

Proving the Improbable

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Clinical Negligence , Personal Injury

The recent case of *Johnson v Williams [2022] EWHC 1585 (QB)* reminds us of the difficulties of proving a case where an uncommon complication has occurred.

C underwent surgery to the knee to repair a meniscal tear. An infection set in and a synovectomy was performed to remove infective material, followed by two washouts. A month or so after the synovectomy, MRI showed a large tear to the medial retinaculum.

C's case was that although it would be extremely unusual for a surgeon to cause such a tear during a synovectomy, that must have been what happened as there was no other plausible explanation. Adopting Sherlock Holmes' reasoning, he argued that where you have eliminated the impossible, whatever remains, however improbable, is the truth.

D put forward a few alternative theories on how the damage occurred, including C's failure to comply with rehabilitation advice or the tear arising from the infection.

The judge found that it was highly unlikely, although not impossible, that the surgeon had caused the tear - it would have required an improbably high degree of negligence to cause this level of damage and to fail to spot the resultant leak during surgery or in either washout procedure. The judge thought there were other explanations as to how the damage was caused which were also unlikely but not impossible. The judge could not say on balance what happened in this case to cause the damage. Result: C's claim failed.

In reaching that conclusion, the judge considered the helpful case of *Rhesa Shipping Co. SA v Edmunds [1985] 1 WLR 948*, where Bingham J said that in order to find that an improbable cause was the cause on balance, all other explanations needed to be ruled out. Bingham J found that the improbable cause was the cause in that case but on appeal, the House of Lords found that the claim should have been dismissed for failure to prove the case. They emphasised that it is not always a case of deciding which improbable theory is right; sometimes the answer is simply that the claimant has not satisfied the court that their improbable theory is likely.

There is a tendency of some judges to always try to solve the case, or to find for a claimant if the defendant does not provide a plausible alternative solution (the trap that Bingham J fell into). This case is a useful tool for helping to remind judges and lawyers how to approach difficult cases dealing with improbable causes.

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