**, **alternative choice** to the suggested treatment.

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Elective Procedures: Refusal

- The determining factor in whether a Claimant is either correct to undergo or correct to refuse to undergo treatment is determined by what is **reasonable**.

- Of course, a Claimant's choice is always their own to make. Provided they receive **proper advice** about the **consequences** of their choices they are always free to make the choices they wish.

- The early tort law cases from the early to mid 20th Century tended to reflect arguments by the tortfeasor that the Claimant **ought** to undergo surgery or medical intervention which would resolve or significantly ameliorate the effects of their (sometime very serious) injury and that their failure to do so should be held against them on the grounds of a failure to mitigate.

- This has waned with both societal and legal developments in the late 20th Century and early 21st Century adopting a less patriarchal and paternalist approach to medicine and the patient.

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Elective Procedures: Refusal

- In **Fyfe v The Fife Coal Co Ltd [1927] SC (HL) 103**
- C suffered a serious injury to his left arm at work. He developed a neurasthenia.
- The medical expert advised treatment under a nerve specialist in hospital.
- He opined that although C was totally incapable of work had he undergone the treatment he would have been fit for light work.
- C refused on the advise his own doctors. C's doctors advised he was unable to travel and that treatment would be injurious because his condition has previously deteriorated owing to his dread of treatment in a nursing home.
- C was able to travel to Court in an ambulance without issue and stated in evidence he had not objection to treatment in hospital but was following the advice of his own doctors. His doctors did not object to the proposed specialist.
- The Court found C was an intelligent man capable of weighing up the options and that the refusal to undergo the hospital treatment was **unreasonable**.
- Judgment was upheld on appeal despite criticism of the Court confounding the date of the decision not to undergo surgery with the evidence gleaned during the trial but the Lords were focused on the ability of the Claimant to exercise a reasonable choice which was held he was perfectly able to but had not.

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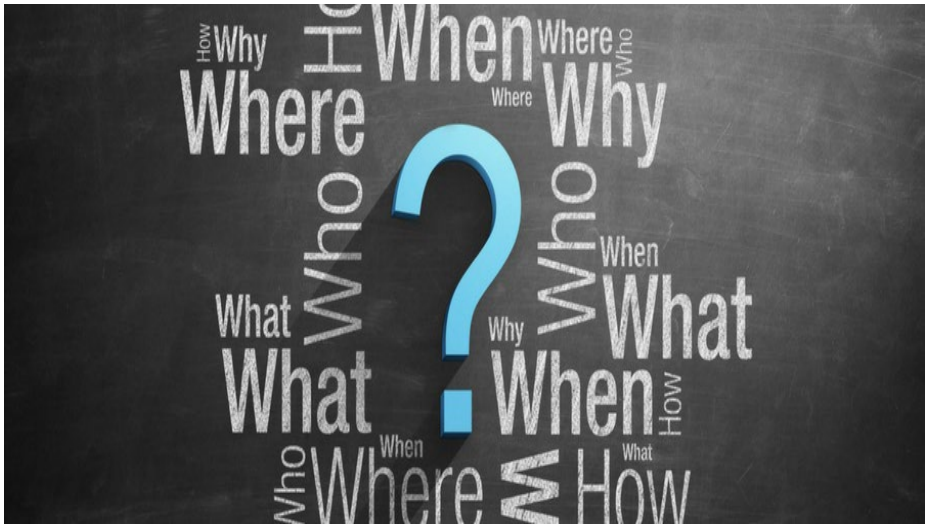
Elective Procedures: Refusal

- In **Fyfe** Viscount Dunedin was clear (at page 106) that:

"The whole question of whether a refusal is reasonable or unreasonable is an absolute matter of fact"



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ELECTIVE PROCEDURES: REFUSAL

- In **Steele v Robert George & Co Ltd [1942] AC 497**
- Mr Steele suffered a comminuted fracture to his left ankle.
- The case turned on whether he unreasonable refused to undergo surgery.
- His treating surgeon advised an operation which it was said would stiffen the joint to relieve pain and provide him with a strong and stable joint. The risks of the operation were no different to any normal surgery and an excellent outcome was anticipated.
- Another surgeon confirmed the treating surgeon's view.
- Mr Steele consulted a third surgeon who advised against the operation.
- Trial judge held **reasonable** not to pursue surgery.
- The Court of Appeal **overturned**. Unreasonable as Q of fact. Reasonable as Q of law. Trial Judge misdirected himself.
- The House of Lords overturned the Court of Appeal. It was a pure question of fact on which the Judge had properly directed himself. **C had not behaved unreasonably.**

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Elective Procedures: Refusal

- In **Steele v Robert George & Co Ltd [1942] AC 497**

1. The onus of proving a Claimant's refusal to undergo surgery or treatment is not reasonable rests with the Defendant.

2. Where the Claimant has been advised against surgery or treatment by a competent doctor in the requisite field.

3. The Defendant will only be able to discharge the onus of proof if they adduce an extremely strong body of medical opinion in favour of the surgery or treatment.

- The House of Lords in **Steele** were wary of endorsing the notion that unless the advice given to the Claimant by his treating doctor or medical expert suitably skilled in the requisite field was negligent it would not be unreasonable to follow the advice. They preferred to endorse the maxim in **Fyfe** that this was a question of fact for the Court to decide.

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Elective Procedures: Refusal

- In **McAuley v London Transport Executive [1957] Lloyd's Law Rep 500**
- Two accidents. (1) Right Wrist. (2) Left wrist - Severe ulnar nerve
- Surgery proposed by D medical expert evidence that had 90% chance of restoring gross movement and 35% chance of fine movement
- C expert in favour of the surgery but not strongly (less specialist or experienced)
- C wanted to resolve claim first for right wrist
- 1st instance: **unreasonable** refusal of surgery
- Court of Appeal: upheld
- C should not ignore the advice of D's doctor
- C not advised by any doctor not to have the operation
- Per Jenkins LJ

"***If he received medical advice to the effect that an operation will have a 90 per cent chance of success, and is strongly recommended to undergo the operation and does not do so, then the result must be, I think, that he has acted unreasonably.***"

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Elective Procedures: Refusal

Geest Plc v Lanisquot [2002] UKPC 48

- C injured back
- Prolapsed disc L4/5
- C underwent surgery but suffered relapse
- No guarantee second surgery would work
- C decided not to undergo surgery
- D argued failure to mitigate by declining to undergo
- Court held operation probably would have succeeded + **C unreasonable**
- Trial judge held by previous authority (**Selvanayagam v University of the West Indies [1983] 1 WLR 585**) burden was on C to prove refusal was reasonable.

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Elective Procedures: Refusal

Geest Plc v Lanisquot [2002] UKPC 48

- Privy Council at [15]:

"There is **nothing** in the evidence to suggest that she was put in a position to make so momentous a personal decision **in a rational way**, still less that it was **unreasonable** of her to prefer to bear the ills she had than **fly to others that she knew not of**. While Mr Seale was prepared to support her decision if she decided to have surgery, he was plainly ready to respect her decision if she decided against. On the limited material before the judge **it could not properly be held that the plaintiff's decision was unreasonable**, as the Court of Appeal correctly ruled."

- Privy Council: **critical** of lack of evidence as to prospects of success / deterioration / worst possible outcome – needed to make an assessment before suggesting C's decision was unreasonable

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Elective Procedures: Negligent Advice

Webb v Barclays Bank plc [2002] PIQR P8

- C having sustained a knee injury during the course of her employment. She was subsequently negligently advised to undergo an above knee amputation.
- The Court of Appeal held that the negligent advice was not sufficient to break the chain of causation.
- The employers were held liable for all the damage attributable to the original fall and 25% liable for the ramifications of the amputation with the remaining 75% being discharged by the relevant NHS Trust.
- The Court of Appeal essentially held that only grossly negligently medical advice would break the chain of causation, see paragraph 56.

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Elective Procedures: Intention to Proceed

Standing back – <u>future</u> surgery / treatment

- Same broad test of mitigation likely to apply – **reasonableness**, question of fact
- The difficult cases:
- C has psychiatric involvement (somatoform)
- D disputes the legitimacy of the underlying diagnosis i.e. CRPS
- C's surgeon lacks expertise / moves very quickly / is very radical
- If C undergoes the surgery – the argument is crystallized
- It's generally difficult to argue decision to **amputate** (for example) is unreasonable or unconnected to original injury (but each case turns on its facts)
- If not undertaken surgery than percentage will apply in terms of (a) likelihood of pursuing the surgery (b) likely outcome. The Court will have to assess the chance and reflect within the damages. It may be moved to find such surgery is inevitable.

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Elective Procedures: Provisional Damages

Provisional Damages – what about when they are not available?

- These are the difficult cases, they are always fact specific.

32A Senior Court Act 1981 (Provisional Damages)

- (1)This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.

1. Has C suffered personal injury?
2. Does C face a chance or risk?
3. Does that risk involve a serious disease or suffer a serious deterioration in his/her mental of physical condition?
4. Should the Court exercise its discretion?

An order for PD must specific the precise nature of the disease or deterioration which must occur before C can seek further recourse to the Court

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Elective Procedures: Provisional Damages

Butler v MOJ [2015] EWHC 3384 (QB)

- C (42yrs) suffers injury to right foot
- Fractured (R) 5th metatarsal + cuboid bone
- Fusion operation (5 yrs pre-accident) and (again) post accident
- Fractures partially united but significant neuropathic pain – could not weight bear
- Options (a) leave alone (b) remove metalwork (c) amputate below knee
- C developed CRPS in (R) foot
- Experts agreed pain due to retained metalwork, ongoing non-union & bio-mechanical imbalance

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Elective Procedures: Provisional Damages

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Elective Procedures: Provisional Damages

Butler v MOJ [2015] EWHC 3384 (QB) cont.

- C decided not to undergo amputation (at present)
- Experts agreed 25% chance of future amputation
- Experts agreed amputation would give 70% chance of improvement in symptoms
- Experts agreed 30% chance of a worse outcome post amputation i.e. a 7.5% (25% x 30%) risk of deterioration by reason of CRPS, phantom limb pain or failure of the stump to heal.
- D argued worse than expected outcome is not within ambit of PDs or limit time to return to 2-3 yrs

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Elective Amputations: During Currency of Litigation

Headline focus points:

- Time – considered opinion, a measured pace (C's pace). Stay of proceedings.
- Expertise – treating surgeon, medical expert and 2nd opinion.
- Experience – consultant in rehabilitation, other amputees, prosthetics and psychologist.
- A clear pathway beyond amputation – support, prosthesis and work.
- Money – pays for all of the above, split trials (liability) and interim payments.

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Conclusions

- It is always the Claimant's choice. The lawyers advise, the Claimant decides.
- If a Claimant relies on competent medical opinion then it will be hard to establish that they have acted unreasonably in refusing to undergo surgery or indeed to pursue surgery.
- One should never underestimate the prospect of a worse outcome with surgery or treatment.
- Surgery or invasive procedures are by their very nature a greater intrusion into the personal autonomy of the Claimant. There is less authority on disputatious treatment proposals but that does not mean that the arguments are any less relevant to the overall outcome in damages.
- Treatment is often a question of funding and timing. The earlier the better. Most Claimants are keen but some are not always understand their individual choices.
- There are some circumstances in which a Claimant may struggle to bring a claim for provisional damages and will have to elect either to undergo a specific surgical procedure or not (i.e. elective amputation).
- Life changing surgery may be the most important decision the Claimant makes in their life. Time is needed. Advice is required from medical professionals with relevant expertise. Money will be required.

And now for the football…

WWW.9sjs.com

Matthew.Snarr@9sjs.com

0161 955 9000

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Matthew Snarr
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