Case No: B3/2015/2044

Neutral Citation Number: [2016] EWCA Civ 1219
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRADFORD COUNTY COURT
HIS HONOUR JUDGE DAVEY QC
Claim No. 3YQ06419

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2016

Before :

LORD JUSTICE TOMLINSON
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

CLAIRE WORRALL	**Claimant/ Respondent**
- and -	
DR. HELENA ANTONIADOU	**Defendant/ Appellant**

- -
- -

Darryl Allen QC (instructed by **Wake Smith Solicitors** for the **Claimant/Respondent**
Jeremy Roussak (instructed by **Ashton Solicitors**) for the **Defendant/Appellant**

Hearing date : 1 November 2016

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Judgment

Lord Justice Tomlinson :

1. This is an appeal against an order made by His Honour Judge Davey QC in the Bradford County Court on 5 June 2015 pursuant to which the judge awarded damages in the sum of £14,378.47 to the Claimant/Respondent Mrs Claire Worrall against the Defendant/Appellant Dr. Helena Antoniadou. The Claimant alleged that she had undergone a breast augmentation operation in reliance upon negligent advice given by the Defendant, the consultant plastic surgeon who performed the operation. The enhancement effected, if any, was short-lived and within 10 months of the operation the Claimant was advised that a more invasive procedure, an uplift or mastopexy, was necessary. It was the Claimant's case that prior to undergoing the relatively straightforward breast augmentation procedure she was advised by the Defendant that a mastopexy would not be needed for another 5-10 years. The Claimant's case was that had she not received that advice she would not have undergone the breast augmentation procedure which she did, at the age of 28. She would have waited until her mid 30s and then undergone a combined breast augmentation and mastopexy procedure.

2. It is common ground that if the Claimant was given the advice alleged, that advice was negligent. No reasonably competent plastic surgeon could have given such advice and the Defendant denies having done so. The procedure left the Claimant dissatisfied with the appearance of her breasts which she said began to droop not long afterwards, although that is not really the gravamen of her complaint. The gravamen of her complaint is that, within 10 months of the operation, she was being advised that an uplift was necessary. Her complaint is thus that she underwent an unnecessary procedure which she would not otherwise have done which incidentally left her in temporary pain. In due course the private clinic at which the Claimant underwent the procedure agreed to carry out a mastopexy free of charge, but unhappily before that could be done in December 2011 the Claimant suffered a transient ischaemic attack which led to the discovery of cardiac problems which ruled out surgery. In those circumstances the clinic instead refunded the cost of the original breast augmentation procedure.

3. The judge found that the Defendant did not give the advice alleged. The judge did however find that the Claimant left her single pre-operative consultation with the Defendant with the impression that she would have at least 5 years after the breast augmentation procedure before a mastopexy would be necessary. The judge found that the Defendant, albeit unintentionally, allowed the Claimant to go away from the consultation with this impression and that she was in that regard negligent. The Defendant appeals.

4. The background may be very shortly stated. The Claimant was born on 16 November 1981. In the summer of 2010 she was thus 28 years old. She was a police officer. By this time she had had four children. Before her first pregnancy her bra size had been 34DD. After breastfeeding all four of her children her breasts had shrunk in volume to a C cup size and, in her estimation, they had begun to droop. In the course of 2010 the Claimant divorced her second husband. This coincided with her losing confidence in herself and in her breasts, about which she felt self-conscious. By the end of June 2010 the Claimant was planning her marriage to her third husband which was due to take place in November.

5. By the end of June 2010 the Claimant had decided to look into breast augmentation surgery, and she discovered on the internet the existence of the MYA clinic in Leeds. MYA is an acronym for "Make Yourself Amazing". The Claimant was keen to use the MYA clinic because one of her colleagues at work had used it and had achieved satisfactory results. The Claimant was also keen to have breast augmentation as soon as possible because of her impending wedding. Her aim was to restore her breasts to their original pre-pregnancy volume and to overcome what she perceived as their droopiness. She was however clear in her own mind that she did not want to undergo an uplift or mastopexy. Another friend had recently undergone a mastopexy procedure and it resulted in what the Claimant considered to be excessive scarring, as well as involving a lot of pain and an extended recovery period. Mastopexy was a more invasive procedure which the Claimant did not wish to undergo at that time.

6. The Claimant attended a pre-operative nursing assessment at the MYA clinic on 27 June 2010, a patient care co-ordinating appointment on 24 July and another nursing assessment on 27 July. It is common ground that throughout her dealings with the MYA clinic the Claimant made it clear that she did not want an uplift operation, and that if that was to be the surgeon's advice, she would not be going ahead with the breast augmentation procedure.

7. It was not until 28 July that the Claimant met the Defendant for the first time. However on 24 July the Claimant paid a deposit and took advantage of a discount on the fee for the operation which had fortuitously come about as a result of a cancellation. It was at that same stage that the consultation with the Defendant was booked for 6 pm on 27 July and the operation itself booked for 3 August. That however would involve the operation taking place less than 21 days after the Claimant's initial consultation with the surgeon. In these circumstances the Claimant was required to sign a disclaimer. That took the form of the MYA clinic's own document headed "Reflection and refund disclaimer for patients wishing to proceed with surgery prior to 21 days after the initial consultation with the surgeon", and it reads:

> "I have been advised by my surgeon *[and then in handwriting the phrase* Dr Antoniadou *is filled in]* that in accordance with guidelines issued by the Independent Healthcare Association May 2003 Good Medical Practice, in order to allow an adequate time for reflection a surgeon will not normally admit any patient for a cosmetic procedure to be carried out sooner than two weeks after the initial consultation. My surgeon has explained this to me and I understand that these are the guidelines issued specifically by the Independent Healthcare Association... *[et cetera]*. *[And then]* I believe that I have been fully consulted with regard to the procedure of *[and then in handwriting is filled in the phrase]* breast augmentation."

8. That document was signed by the Claimant on 27 July and by the Defendant on 28 July. By appending her signature the Claimant indicated that she wished to proceed. Plainly the Claimant had received no advice from the Defendant before signing this document. There are a lot of things that could be said about this procedure, but the most relevant is the judge's observation that the greater significance of the document and the circumstances in which it came to be signed by the Claimant is that it is

another good indicator that the Claimant was determined to have the breast augmentation operation if she sensibly could.

9. The Claimant also paid the balance of the fee for the operation at 5.05 pm on 28 July, whilst waiting for her appointment with the Defendant at 6 o'clock.

10. The resolution of the appeal turns exclusively on what transpired at the Claimant's consultation with the Defendant at 6 pm on 28 July. Although the judge did not make an express finding to this effect, he clearly formed the view that insufficient time was devoted to this consultation. Thus at paragraph 18 the judge said:

> "18. Two eminent and experienced consultant plastic surgeons gave oral evidence: Mr Henderson for the claimant and Mr Percival for the defendant. Despite their expertise in the same area, they disagreed about just about everything; but one thing they did agree about was the insufficiency of time devoted to the consultation of 28th July 2010. Mr Henderson said that he thought that there should always be at least two consultations before surgery, sometimes three, but, in his view, a breast augmentation consultation should take at least one hour and one and a half hours if mastopexy was to be discussed as well. Mr Percival thought that matters could proceed rather more quickly, but he himself considers half an hour to be the absolute minimum for a consultation such as this and himself allows 45 minutes for a breast augmentation first consultation. Mr Percival in oral evidence agreed with my suggestion that the defendant's patient list of 28th July 2010 is cramming too much of a quart into a pint pot and, in my judgement, that remains the case even allowing for the defendant's habit to which she refers at page 293, paragraph 4 of her witness statement, of working late, sometimes not finishing until more like nine o'clock, rather than seven o'clock."

11. At paragraph 26 of his judgment the judge recorded his view that the circumstances in which the Claimant presented were such that adequate time was needed in order to ensure that the Claimant was given clear and appropriate advice. It is plain that the judge thought that adequate time had not been allowed.

12. A conclusion as to the length of the consultation is neither indicative nor conclusive as to the nature and quality of the advice given on that occasion. I agree however with Mr Jeremy Roussak for the Defendant that the judge's partly unspoken conclusion in this regard was unfair to the Defendant and may be indicative of a tendency by the judge to have adopted a flawed approach to his evaluation of the evidence. The judge based his conclusion on the contents of the Defendant's appointment list, which showed a full schedule of what were for the most part 15 minute appointments solidly from 14.30 until 19.00 hours on the relevant afternoon. Indeed the schedule lists two appointments for 18.00 hours and two more at 18.15

hours. The fact remains however that it was the Defendant's evidence that all consultations with new patients took not less than 30 minutes and she explained that her lists frequently overran for the very reason that she allocated sufficient time to her patients and that it was common for her to be going home in the dark even in high summer. All this evidence was unchallenged. Neither the Claimant nor her husband who accompanied her to the consultation gave any evidence as to its length and neither suggested that it was, or that they felt, rushed. In these circumstances the judge was in my view unjustified in concluding, sub silentio, that the consultation was rushed. He should have concluded that the time devoted to it was adequate, even if characterised by one of the expert witnesses as the absolute minimum.

13. It was the Claimant's pleaded case that at the consultation the Defendant advised her that she could achieve satisfactory cosmetic improvement without the need for uplift surgery, mastopexy, and that whilst she would eventually need mastopexy this was not likely to be for another 5 to 10 years after the breast augmentation procedure. The Defendant maintained throughout that she had said no such thing and that it would have been irresponsible to do so because it is not possible to put a time-scale on such matters, and that all she told the Claimant was that she would need an uplift sooner or later. At trial, each accused the other of giving a dishonest account of what had been said at the consultation.

14. The judge's findings as to what transpired at the consultation are as follows:

> "27. I am satisfied that the defendant did not explicitly give a timescale of five to ten years before mastopexy was necessary because that would have been an irresponsible thing to say and I cannot imagine that she did. However, I am equally satisfied that that sort of timescale was mentioned by someone at that consultation and that the claimant has not invented it. I am sure that it was mentioned when the claimant was pressing the defendant for a timescale as to when mastopexy would be needed, as everybody agreed at some point would be the case. I am sure that, in that respect, the claimant did press the defendant because that was a matter that was considerably on her mind, not least because if she needed a mastopexy before her forthcoming wedding then she was not going to have an operation at all.
>
> 28. It may have been the defendant who said, when pressed by the claimant, something along the lines of "it could be sooner, it could be later, it could be up to five to ten years", but I think the more probable likelihood is that the timescale was mentioned by the claimant who, when pressing the defendant, said words to the effect of, "What do you mean by sooner or later? Are we talking months? Years? Five years? Ten years?" to which the defendant said something non-committal, which the claimant then interpreted, because this was what she wanted to hear, as giving

her up to five to ten years before mastopexy was necessary. In truth, I am satisfied that when the defendant was pressed by the claimant, she was non-committal as she has always maintained she has been about the timescale before mastopexy would be necessary, and whatever the precise wording used, 'sooner or later' represented the gist of what Dr Antoniadou was trying to say to the claimant. However, I am also satisfied that the claimant went away from that consultation with the impression that she had at least five years before a mastopexy would be necessary and I am reinforced in that view by a particular piece of evidence.

29. Fairly soon after the operation, the claimant was complaining of a poor aesthetic result and of pain. She eventually saw the defendant again on 16th August 2011. A note taker was present at that appointment specifically to take notes of what was said. They appear in the bundle for these purposes at page 146, where the defendant is described as "H" standing for Helena and the claimant is described as "C" standing for Claire. About halfway down the page, the contemporaneous notes read as follows:

"H: I couldn't have anticipated this.

C: I didn't anticipate it would be so quick.

H: Neither did I.

C: Looking at my photos, I should have had an uplift.

H: Your measurements and nipple positioning meant that an implant should have been okay.

C: Should you not have said to me at the beginning that it may sag and an implant will just weigh it down further?

H: An implant would normally have solved the problem. *[And then this from Claire]*

C: There's a difference between an uplift after five years and nine months. Shouldn't you have known this would happen? I wasn't given the right information."

30. In my judgement, that reference to five years gives the ring of truth to the essence of the claimant's recollection about what she was told and about the impression with which she left the consultation of 28th July. It was clearly a reference to their one and only

> conversation pre-surgery on 28th July. On the balance of probabilities, in my judgement it simply, on the evidence, cannot have come from anywhere else, and it demonstrates to me that the claimant in fact went away from that consultation thinking that she had at least five years before mastopexy would be required. I am satisfied that the defendant, albeit unintentionally, allowed the claimant to go away from the consultation of 28th July 2010 under the impression that she had at least five years before mastopexy would be required. So, that resolves issue number one."

Discussion

15. Mr Roussak is critical of these findings which he characterises as speculation disguised as findings of fact. In considering the reliability of the central findings it is in my judgment important to bear in mind certain other findings made by the judge which bear upon the ultimate fact-finding exercise.

16. The judge found at paragraph 10 of his judgment that the Claimant was absolutely determined to have the breast augmentation operation if possible and that she did not really want to hear any suggestion that she should not do so.

17. Next, the judge found that the Claimant was prone to making mistakes. The most egregious of those mistakes in her evidence was perhaps her bland assertion that the Defendant told her that her implants were guaranteed for life. That would be a very surprising thing for an experienced consultant plastic surgeon to say and I do not think that it was suggested to the Defendant that she had in fact said it. The Defendant's contemporaneous handwritten note of the consultation records that she warned the Claimant of the risk of rupture amongst other possible misfortunes.

18. So far as concerns the Defendant, the judge found that whilst she had a generally good command of English, it was not her mother tongue, she spoke very quickly and did not always select the correct words to convey her intended meaning. The judge concluded that it was not always easy to follow what she was saying. As the judge put it, the intelligibility of the Defendant was a real issue in the case.

19. In these circumstances, as it seems to me, the situation at the consultation was ripe for misunderstanding. The judge found that that is exactly what occurred. At paragraph 26 the judge said:

> "26. So, with the defendant seeing the claimant only once before surgery, in what I am satisfied was a busy and overcrowded list of patients, one into which, as Mr Percival confirmed in evidence, a quart was trying to be crammed into a pint pot; with the defendant speaking quickly and sometimes not clearly; and to a patient who, in my judgement, was disposed to hearing only that which she really wanted to hear, the conditions were ripe for the claimant to get hold of the wrong end of the stick. On the balance of probability

> that, in my judgement, is exactly what happened. Especially with a patient such as the claimant, anxious as she was to have a breast augmentation as soon as possible if she could, even greater care - and the time to take such care – was required on the part of the defendant to ensure that the claimant was given clear and appropriate advice about how soon a mastopexy would be needed after a breast augmentation operation and that the claimant understood that advice."

20. Thus the judge has concluded that the Claimant left the consultation having misunderstood what the Defendant had said to her, or perhaps did not say to her. The judge has concluded that the Defendant gave a non-committal answer to a question which the Claimant did not say in evidence that she had asked. The judge did not find that the Defendant either knew or ought to have known that the Claimant was labouring under the relevant misapprehension, and it was not suggested to the Defendant at trial that she either realised or ought to have realised that this was the case. Thus the judge has, in effect, found the Defendant guilty of negligence because she failed by a non-committal answer to dispel an impression which she had not herself expressly given and which she neither knew nor ought to have known the Claimant had somehow or other derived.

21. This cannot be right and it is certainly not fair to the Defendant, who can justifiably complain that she has been made liable on a basis which was neither pleaded nor put to her at trial.

22. The question which the judge ought to have asked himself is whether anything said or done by the Defendant at the consultation would have been reasonably understood by a reasonable patient in the position of the Claimant as an assurance that it would be of the order of 5 to 10 years before she would require a mastopexy. This is always the relevant and objective approach, but it was critically important that the judge should have couched the question in this way having first concluded that the Claimant had got hold of the wrong end of the stick. A defendant medical professional ought not to be liable in such circumstances unless either he/she is responsible for the patient getting hold of the wrong end of the stick or, having realised that the patient has or is in danger of getting hold of the wrong end of the stick, or in circumstances where the medical professional ought so to have realised, he/she takes no step to dispel the misapprehension. In my judgment the judge would not have been justified in answering the relevant critical question in the affirmative.

23. Even on the basis of his own findings the judge was not in my view entitled to reach the conclusion which he did. If the enquiry by the Claimant was "are we talking months? Years? 5 years? 10 years?" then a non-committal response by the Defendant along the lines "sooner or later" could not reasonably be interpreted as an assurance that the time-scale was of the order of 5-10 years. It could equally have been months or years.

24. The critical finding by the judge is his finding that the Claimant pressed the Defendant for a time-scale within which a mastopexy would be required and moreover that she couched her enquiry in terms which included reference to a period of 5 years or 10 years or perhaps 5 to 10 years, although that is not what the judge

found. There was however no evidence to support the finding that the Claimant asked about the time-scale in these terms. It was not pleaded by the Claimant that the exchanges developed in this way, and neither did she give evidence to this effect. It was not suggested in evidence by the Claimant or her husband that an enquiry in these terms was made. Their evidence was that the Defendant, aware that the Claimant did not want a mastopexy, volunteered the advice that this would be unnecessary for 5 to 10 years.

25. It is true that the Defence pleads:

> "(f) The Defendant reiterated to the Claimant that as these implants [the Claimant having selected 410cc implants] were heavier [than implants of lower and average weight recommended by the Defendant] the effect of gravity would be such that her breasts would become saggy sooner. The Claimant asked how long that would be and the Defendant told her that it was not possible to predict when.
>
> . . .
>
> (h) The Defendant agrees that both she and the information packs supplied by the Clinic advised the Claimant that the breast augmentation procedure would not be permanent and that sooner or later the Claimant would require a mastopexy procedure."

It is also true that in her first witness statement at paragraph 11.5 the Defendant said this:

> "I reiterated to the Claimant that as those implants were heavier, the effect of gravity would be more severe and that her breasts could appear saggy sooner rather than later. The Claimant asked how long would that be and I replied that it was impossible to predict."

In none of these passages however was it suggested by the Defendant that any enquiry directed to her concerning post-operative droopiness was couched in terms of 5 or 10 years, still less that that period of time was mentioned in the context of the likely need for a mastopexy.

26. Furthermore it was never put to the Defendant that she was asked what she meant by "sooner or later", still less that she was asked that question in a context in which it should have been clear to her that failing a more precise response the Claimant would reasonably be left with the impression that that imprecise period either would or could extend to 5 to 10 years.

27. It is not surprising that this suggestion was not put by Mr Pearce, then counsel for the Claimant, because it did not represent his client's case. To his credit the judge came close to putting the suggestion, but in my judgment he did not come close enough. At

the conclusion of the Defendant's cross-examination there was no re-examination by Mr Roussak and the judge then embarked on a series of questions as follows:

> "Q. Doctor, can you just help me with one thing please? If you just go back to your witness statement and go to page 233...
>
> A. Yes.
>
> Q. And if you just look at paragraph 25.5, it is something we have had a look at before, as to whether you told her that the implants would cause her breasts to droop and she could, or would, require an uplift. Now, I understand that she wanted to know how long it would be before an uplift would be required, is that right?
>
> A. She did not ask me the question, but I couldn't have given a straight answer with any certainty anyway. So, even if she did, my response would have been that I cannot determine how soon that could happen.
>
> Q. Well—
>
> A. At the point when she had the consultation, she was very keen to go ahead with the surgery and because she wanted a breast augmentation, I wanted to make sure that she understands... she understood at that point that it would not be a permanent solution and that, at some point, she would require a mastopexy.
>
> Q. Yes. You see, I think you told me earlier when I was asking you about that paragraph that you told her that the implants she was thinking about would mean that, in due course, she would need an uplift, yes? That is what you told me.
>
> A. I don't think the choice of implants is the important factor in that. It's more the ability of her tissues to resist the pull, which cannot be determined.
>
> Q. Mm, but I think you told me, and counsel will correct me if I am wrong, that in the course of this consultation you told her that, in due course, she would need an uplift.
>
> A. That at some point she would require an uplift, yes, I did.
>
> Q. Now, once you told her that, did she not say, "Well, how long will that be?"
>
> A. I can't remember her asking this question, but if she did, the answer would have been, "I cannot tell you."

Q. And did she not then try to press you to give her some idea? Did she, for instance, say, "Well, are we talking months, or years, or five years, ten years?"

A. I don't remember that but I wouldn't have committed to anything like that because, simply speaking, I do not know.

THE JUDGE: Yes. All right. Thank you. Mr Pearce, do you want to ask anything arising out of that?

MR PEARCE: No, thank you, your honour.

THE JUDGE: Mr Roussak?

MR ROUSSAK: No, your honour."

28. Mr Darryl Allen QC for the Respondent before us submitted that this amounted to the judge giving to the Defendant a fair opportunity to comment on the conclusion to which ultimately he came in his judgment. I do not agree. What the exchange between the judge and the Defendant lacked was the critical suggestion that the Defendant ought to have realised that a non-committal answer to the question as posed could reasonably have been interpreted as an indication that the relevant time-scale would be of the order of 5 to 10 years.

29. For all these reasons, whilst the judge may have been justified in finding that it was inherently likely that the Claimant would have been pressing for an answer as to the time-scale within which a mastopexy would be necessary, he was not in my judgment justified in concluding that the Claimant couched that enquiry in a manner which would have made it reasonably apparent to the Defendant that a non-committal answer could reasonably be interpreted as an assurance that a mastopexy would not be necessary for a period of up to 5 to 10 years. In so finding the judge was indeed speculating in a manner which lacked any sure foundation. The finding was not open to him. The judge had dismissed the evidence of the Claimant and her husband that the Defendant had spoken in terms of 5 to 10 years. There was simply no basis upon which he could reliably have concluded that it was the Claimant who introduced this possible time-scale.

30. I do not overlook the judge's reliance on what the Claimant said during the consultation over a year later on 16 April 2011 – see the judgment at paragraphs 29 and 30. That reference does not, with all respect to the judge, give the ring of truth to the essence of the Claimant's recollection of what she was <u>told</u> because it is inherently unlikely that the Defendant would have made so irresponsible a statement. The judge found that she did not. I agree with the judge that this evidence may tell one something about the impression with which the Claimant left the consultation over a year earlier, but it is not probative of what she may have <u>said</u> at that consultation, and it is only a passing reference in a much longer note of an evidently quite heated interview in which the Claimant was critical of the advice she had been given, or not given, without ever alleging in terms that the Defendant had said to her that a mastopexy would not be needed for 5 to 10 years. I also bear in mind that the Claimant's pre-action protocol letter of claim dated 15 July 2013 makes no reference

to mention by anyone at the consultation on 28 July 2010 of a period in which mastopexy would not be required. It is therefore difficult to accept that the period of 5 years, let alone 5 to 10 years, played a prominent or indeed any role in the discussion on 28 July 2010. I consider that the judge gave more weight to the reference to 5 years at the consultation on 16 August 2011 than it could properly bear. But in any event even if the Claimant did mention a period of 5 years at the consultation on 28 July 2010, the fact remains that there is no basis upon which the judge could properly conclude that anything said by the Defendant on that occasion could reasonably have been regarded as an assurance that a mastopexy would not be required for a period of 5 years, 10 years, or 5 to 10 years. This is with respect a speculation too far upon which the Defendant was not asked at trial to give her comment.

31. Mr Allen submitted that the judgment can be read as upholding the complaint that the Defendant had failed to give clear advice which included advice as to the time-scale within which a mastopexy would be required. A doctor is of course under a duty to take reasonable care to ensure that a patient is aware of any material risks involved in any recommended treatment, and the test of materiality is whether, in the circumstances of a particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor was or should reasonably have been aware that the particular patient would be likely to attach significance to it. See *Montgomery v Lanarkshire Health Board (General Medical Council Intervening)* [2015] AC 1430 at 1463 per Lord Kerr of Tonaghmore and Lord Reed. Equally trite law is that a doctor, if specifically asked by a patient about risks involved in a particular treatment proposed, is under a duty to answer both truthfully and as fully as the patient requires. See *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] 1 AC 871 at page 898B-C per Lord Bridge of Harwich. Mr Allen points out that at paragraph 26 of his judgment the judge identified the relevant duty in these terms – "even greater care – and the time to take such care – was required on the part of the defendant to ensure that the claimant was given clear and appropriate advice about how soon a mastopexy would be needed after a breast augmentation operation and that the claimant understood that advice." Mr Allen suggests that at paragraph 31 the judge found that this duty had been broken:

> "31. I turn to issue number two; was what Dr Antoniadou said negligent? In my view, plainly it was. Mr Henderson thought that breast augmentation could only give a satisfactory outcome, before mastopexy would be needed, for something like six months and that the claimant should have been advised accordingly. Mr Percival thought the timescale would be rather more generous, in the order of two to three years. Both experts agreed that, at some time in the future, the claimant would need a mastopexy, but by no stretch of the expert evidence could it be said that it would be reasonable to let the claimant think that she had five years or more before mastopexy would be needed.

> 32. Mr. Percival initially agreed in evidence that it would be negligent for a surgeon to say that mastopexy would not be required in 5 – 10 years, but later, when asked what he would say if a patient asked him in consultation how long it would be before a mastopexy would be required, he said, "I`d say that it`s very difficult to predict and it`s a case of watch and see how it goes after surgery. But if pressed, I`d say it`s unlikely *[my note:- by which he went on to say that he meant a less than 50% chance]* you`d have to consider surgery in under two years; and I think that two to three years would be a reasonable prediction".
>
> 33. If the claimant had been given this advice (let alone the advice that Mr. Henderson thought should have been given) there is no doubt, on the evidence, that she would not have gone ahead with the breast augmentation operation at that stage but would have waited until her mid-30`s until she could have a combined breast augmentation and mastopexy. I note that given that she was still only 28 years old at the time of the consultation of 28th. July 2010, her mid-30`s were some 5 years plus away – which reinforces the view I have formed about what was said at that consultation.
>
> 34. In my judgement what the defendant said at the consultation was tantamount to advising her that she could have a breast augmentation operation alone without a mastopexy being required for at least 5 years. On any view of the expert evidence, that was negligent."

32. I do not consider that the judgment can be rescued in this manner. Mr Allen accepted that the case had not been expressly pleaded in this way, although he submitted that the formulation of the duty and of the breach thereof which he put forward at the appeal, and which he suggests the judge adopted in his judgment, was fairly within the ambit of paragraph 18.1 of the Particulars of Negligence in the Particulars of Claim which reads:

> "Advising the Claimant that she was likely to achieve a satisfactory cosmetic improvement by undertaking surgery by way of breast augmentation alone."

I do not agree that the pleading fairly conveys the allegation now put forward by Mr Allen. There is however a more fundamental obstacle in Mr Allen's way. It does not avail the Claimant in this context to demonstrate, as was common ground, that it would have been a breach of duty for the Defendant to have advised that mastopexy would not be required for 5 to 10 years, because the Defendant did not so advise. On this alternative formulation of the case the negligence alleged is the failure to give clear advice as to the time-scale within which a mastopexy would be required.

However the advice which the judge found the Defendant to have given was non-committal. As the judge put it at paragraph 28, whatever the precise wording used, "sooner or later" represented the gist of what the Defendant was trying to say to the Claimant. Both expert witnesses were agreed that it was not possible to predict with any degree of accuracy the time within which a mastopexy would be required. Indeed they were also agreed that it was reasonable to advise the Claimant that it was not possible to predict when her breasts would become saggy. Thus the advice given by the Defendant, "sooner or later" was as clear as it was possible to be. The Defendant was, as Mr Roussak put it, under no duty to give information which she could not give. It is only by factoring in a time-scale of 5 to 10 years which was neither introduced by the Defendant nor understood by her to be in play that this imprecise advice can be converted by implication into a precise and incorrect representation.

33. For what it is worth the experts were not agreed on what a reasonable response would have been to a specific enquiry as to time-scale, on the assumption that a period was to be given. Mr Henderson for the Claimant thought that a time-scale of 6 months would have been reasonable, Mr Percival for the Defendant 2 to 3 years. This only serves to emphasise that the Defendant cannot legitimately be criticised for advising that sooner or later a mastopexy would be required, without attempting to be more precise.

34. For these reasons the judge's decision in favour of the Claimant cannot in my view stand. For the avoidance of doubt I should state expressly what is I hope obvious, that the judge's finding on causation necessarily falls with the conclusion that the Defendant did not give negligent advice. The judge concluded that had the Claimant been advised that she might have to consider a mastopexy in 2 to 3 years, she would not have undergone the breast augmentation procedure, and I do not consider that Mr Roussak succeeded in demonstrating that that conclusion was unfounded. He attempted so to do by reliance on an answer to an ambiguous question at the end of re-examination, but that attempt was over-ambitious.

35. Mr Allen submitted that unless we were to conclude that the judge's conclusion on causation is incorrect we should, in the event that we regard his conclusions on breach of duty as untenable, remit the matter for a re-trial. I do not conclude that the judge's conclusion on causation is incorrect but rather that it is of no relevance, as founded upon a premise removed from the facts. I do not consider that a re-trial is appropriate. The Claimant failed to prove her case that the Defendant advised her that a mastopexy would not be required for 5 to 10 years. The judge did not simply come up with a version of events which lay somewhere between the versions asserted by each party but upon which the witnesses, including the expert witnesses, were not asked to comment, as in *Faunch v O'Donoghue* [2013] EWCA Civ 1698, on which Mr Allen relied in this respect. Rather, the judge came up with a version of events which was unjustified on the evidence, and which in any event did not result in a justified conclusion that the Defendant was negligent, since it was not demonstrated that the Defendant ought reasonably to have appreciated the misapprehension under which the Claimant was labouring. Having failed to prove her case, the Claimant's action should be dismissed.

36. I would allow the appeal and dismiss the claim.

Lord Justice David Richards :

37. I agree.