Case No: HQ14X00234

Neutral Citation Number: [2017] EWHC 1495 (QB)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2017

**Before** :

**HIS HONOUR JUDGE FREEDMAN**
**(Sitting as a Judge of the High Court)**

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**Between :**

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| **LUCY DIAMOND** | **Claimant** |
| **- and -** | |
| **ROYAL DEVON & EXETER NHS FOUNDATION TRUST** | **Defendant** |

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**Mr Robert Kellar** (instructed by **Taylor Rose**) for the **Claimant**
**Mr Henry Charles** (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 8-12 May 2017

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# Judgment

**HHJ Freedman :**

***Introduction***

1. This is a clinical negligence claim relating to spinal fusion surgery performed by Mr Khan on 6th December 2010; and abdominal hernia repair surgery performed by Mr Wajed on 28th June 2011.

2. At the outset of the trial, there were three separate and distinct allegations. The first of these – namely, that it was *Bolam*/*Bolitho* negligent to use vicryl to close the abdominal wound – fell away by the end of the trial and, indeed, Mr Kellar on behalf of the claimant expressly withdrew this allegation. In the light of the evidence which was adduced on this issue, that seemed to me to be a very sensible course to adopt. Moreover, I had expressed the view (when giving preliminary indications at the invitation of counsel) that the Claimant was highly unlikely to establish a breach of duty in relation to the choice of suture material.

3. There remain, therefore, two limbs to the Claimant's case:

    i) Mr Khan's alleged failure (in response to complaints of abdominal distension) to examine the Claimant's abdomen at a review appointment on 21st January 2011 ("first issue").

    ii) Mr Wajed's failure to ensure that the Claimant had given informed consent before proceeding to repair the hernia with a mesh ("second issue").

***Background***

4. The Claimant, who was born on 11th September 1971 and is, therefore, now aged 45, has an extensive history of chronic back pain. On 6th December 2010 at the Royal Devon & Exeter Hospital ("the hospital"), Mr Khan carried out spinal fusion surgery. Unhappily, although there was some improvement in her back pain initially, in the longer term, the surgery appears to have been of limited benefit. The Claimant continues to complain of significant back pain.

5. The relevance, however, of the surgery in the context of this claim (as now advanced) is that the Claimant developed a post-operative incisional hernia. This is a very rare complication following this type of surgery, where a left-sided retroperitoneal approach is used.

6. The hernia was provisionally diagnosed on 11th March 2011 by Dr David Cumming when reviewing the Claimant in out-patients at the hospital. He noted "*significant swelling over the anterior abdomen especially on the left side*". An ultrasound carried out on 4th April 2011 confirmed this diagnosis. Meanwhile, the hernia continued to grow and become more painful (particularly around the groin) and more unsightly.

7. On 9th May 2011, the Claimant saw Mr Wajed (General Surgeon) at the hospital. He resolved to repair the hernia, carrying out an open (as opposed to laproscopic) mesh-based repair with abdominal wall reconstruction. He explained that this would either be a large synthetic mesh or if a "tension-free" closure could not be achieved, a biological mesh would be necessary.

8. Regrettably, there followed some delay in the surgery being performed. The Claimant sought to expedite matters by visiting her GP on 1st June 2011.

9. The surgery was eventually carried on 28th June 2011 by Mr Wajed. He found a "*large incisional hernia"*. The divided recti were closed and a large prolene mesh was secured with protacks.

10. Following this surgery, the Claimant continued to complain of abdominal swelling and pain. She was advised to undergo another surgical procedure involving abdominoplasty. Unfortunately, there was a delay in obtaining the necessary funding. It was not until 5th August 2014 that the surgery was performed, this time by Mr & Mrs Jones. The mesh was removed, the hernia was repaired with a single stitch and a full abdominoplasty was then undertaken.

11. Unsurprisingly, all that the Claimant has had to endure has adversely affected her mental health, as well as her physical wellbeing. She has suffered depression and anxiety. She has not been able to resume her career as a singer although she hopes to do so in the near future. Having commenced a university degree in psychology, she has had to take two years out. She is, however, due to resume her studies in September of this year. Coupled with these matters, having established a relationship with her now partner, Andy Labram, she wanted to explore the possibility of having a second child (her first child, Rosie, is aged 14). For reasons which will emerge later in this judgment, that proved not to be possible.

***First Issue: Breach of Duty***

12. It is the Claimant's case that at some time in early January 2011, the swelling in her stomach became more pronounced on the left side, below her umbilicus. Prior to this, on 30th December 2010, she had contacted her GP because of back pain and a concern about the distension of her stomach. This resulted in an admission to hospital over a period of two days. No hernia was identified or apparently suspected prior to her discharge from hospital. Accordingly, it is reasonable to assume that it was not present at that time.

13. In January 2011, the Claimant was staying at her mother's home in Devon. On 21st January 2011, the Claimant saw Mr Khan at the hospital for her six-week post-operative check up. As she explained at paragraph 35 of her first witness statement: "*I asked Mr Khan how long my stomach would be swollen as much to which he replied with a shrug of his shoulders and did not proceed to examine it*".

14. Her mother confirmed that prior to this consultation with Mr Khan, she had noticed that her daughter had an "*obvious deformity of the left side of her abdomen*". She had encouraged her daughter to raise the matter of the abdominal swelling with Mr Khan. She was able to recall that the Claimant told her that Mr Khan seemed disinterested in this problem and merely shrugged his shoulders.

15. Mr Khan did not deny that the Claimant had mentioned the problem with her stomach: perhaps not surprisingly (and in the absence of any contemporaneous note) he could not recall one way or the other whether this problem had been flagged up by the Claimant. But he did agree that his main concern was in relation to the Claimant's back and leg.

16. As I made clear, when I gave my preliminary indications, I found the evidence of the Claimant and her mother on this issue to be persuasive. On reviewing the evidence, my assessment remains unchanged. Furthermore, Mr Charles on behalf of the Defendant in his admirably succinct written closing submissions, confirmed that the Defendant was not intending to seek to dissuade the court from its preliminary view that the Claimant had mentioned a problem with her stomach at this consultation; and that, at that time, the hernia was present.

17. Having made those factual findings, the inevitable consequence is a finding of breach of duty. The joint experts, Messrs Lee and Crawshaw, in their joint statement stated that:

> "*We both agree that if the court accepts the Claimant reported to Mr Khan that there was a problem with the wound then Mr Khan should have examined the wound and failure to do so would fall below acceptable standard.*"

Again, helpfully, Mr Charles in his written closing submissions effectively accepted my preliminary finding of a breach of duty.

***First Issue: Causation***

18. The Defendant does, however, dispute causation. In short, it is said that the missed opportunity to diagnose or suspect a presence of the hernia on 21st January 2011 did not result in any delay in surgical treatment. Mr Charles relies on the chronology. Following the consultation on 11th March 2011 he makes a point that Dr Cumming made no reference to any symptoms although he did of course describe "*a significant swelling*". On 6th April 2011, the Claimant emailed Mr Khan explaining that the ultrasound scan had shown "*a massive incisional hernia*" and asking if he could help to *accelerate* the repair surgery. The appointment on 9th May with Mr Wajed was expedited because of the Claimant's symptoms. Similarly it is the case that the surgery on the 28th June 2011 was expedited. It is submitted that the timeline would have been the same even if the problem had been picked up at the consultation on 21st January 2011 and, in particular, the pressure to accelerate treatment would not have occurred any earlier than in fact was the case.

19. In my judgment, logic and common sense dictate that if (as she should have been) the Claimant had been referred for an ultrasound scan after the review appointment on 21st January 2011, the whole process would have been expedited. On the basis of what actually occurred, it is likely that the diagnosis would have been made in February, a referral to a general surgeon would have followed, with an examination in March. By early April the Claimant would have been complaining of very significant pain and discomfort. The result, on a balance of probabilities, would have been that surgery would have been undertaken approximately two months before the time when it was in fact carried out.

20. Accordingly, in my view, on the balance of probabilities, the breach of duty on the part of Mr Khan caused the Claimant to suffer additional pain and suffering over a period of approximately two months. Additionally, by reason of the delay in surgery, the hernia was permitted to increase in size although this cannot be measured in any meaningful way. I shall consider quantum at the conclusion of this judgment.

***Second Issue: Breach of Duty***

21. The discussion with Mr Wajed in relation to the treatment of the Claimant's hernia took place on 9th May 2011 at the hospital. It is common ground that Mr Wajed talked only in terms of a mesh repair, whether a prolene mesh or, if the muscle damage was too extensive, a biological mesh; and that he made no reference to the possibility of a primary sutured repair.

22. There is, however, a dispute about what, if any, discussion took place in relation to the Claimant's intentions as to becoming pregnant in the future. Mr Wajed, in his witness statement at paragraph 12 said:

> "*She made it very clear to me on detailed discussion that she was not contemplating further pregnancy in the immediate or the foreseeable future.*"

However, in a letter which he wrote to Mr Khan following the consultation, there is no reference at all to the Claimant's plans in relation to any future pregnancy, nor indeed to the fact that she had a 9-year-old daughter. This is despite his assertion at paragraph 49 of his statement that the fact she was not contemplating a further pregnancy was "*alluded to in the clinic* (sic) *letter of 9 May 2011*". At all events, given the lapse of time, in the absence of any documentary evidence to support what he says, I find it hard to accept that Mr Wajed has an independent recollection of what the Claimant said, or did not say, about future plans for pregnancy.

23. It follows that I prefer the Claimant's account to the effect that she was not asked by Mr Wajed whether she planned to become pregnant in the future. In the end, however, this factual dispute is of little, if any, relevance because even on Mr Wajed's account, the Claimant had only said that she had no plans for a pregnancy in the foreseeable future which he took to mean within the next few months.

24. Mr Wajed agrees that he did not discuss at all with the Claimant the potential implications of a mesh repair in terms of a pregnancy in the future. On the basis of the expert evidence from both the Claimant's expert, Professor Winslet and the Defendant's expert, Mr Royston, there is general consensus that the Claimant should have been counselled about the potentially adverse effects of a mesh being present in pregnancy. Indeed Mr Wajed himself agrees that if there was a prospect of a pregnancy in the future, the risks associated with a mesh repair needed to be discussed.

25. In such circumstances, it is unsurprising that Mr Charles does not seek to argue against the preliminary view which I expressed to the effect that there was a lack of informed consent. Putting it shortly, on the basis (as I find) that Mr Wajed could not reasonably have excluded the prospect of a pregnancy in the future, to fail to mention the risks associated with the presence of a abdominal mesh amounted to a breach of duty.

26. Similarly, Mr Charles does not seek to dissuade me from the view that Mr Wajed was under an obligation to mention the possibility of a primary suture repair. On the totality of the expert evidence, it is agreed that the Claimant should have been told that this was an option and, a possible alternative to, a mesh repair.

27. I am quite satisfied that the reason why Mr Wajed did not mention it was because he himself was convinced, or at least thought it highly likely, that a suture repair would fail with the result that the hernia would recur. Nevertheless, both Professor Winslet and Mr Royston maintain that the Claimant should have been informed that there was a possible alternative to a mesh repair.

28. Accordingly, in two respects, I find there was a breach of duty in relation to the counselling process for the mesh repair:

    i) it should have been explained to the Claimant that there was attendant upon a mesh repair certain risks, should she become pregnant in the future; and

    ii) the claimant should have been told a primary suture repair as opposed to mesh repair was possible even if there was a high risk of failure.

***Second Issue: Causation***

29. In order to determine what would have been the likely outcome but for Mr Wajed's failures, as identified in paragraph 28 above, it is necessary to look at what Mr Wajed would have in fact have told the Claimant then to apply the *Bolam/Bolitho* test and decide whether, objectively, such would have complied with the duty which he owed the claimant.

30. In relation the first matter, Mr Wajed agreed that if he had been specifically asked about what impact the mesh might have on any future pregnancy, he would have said something along the lines of what appears in his letter dated 3rd September 2013 sent to the Claimant's GP. This letter was written after the examination on the 2nd December 2013 following a referral by the Claimant's GP. The referral came about because the Claimant was complaining of discomfort in the lower part of the wound, but at the consultation the Claimant also asked Mr Wajed about becoming pregnant. He said this:

> "*She asked me about pregnancy today and I think, although not completely contraindicated, given her previous abdominal surgery there will have to be some cautions* (sic) *as the mesh may restrict the growth of the uterus causing possible early delivery. There is also the risk that if she requires an emergency caesarean section that access to her abdomen may be difficult in the presence of the mesh and certainly there is a possibility that after the pregnancy the mesh and abdominal wall may be disrupted…*".

31. It is therefore reasonable to infer that, at the consultation in May 2011, had Mr Wajed turned his mind to the issue of pregnancy, he would have told the Claimant that the mesh would not mean that she could not become pregnant. However, he would have been obliged to point out that there were certain risks namely:

    i) the mesh restricting growth of the uterus, possibly resulting in early delivery;

    ii) if a caesarean section was required, access to the abdomen could be difficult in the presence of the mesh;

iii) after the pregnancy the mesh and abdomen wall could be disrupted.

It is also likely that he would have added in the event that if she was contemplating becoming pregnant, it would be prudent to consult a gynaecologist.

32. Mr Royston agreed that what appeared in the letter of 3rd September 2013 was broadly what he should have told the Claimant. Professor Winslet, in his evidence went into more detail about the risks associated with a mesh repair in the face of a pregnancy, but he appeared to agree that the general thrust of what was set out in Mr Wajed's letter would suffice by way of warning of the risks.

33. At all events, having heard from Mr Wajed, Mr Royston, and Professor Winslet, I am entirely satisfied that if Mr Wajed had pointed out the matters which I have summarised at paragraph 31 above, he could not have been criticised. Whilst other surgeons, including Professor Winslet might have gone into more detail, there would have been no question of *Bolam/Bolitho* negligence if Mr Wajed had confined himself to the matters raised in the letter raised on 3rd September 2013. What he would have said would have been well within the range of the advice given by reasonably competent general surgeons. Accordingly, I find that what Mr Wajed would have said if asked about the risk of pregnancy was sufficient to allow the Claimant to give informed consent, subject of course to being offered the choice of a different surgical procedure.

34. As to an alternative surgical procedure, Mr Wajed was emphatic that he considered that the primary suture repair would fail. In his supplementary witness statement dated 11th April 2017, he said:

> "*Sutures alone would not have provided a sound and durable repair as the quality of her abdominal wall tissue was very poor. This was evident both clinically and on the scans… In my opinion the risks of recurrent hernia from a simple suture repair were very high – in the region of 50% within two years and inevitable in the course of her natural life. Therefore, I did not consider this was a viable option for the Claimant.*"

35. Professor Winslet considered the risk of hernia recurrence with a suture repair was in the order of 30%. However, he was willing to defer to Mr Wajed's pre-operative clinical assessment. He accepted in cross-examination that Mr Wajed would have been entitled to conclude that a primary suture repair stood little, if any, prospect of success.

36. Mr Royston put it this way:

> "*The Claimant should have been told that a suture repair was possible but likely to fail and, if it did, she would require a mesh repair.*"

He went onto say that the risk of hernia recurrence with a suture repair was well over 50%. When pressed, he postulated a failure rate of perhaps 70%/80%. But I accept, as Mr Kellar urges me to, that this was speculation on his part and he had not mentioned such percentages either in his report or in the joint statement; nor, indeed,

had he made reference to the requirement for a mesh repair if the primary suture repair failed.

37. Returning then to Mr Wajed's assessment of matters, I conclude that if he had discussed the possibility of a suture repair with the Claimant, he would have told her that the rate of a recurrent hernia from such a repair was very high, in the order of 50% within two years and, highly likely, if not inevitable that a hernia would recur during her lifetime. In short, he would have very strongly recommended a mesh repair and counselled against a primary suture repair. I am satisfied that this is the advice which he would have given even if he had been made aware that the Claimant had not ruled out becoming pregnant in the future. He would have explained that a pregnancy would put additional strain on a suture repair with a real risk of recurrence of the hernia. He is likely to have added that the vast majority (in the order of 95%) of surgeons would elect to repair the Claimant's hernia with a mesh.

38. In the light of the expert evidence from Professor Winslet and Mr Royston, it seems to me that what, as I find, Mr Wajed would have said about the suture repair was entirely reasonable and well within the range of what a competent surgeon might say. It accords with what Mr Royston would have said, and Professor Winslet accepts it was reasonable for Mr Wajed to conclude that a suture repair stood little chance of success.

39. The critical question is of course what the Claimant would have elected to do armed with the knowledge that a mesh repair carried certain risks in the event of a pregnancy and that a suture repair was a possibility, albeit likely to fail.

40. I am urged very strongly by Mr Kellar to find that the Claimant would not have undergone a mesh repair if appropriately counselled but rather a suture repair. I should make it plain that it is not argued that the Claimant would have opted for no treatment: she was understandably desperate to have her hernia repaired.

41. Mr Kellar relies upon various passages in her evidence. By way of illustration, she said that if she had been advised about the risk of carrying a child, "*that would have changed everything*". She went onto to say that she would not have elected to have a permanent repair "*at the cost of [my] fertility*". She sought to emphasise that any risk to a baby would have overridden any concern she had for herself, saying words to the effect "*it's not just yourself when you're told that there is an inkling of risk to the baby, that is something you just don't think about risking*". She added that the ability to have children was "*just about everything I am*".

42. In her third witness statement at paragraph 7 she said:

> "*If I had been told in May 2011 that prolene mesh repair might compromise a future pregnancy I would never have agreed to have this procedure. The ability to have children has always been very important to me and I would not have wanted to be stripped of my womanhood in this way. This is especially as I witnessed what damage a hysterectomy has done to the psyche, self-esteem and consequent relationships experienced by my mother when she was 43 and my cousin (who is like a sister to me) at least 10 years ago.* "

43. Mr Kellar also urges me to accept that the risk of recurrence would not have deterred the Claimant from opting for a sutured repair. He says that such would be consistent with the fact that she opted to undergo spinal surgery notwithstanding the serious risks of the procedure and the very high chance of failure.

44. Mr Kellar also relies upon the fact that the risks of pregnancy posed by the mesh repair were both *objectively* serious and *subjectively* serious. As to the latter, he points to the fact that once the Claimant was made aware of the risks of a pregnancy, she chose to abandon her plans of having another child. It is right to observe, however, that she was told, in fairly clear terms by Mr Peter Jones that it would be inadvisable to become pregnant in the presence of a mesh.

45. I pause to observe that I unhesitatingly find the Claimant to be a credible and a truthful witness. Earlier in this judgment, I have found her evidence to be reliable in two material respects: telling Mr Khan about her stomach problems on 21st January 2011 and in relation to the lack of any discussion about pregnancy with Mr Wajed.

46. But recalling specific events or conversations is markedly different from attempting to reconstruct what her response would or might have been if given certain information. Expert witnesses, lawyers and others are trained not to use the benefit of hindsight to inform their opinion of what might or should have happened. It is, however, human nature for people to permit that which eventuated to influence their thinking on what they might have done if warned about a particular risk. To my mind, it would be quite impossible for the Claimant to divorce from her thinking, the fact that she was subsequently told by Mr Jones that it would be inadvisable for her to become pregnant because of the mesh and that, in the event, she has not had another child. Unquestionably, in my view, this sad outcome colours and informs her view of what she would have done if she had been appropriately warned.

47. I conclude that the Claimant genuinely believes and has convinced herself that she would have opted for a suture repair, if she had been provided with all the relevant information. Accordingly, what she said to me in evidence accords with her honestly held belief. But it does not of course, automatically follow that what she now believes to be the case would in fact have been the position at the material time.

48. I have weighed up, as I must, all the available evidence (both objective and subjective) on this issue and I have come to the conclusion, on the balance of probabilities that even if she had been in a position to give informed consent, exactly the same procedure would have been undertaken.

49. Having heard and seen the Claimant, my reasons for coming to this view are as follows:

    i) She would have been told that a primary suture repair was almost certain to fail ultimately and likely to fail within 2 years.

    ii) She would have been told that a mesh repair stood a very high chance of success.

    iii) She would have been told that virtually all surgeons would do a mesh repair in these circumstances.

iv) Mr Wajed would have given her the strongest possible advice that she should have a mesh repair.

v) Mr Wajed would have expressed enormous reluctance to do a suture repair.

vi) She would not have been told that she could not have children in the future – only that there were certain risks. (That to my mind is a crucial distinction.)

vii) She was single at the time. A pregnancy was not within her immediate contemplation albeit that she had thought about having a child two years earlier with her ex-partner.

viii) Overall, in the face of this information, looking at the matter both objectively and subjectively in the face of the advice which would have been given to her, it would have been irrational for her to opt for a suture repair; and I find that she is not a person who would act irrationally.

I stress that, in my judgment, even if the operation had been performed two months' earlier when the lesion may have been a little smaller, a mesh repair would still have been the outcome.

50. Mr Kellar advances two further arguments which he says should give rise to an entitlement to damages for the failure to provide informed consent. First, he argues that the Claimant should be entitled to compensation for the "shock" of discovering that she could not have children. The Claimant told Dr Wright, "*being told I wouldn't have children was a major slap in the face*". It is contended that being told that she could not have children exacerbated her psychiatric condition.

51. It should be observed that this somewhat ingenious argument featured for the first time in Mr Kellar's closing submissions. The whole thrust of the Claimant's case has been that had she been adequately counselled, she would not have had the mesh repair and, in that event, she would have been able to child-bear. This "secondary" case is only propounded in the event of a finding that the Claimant would still have had a mesh repair, even if appropriately warned and counselled.

52. As it seems to me, it is not surprising that Mr Kellar did not, at any earlier time, put forward this argument. The reason why I express that view is because, in my judgment, it has neither factual or legal validity. The breach of duty on the part of Mr Wajed was to fail to warn the Claimant about possible complications in pregnancy. That is wholly different from being under a duty to tell a patient that if she undergoes a certain procedure, she would not be able to child-bear in the future. It cannot conceivably be said that it was a foreseeable consequence of the failure to warn about certain risks that another doctor (Mr Jones), nearly three years later would tell the Claimant that it was inadvisable to become pregnant. That such advice was given is, to my mind, unconnected to the breach of duty of the part of Mr Wajed or, at the very least, far too remote a consequence.

53. Furthermore, it is the Claimant's case that by the time she was given advice by Mr Jones, she was already suffering depression and anxiety. It seems to me that it would be very difficult to measure, in any meaningful way, the extent to which the advice

given by Mr Jones rendered her depression/anxiety more severe. Additionally, it is, of course, trite law that 'shock' on its own does not sound in damages.

54. The further argument advanced by Mr Kellar is that where there has been a negligent non-disclosure of information by a doctor then, that of itself, can create a right for the patient to claim damages. This bold assertion is based upon the decision of Supreme Court in *Montgomery v Lanarkshire Health Board* [2015] 2 WLR 162 and the decision of the House of Lords in *Chester v Afshar* [2005] 1 AC 134. Both cases were concerned with the issue of informed consent and clearly recognised the importance of a patient's autonomy, including the right to choose what treatment to accept. The broad principle which emerges is that a failure properly to warn of the risk of surgery is fundamental as it vitiates the consent itself and removes the right of autonomy and dignity of the patient to make an informed choice.

55. However, as Mr Kellar accepts, *Montgomery* is only of marginal relevance to the present case. There, the Supreme Court was considering the appropriate test for breach of duty where there has been a failure to give a proper warning or advice. Specifically, the Supreme Court decided that *Bolam* has no role in determining the standard of care which is required to be exercised by a doctor when advising a patient of the treatment options. The ratio can be extracted from the leading Judgments of Lord Kerr and Lord Reid at paragraph 87:

> "*The doctor is under a duty to take reasonable care to ensure that the patient is aware that any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments.*"

As I read the speeches, the Supreme Court did not lend any support to the proposition that a mere failure to warn of risks, without more, gives rise to a free-standing claim in damages.

56. Equally, as it seems to me, *Chester* is not authority for the proposition that a claimant does not need to prove causation, in the conventional sense, as a result of failure to provide informed consent. This case has been analysed in some detail very recently by Simon LJ in *Correia v University Hospital of North Staffordshire NHS Trust* [2017] EWCA Civ 356. It is neither necessary nor helpful for me to cite at length the erudite disquisition of what was said by the House of Lords in *Chester* but it does need to be stressed that the facts of *Chester* were most unusual. I quote from Simon LJ's judgment at paragraph 13:

> "*The defendant neurosurgeon advised the claimant to undergo an operation on her spine but failed to explain that, if performed without negligence, the procedure carried a small (1-2%) unavoidable risk of neurological damage leading to a disabling condition. The claimant agreed to the procedure on a Friday and the operation was performed on the following Monday. She subsequently developed the disabling condition which left her partially paralysed, and sued the surgeon for negligence. In these circumstances, the claimant had needed to show that, if a relevant warning had been given, she would not have undergone the procedure. That finding was not made in*

> *Chester v. Afshar. The trial judge held that the defendant had not performed the operation negligently, but that he had negligently failed to warn the claimant of the risks of developing the disabling condition and that, if she had been aware of the risks, the claimant would have sought advice on alternatives to surgery and the operation would not have taken place when it did. The judge held that there was a sufficient causal connection between the failure to warn of the inherent risks of the operation and the damage sustained by the claimant, and that the link was not broken by the possibility that the claimant might have consented to the surgery in the future. The Court of Appeal dismissed the defendant's appeal and he appealed to the House of Lords*."

57. It is apparent, therefore, that the facts in *Chester* were striking and very different from the instant claim. The important point, however, as emphasised by Simon LJ (and by other judges in recent cases) is that *Chester* permits only a very modest departure from established principles of causation. The Opinion most often cited is that of Lord Hope at [87]:

> "*To leave the patient who would find the decision difficult without a remedy, as the normal approach to causation would indicate, would render the duty useless in the cases where it may be needed most. This would discriminate against those who cannot honestly say that they would have declined the operation once and for all if they had been warned. I would find that result unacceptable. The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence. On policy grounds therefore I would hold that the test of causation is satisfied in this case. The injury was intimately involved with the duty to warn. The duty was owed by the doctor who performed the surgery that Miss Chester consented to. It was a product of the very risk that she should have been warned about when she gave her consent. So I would hold that it can be regarded as having been caused, in the legal sense, by the breach of that duty*."

58. In my judgment, this Claimant cannot come within the *Chester* exception. In the first instance, it is difficult to see how it could be said that she has suffered an *injury* in consequence of the operation. Even if it be said that when, later, she was advised not to child-bear, that constituted an *injury*. It cannot sensibly be argued that that outcome was *intimately connected to the duty to warn* such that it should be regarded as being caused by the breach of the duty to warn.

59. At all events, I am satisfied that *Chester* does not provide a claimant with a free-standing remedy in circumstances where there has been a failure to warn of risks attendant upon surgery. The same point was made by Simon LJ in *Corriea* at [28]:

> "…*there is an additional problem for the appellant in the present case. The crucial finding in Chester v. Afshar was that, if warned of the risk, the claimant would have deferred the operation. In contrast, in the present case, it was not the appellant's case that she would not have had the operation, or would have deferred it or have gone to another surgeon*…"

Of course, in this case, the Claimant does say that she would not have had this operation if properly warned but that is not my finding of fact. The important point is that if the Court of Appeal had construed *Chester* as modifying such principles of causation to the extent that a mere negligent failure to warn, without more, could sound in damages such could not be reconciled with what Simon LJ said at [28] set out above.

60. It follows from all of the above that whilst I have found that Mr Wajed was negligent in his pre-operative counselling, no consequences flowed and, accordingly, causation is not established.

***Quantum***

61. Finally, general damages for pain, suffering and loss of amenity fall to be assessed to reflect the culpable delay in the diagnosis of the hernia. The period of the delay was approximately two months. The hernia caused the Claimant considerable discomfort and, of course, was unsightly. It will have extended in size over that period of time. Mr Kellar suggested a figure of £7,500 for the pain, suffering and loss of amenity. It seems to me that that is a realistic figure and it is the sum which I award.