Neutral Citation Number: [2022] EWHC 2048 (QB)

Claim No: 9BS0136C

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY

ON APPEAL FROM
THE COUNTY COURT AT BRISTOL
HIS HONOUR JUDGE RALTON

Bristol Civil and Family Justice Centre
2 Redcliff Street, Bristol BS1 6GR

Date: 29 July 2022

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

MR DANIEL WATTS	**Appellant**
- and -	
NORTH BRISTOL NHS TRUST	**Respondent**

- -

Stephen Cottrell (instructed by **Harding Evans LLP**) for the **Appellant**
Matthew Barnes (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing date: 5 July 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

The Hon. Mr Justice Bourne:

Introduction

1. The Appellant, Mr Watts, appeals against a decision of HHJ Ralton dated 6 December 2019, dismissing his claim for clinical negligence.

2. The Defendant NHS Trust was alleged to be liable for acts and omissions of a consultant orthopaedic spinal surgeon, Mr Katsimihas, who advised and treated Mr Watts for back and leg pain.

3. Mr Katsimihas conducted a pre-operative consultation with Mr Watts on 27 March 2014 and carried out spinal fusion surgery on 29 April 2014. Although it is now agreed that the surgery was carried out competently, it was unfortunately not successful in that Mr Watts has been left with pain and limited mobility which are worse than before the operation.

4. By his claim, Mr Watts set out to prove (1) that Mr Katsimihas did not obtain his informed consent for the surgery by providing information about any alternative procedures, (2) that if such information had been provided, he would have elected to undergo the less invasive procedure of microdiscectomy rather than spinal fusion and (3) that carrying out the spinal fusion procedure has resulted in pain and suffering and very considerable loss for him which, or most of which, would not have been incurred if he had undergone microdiscectomy instead.

5. The Judge found in Mr Watts' favour on the first issue. When proposing spinal fusion, Mr Katsimihas failed in his duty to identify the reasonable options together with their advantages and disadvantages. In this case the reasonable option was microdiscectomy. Although this was mentioned or known about, Mr Katsimihas did not sufficiently advise on its pros and cons and in reality did not present Mr Watts with any real option other than spinal fusion.

6. However, Mr Watts lost on the second and third issues.

7. As to the second issue, his particulars of claim stated that he would have chosen microdiscectomy but gave no further details. His first witness statement did not address this question, an omission which in the Judge's view was never properly explained. In his second witness statement, filed shortly before trial, he said that he would have preferred microdiscectomy because it was a less invasive and shorter procedure and because, if necessary, fusion could be attempted after microdiscectomy, whereas a fusion operation precluded a later attempt at microdiscectomy. When cross examined, Mr Watts rhetorically asked why anyone would opt to have a much bigger operation to achieve the same outcome, and said that he would have taken the less risky, less invasive procedure.

8. The Judge was not persuaded by this, in particular because he found that the two procedures are not designed to achieve the same outcome. Microdiscectomy treats nerve compression and thereby seeks to relieve sciatic pain and some referred pain, but not "constitutional" back pain (discussed below). It also does not correct "tilting" of the spine. Fusion can address constitutional back pain and tilting. The expert witnesses agreed that the prospect of improving back pain with microdiscectomy was 30% whilst with fusion it was 60%. Both procedures had an 80% chance of improving leg pain. Both carried a risk of 5-10% of making the symptoms worse. Fusion is more invasive, and the recovery time for patients is 6 months, whereas it is only 6 weeks for microdiscectomy.

9. Bearing in mind the difficulty for a claimant of giving a reliable answer, after the outcome of an operation is known, to the question of what he would have done if advised differently, and taking the view that the choice would have been objectively difficult, the Judge decided that he could not be satisfied on the balance of probabilities that Mr Watts would have chosen microdiscectomy. That finding was fatal to the claim.

10. The Judge nevertheless considered the third issue. He rejected the proposition that in the medium and long-term Mr Watts would have been better off with microdiscectomy and therefore rejected much of the loss claimed. He found that the short term effects of fusion, when compared with microdiscectomy, would have justified an award of £6,000 for PSLA and £2,500 for some care needs. Those are the only sums which Mr Watts would have recovered if he had succeeded on the second issue.

11. Following the oral hearing of a renewed application on 12 March 2021, I granted permission for the appeal to proceed on two grounds.

Ground 1

12. By his first ground, Mr Watts challenges the Judge's rejection of his evidence that, if properly advised of the option of microdiscectomy in addition to the recommended option of spinal fusion, he would have chosen microdiscectomy and therefore would not have undergone the procedure which has left him in his present condition.

13. I gave permission for two aspects of this challenge. The first is a contention that the Judge was wrong to reject the Appellant's evidence on the point because of a perceived "lack of reasoning". The second is a contention that the Judge was wrong to reject the premise on which he based his evidence, namely that the two operations were designed to achieve the same outcome.

14. This issue turns on what Mr Watts would have done in a hypothetical situation. It is therefore necessary to define that hypothetical situation with precision.

15. I begin with the relevant anatomy, which I understand to be uncontroversial. A human spine consists of bony vertebrae separated from each other by rubbery discs which act as shock absorbers. The vertebrae surround a column of nerve tissue known as the spinal cord. Spinal nerves branch out from the spinal cord and carry sensory messages to other parts of the body. Degenerative changes to the discs can permit motion between vertebrae, which in turn may interfere with or compress the nerve roots, causing pain. If the sciatic nerve, which extends from the lower back down the back of each leg, is compressed, the patient may feel pain in the buttocks or legs. One surgical option for nerve root compression is fusion, meaning the permanent connection of two or more vertebrae (in this case by insertion of metalwork) to eliminate motion between them. Another surgical option is microdiscectomy, meaning the removal of small amounts of disc or of bone or other tissue which are pinching the nerve root and causing pain.

16. The hypothetical situation begins with the background facts as found by the Judge.

17. Mr Watts, born in 1973, was a self-employed landscape gardener. He left his business to study for a degree in that field which he obtained in 2013, whereupon he started a postgraduate course. He had suffered intermittent back pain from his teens onwards. From about 2008, there were episodes of left leg sciatica and low back pain which caused him to see his GP roughly annually. On 20 April 2013 he suffered severe pain and numbness in his left leg and was taken by ambulance to A&E. In May 2013 an MRI scan revealed impingement of the nerve between the Lumbar 5 and Sacral 1 vertebrae caused by a prolapsed intervertebral disc and he was referred to the spinal team at Frenchay Hospital. He had a nerve root block in November 2013 but this did not solve the problem. He continued to experience leg and back pain. By December 2013 he said that his mobility varied from being independent to wheelchair bound.

18. Dissatisfied with his NHS treatment, he had a private appointment with Mr Harding, a consultant orthopaedic spinal surgeon, on 13 December 2013. He complained of weakness, numbness and severe back pain. Mr Harding recommended microforaminotomy, which I am told is effectively the same as microdiscectomy. He identified the alternative option of fusion, but thought that this should be avoided in view of the Appellant's size and his widespread degenerative changes, and said that up-to-date imaging was needed. On 20 February 2014 Mr Harding reviewed further imaging, diagnosed significant nerve compression from a disc bulge and asked for Mr Watts to be listed for surgery as soon as possible by the first available surgeon. The expectation of all concerned was that the surgery would take the form of microdiscectomy.

19. As a result, Mr Watts attended a pre-operative consultation with Mr Katsimihas, an NHS surgeon, on 27 March 2014. They had not previously met. According to a letter sent by Mr Katsimihas to the GP that day, Mr Watts complained of "quite a lot of low back pain, pain down his left leg along the L5 distribution and also numbness of the left foot of the dorsal aspect at the big toe and some weakness".

20. It was on that occasion that the advice to undergo fusion was given and the omission to discuss the alternative of microdiscectomy occurred. The Appellant accepted the advice and the fusion surgery was expected to proceed five days later. After a delay, it actually took place on 29 April 2014.

21. The Judge resolved various contradictions in the evidence about what was said on 27 March 2014. He found that Mr Katsimihas, having seen an X-ray as well as imaging, drew attention to a "tilt" in the Appellant's spine. One of his reasons for choosing fusion over microdiscectomy was the risk of instability resulting from the tilt if microdiscectomy was attempted.

22. On the Judge's findings, there was no clinical error in the analysis of Mr Katsimihas. Nor did he omit to give proper advice about the risks, as well as the potential benefits, of fusion. His breach of duty consisted only of failing to tell the Appellant that microdiscectomy remained possible, albeit that he was not willing to carry it out, and to set out its pros and cons.

23. Therefore, in the hypothetical situation, Mr Katsimihas would have given the same advice about fusion, identifying it as the appropriate treatment. He would also have said that microdiscectomy remained possible but that he did not recommend it and was not willing to undertake it himself. He would have set out the advantages and disadvantages of both procedures, in particular the following:

    i. Either procedure had roughly an 80% chance of improving the leg pain.

    ii. Fusion had around a 60% chance of improving back pain caused by nerve compression and "constitutional" back pain arising from degenerative change.

    iii. Microdiscectomy had around a 30% chance of improving back pain caused by nerve compression. It would not be expected to improve constitutional back pain.

    iv. Microdiscectomy could lead to instability because of the tilt in the Appellant's spine.

    v. Either procedure had a 5-10% chance of making the situation worse.

    vi. The recovery time from microdiscectomy would have been considerably shorter than from fusion.

    vii. If microdiscectomy was attempted first and was unsuccessful, fusion would remain an option. Indeed, there was a significant chance that fusion would be needed in future.

viii. If fusion was attempted first and was unsuccessful, microdiscectomy in the same location would not be possible.

24. It is then necessary to consider the case which Mr Watts advanced.

25. The Particulars of Claim were originally dated 18 February 2018 and were amended on 15 April 2019. In both versions, paragraph 44 set out several alleged breaches of duty, including the key failure to obtain the Mr Watts' informed consent to surgery by offering him a meaningful choice of procedures.

26. Paragraph 45 (in both versions) pleaded that, "as a result of the breaches of duty set out above", he had sustained personal injury, loss and damage. The particulars included the choice of surgery which he would have made. The relevant sub-paragraph contained what are agreed to be two clerical errors. I quote it with corrections of those errors inserted and underlined for clarity, and with the insertion of a missing word in square brackets:

> "(ii) But for the breaches of duty … the Claimant would <u>not</u> have undergone an interbody fusion procedure in May <u>2014</u> and would, instead, at this time, [have] undergone a microdiscectomy procedure which would have provided a long-term, substantial reduction in his pain system."

27. The Appellant's first witness statement was dated 30 November 2018. He set out the relevant events in detail. In respect of the choice of procedure, it included the following:

> "30. Mr Katsimihas brought up an MRI scan on his computer screen. He said to me 'I think you have scoliosis'. I had never been told this before. Mr Katsimihas that said on this basis he was not happy to proceed with an operation until an x-ray had been performed. He said that he could not even carry on the consultation until this was confirmed. Consequently, Julia and I were in the consultation room for less than 5 minutes before he sent us off to have an x-ray.
>
> 31. I returned to meet with Mr Katsimihas after the x-ray had been performed, that same afternoon. Mr Katsimihas said that the x-ray results showed that I did have scoliosis and because of this, he would only perform a fusion. Mr Katsimihas went on to explain that my spine was tilted and if bone was taken away on that side, it would collapse. He said it would 'concertina down' and the levels above would also be affected. He said I would end up having a fusion performed anyway'
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> 32. I specifically recall him saying to me 'Your spine is in a very bad way my friend'.
>
> 33. Prior to meeting Mr Katsimihas, Julia and I were led to believe the problems with my spine were not that severe. Mr Katsimihas said that if we proceeded with

> the surgery proposed by Mr Harding, then I would need lots of future surgeries. I felt there were no other options than to proceed with Mr Katsimihas' proposal. He did not tell us that there were any other options available and it was put to us as a take it or leave it scenario.
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> 34. Mr Katsimihas said we could talk about his proposed surgery another time. I found this quite alarming and reminded him that the operation was to take place 5 days later. Mr Katsimihas look confused he didn't even know that he was going to be operating on the following Tuesday and when we informed him of this he said 'Oh, don't worry'.
>
> 35. Julia and I left the appointment feeling very worried. We talked on the way home and I felt fortunate that although his bedside manner was poor, Mr Katsimihas had been thorough and spotted the scoliosis because otherwise I may have had the wrong operation. As Mr Katsimihas had said my spine was in a very bad way and I had scoliosis, I was told that the only option available was the procedure he was recommending. Especially as he had said that I would need lots of additional surgeries if I proceeded with the recommendation of Mr Harding.
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> …
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> 67 . The surgery I underwent with Mr Katsimihas was a different procedure to that which had been recommended by Mr Harding, Mr McArthur and Mrs Veater. I was told by Mr Katsimihas that I definitely could not have the original proposed surgery because I apparently had scoliosis; which I now know to be untrue.
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> 68. Mr Katsimihas performed a more complex surgery. Following receipt of our expert evidence in the case, I have real concerns that this needless surgery was not performed to a competent standard. I feel that Mr Katsimihas performed an unnecessary and incorrect procedure which has changed my life dramatically."

28. Not all of this was accepted in the Judge's careful findings of fact. In particular, on the Judge's findings, the discussion of scoliosis (sideways curvature of the spine) was a red herring. Mr Katsimihas considered that Mr Watts had mild scoliosis but that did not affect the choice of treatment. What was significant was the "tilt" in the spine. The Judge found:

> "Mr Katsimihas did not speak of "concertinaing down" or "collapse"; he did draw attention to the tilt, removal of bone and consequential risk of future instability from microdiscectomy but from the perspective of ruling microdiscectomy out".

29. As the Judge pointed out, the witness statement did not say, in terms, what option Mr Watts would have chosen if given the correct advice.

30. That omission is surprising in the circumstances. However, a possible explanation for it is that the Defence (an Amended Defence dated 2 August 2019) responds to paragraph 45 of the Particulars of Claim in these terms:

> "18. As to paragraph 45 (i) to (iv), as breach of duty is denied, it follows that causation is also denied. The Defendant avers as follows:
>
> *[two paragraphs of the original Defence, not material to this issue, were deleted by amendment]*
>
> 18.3 It is not admitted and the Claimant is put to proof that if he had undergone a micro-discectomy procedure, this would have provided a long term substantial reduction in his pain symptoms, as alleged.
>
> 18.4 It is not admitted and the Claimant is put to proof that he would have had some reduction of pain symptoms or would have had no exacerbation of pain symptoms if Mr Katsimihas had performed his chosen procedure differently.
>
> 18.5 It is not admitted and the Claimant is put to proof that he would not have suffered the alleged restrictions on his daily living … ".

31. That pleading does not take issue with the allegation that, but for the breach of duty, Mr Watts would have undergone microdiscectomy. On the face of it, the effect of CPR 16.5(5) was that the Defendant was taken to admit that allegation.

32. However, matters did not rest there. It seems (from the transcript of argument on day 1 of the trial) that the Defendant's spinal surgery expert had pointed out an apparent omission to deal with the issue, and that this was perceived as an error by the Appellant, not the Defendant. On the first day of the trial, the Appellant's then counsel, Mr Peter, sought permission for him to rely on his second witness statement. In argument Mr Peter said that there was no good explanation for the failure to deal with this issue earlier and, not entirely accurately in my view, that "it was set out in the pleadings".

33. The second statement was dated 15 October 2019, six days before the start of the trial. It said that it was made in response to the joint report of the spinal surgery experts, which was dated 10 October 2019. Taking their conclusion, that Mr Watts should have been given the two surgical options, the statement said:

> "4. Had I have been offered a choice of operation by Mr Katsimihas, of course I would have gone for a microdiscectomy. I did believe this to be a smaller operation which was a less complicated and less risky option at the time of consultation. That is the operation that I was expecting to have. This was the operation that had been recommended by Mr Harding.

> 5. Obviously a less invasive and shorter procedure would have been preferable to me. I had no desire to be in hospital for any longer than necessary. However, I was told in no uncertain terms that this was the only option available to me from Mr Katsimihas because I had 'scoliosis'.
>
> 6. I don't believe that anyone would voluntarily have a bigger operation if given a choice. It would be like being offered a choice between a having an ingrowing toenail removed, or having my foot amputated. I was never given a choice.
>
> 7. I would have had more future treatment options if I had undergone a microdiscectomy; for example, if I had experienced continued sciatic pain in my leg or developed further pain in my back."

34. When cross-examined on this topic, Mr Watts said that he would have opted for microdiscectomy. When asked why this was not in his first statement, he said "because it was never offered". Asked whether he would in fact have followed Mr Katsimihas' advice, he said:

> "Why would anybody in their right mind opt to have a much bigger operation to achieve the same outcome? It would be foolish to do that; no one in their right mind would do that. If the offer was there, obviously I would have taken the lesser, less invasive procedure, less risky procedure, obviously I would have done, any human being would choose that."

35. When asked again why he would not have trusted the surgeon and followed his advice, Mr Watts said "because there was no other option on offer". The Judge perceived that the answer did not match the question and invited counsel to put it again. Mr Watts reiterated his position and asked rhetorically why he would choose fusion if "the benefits of each of these surgeries were more or less the same". There then followed this exchange:

> "Q. … If the learned Judge were to conclude that actually the benefits are, that you had been given advice that the benefits were potentially different and you'd been given advice by the surgeon that actually the fusion operation is the better operation for the reasons that, we don't need to go into at the moment, then that would have persuaded you, wouldn't it, to have gone for the fusion surgery?
>
> A. I can't answer that question. It's hypothetical, sorry, I can't answer it."

36. Counsel took the matter no further and it was not pursued in re-examination.

37. In his judgment, the Judge noted the allegation that Mr Watts would have chosen microdiscectomy and a lack of particulars of it. He added that "the Trust put Mr Watts to proof of this". He found it "quite extraordinary" that the first statement did not touch on the point. The Judge continued:

> "60. The problem is compounded by the lack of reasoning in Mr Watts' second statement. All parties knew by this stage that it was reasonable to offer fusion or microdiscectomy and the procedures had different pros and cons. I fully accept and understand Mr Watts' assertion that he would have preferred a less invasive and shorter procedure – who would not? But to all intents and purposes his reasoning ends there (see the second statement). However, we know that microdiscectomy treats only the nerve compression causing the sciatica and some referred pain; not the constitutional pain in contrast to fusion which also assists with constitutional pain. We also know that the microdiscectomy cannot help with the tilt.
>
> 61. Mr Watts is plainly an intelligent gentleman and so I would have expected to see credible reasoning on his part otherwise one can be left with a distinct impression that Mr Watts is now saying he would have chosen microdiscectomy because the fusion did not work.
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> 62. The evidence did not improve in cross examination. Mr Watts was asked why his first statement omitted to say that he would have chosen microdiscectomy. He could have put this down to oversight but he said the omission was because Mr Katsimihas had not offered microdiscectomy. That is not a good explanation. Mr Watts went on to say (according to my note):
>
> '*Why would anyone opt to have the much bigger operation for the same outcome. I would have taken the less risky less invasive procedure.*'
>
> But it is not alleged by any party that the two operations were designed to achieve the same outcome – they were not. He said soon thereafter that if the benefits of the surgery were the same he would have chosen microdiscectomy which is readily understandable but again is on the erroneous assumption that the benefits are the same.
>
> 63. Mr Barnes asked Mr Watts what his position would be if he knew that the benefits of the two procedures were different and the prospects of success better with fusion. Mr Watts responded saying that he could not answer that question."

38. The Judge directed himself by reference to *Smith v Barking, Havering and Brentwood Health Authority* [1994] 5 Med LR 285 in which a similar issue arose. There, Hutchison J referred to the difficulty for a claimant in giving reliable answers to this type of question after the event, and added:

> "Accordingly, it would, in my judgement, be right in the ordinary case to give particular weight to the objective assessment. If everything points to the fact that a reasonable plaintiff properly informed, would have assented to the operation, the assertion from the witness box made after the adverse outcome is known, in a wholly artificial situation and in the knowledge that the outcome of the case

> depends upon that assertion being maintained, does not carry great weight unless there are extraneous or additional factors to substantiate it. …
> … Of course the less confidently the judge reaches a conclusion as to what objectively the reasonable patient might be expected to have decided, the more readily will he be persuaded by her subjective evidence."

39. The Judge, noting that both types of operation were reasonable options, considered whether any other evidence supported the Appellant's assertion. Having reviewed the pros and cons of the two procedures, he concluded:

> "71. … The position for Mr Watts would have been that it was more likely than not that both procedures would help with leg pain. It was more likely than not that fusion would help with back pain but it was unlikely that microdiscectomy would help with any back pain.
>
> 72. Therefore it seems to me that the decision to choose between microdiscectomy and fusion would have been quite a difficult choice to make and the expert evidence does not persuade me that it was obvious Mr Watts would have chosen microdiscectomy over fusion.
>
> 73. I have no reason to disbelieve Mr Watts when he now says he would have chosen microdiscectomy but he needed to persuade me that he would have chosen microdiscectomy in March 2014 and I am afraid I am not so satisfied on the balance of probability."

40. The question for me on this appeal is not whether I would have made a different finding but whether I am satisfied that the Judge's finding of fact was plainly wrong, meaning that it was a finding which no reasonable Judge could have reached. For that proposition, see *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [62].

41. Mr Watts was represented by Stephen Cottrell of counsel, who did not appear at trial. He showed me evidence given at the trial suggesting that the main purpose of the surgery was to treat the Appellant's leg pain, and that any prospect of improving his "constitutional" back pain was just a bonus. He emphasized that the chance of relieving the leg pain was the same with either procedure. Therefore, he contended, microdiscectomy was in reality the more attractive option because it was less intrusive and risky than fusion, while pursing the same main benefit. He submitted that the Judge wrongly attached too much weight to the bonus of possibly relieving back pain, instead of equating the two types of operation.

42. Mr Cottrell further contended that the Judge was wrong to say that Mr Watts' reasoning went no further than that point, pointing out that the second statement also advanced an additional point, namely that when Mr Watts came to see Mr Katsimihas, he was expecting to have a microdiscectomy and not fusion.

43. As to the law, Mr Cottrell submitted that the *Smith* case does not set up any extra hurdle for a claimant. He said that in any event, objective factors weighed in the Appellant's favour, as the Judge recognised when asking "who would not" prefer a less intrusive operation.

44. In response, Matthew Barnes, counsel for the Respondent, first pointed out that fusion, unlike microdiscectomy, had a better-than-evens chance of remedying back pain. Second, he emphasized that the Appellant's evidence about the choice he would have made was logically less convincing because it appeared only in the second statement, years after the event and just before the trial. The Judge's reference to a "lack of reasoning" in that evidence, he argued, was not to a simple lack of reasons, because reasons were given, but to a failure to explain why Mr Watts would have rejected fusion despite it solving the issue of spinal tilt and instability and despite it helping, unlike microdiscectomy, with constitutional back pain. Thirdly, he emphasized that in cross-examination, once the nature of the hypothesis was made clear, Mr Watts said that he couldn't answer the question.

45. For those reasons, Mr Barnes invited me to reject the two criticisms of the Judge's decision which are made under ground 1.

46. In my judgment, ground 1 cannot surmount the high hurdle necessary to overturn a finding of fact.

47. The Judge rightly ruled that it was for the Appellant to prove, on the balance of probability, that he would have chosen microdiscectomy if offered the option. *Smith* does not set up an extra hurdle for claimants, but is a reminder of the logical need for some caution in accepting a claimant's assertion of this kind. It was appropriate and necessary for the Judge to consider whether Mr Watts' assertion could be accepted in this case.

48. Mr Watts supported his assertion by claiming that the choice was an obvious one. The Judge was entitled to, and did, reject that view. Choosing microdiscectomy would have meant rejecting the strong advice of the surgeon who was, in effect, standing by to operate. In particular it would have meant rejecting his advice about "tilt" and instability. It would also have meant giving up a likelihood of the back pain being relieved. Whilst there were also factors leaning in favour of microdiscectomy, the Judge was entitled not to be persuaded that they made the choice obvious. Indeed, if microdiscectomy was the obvious choice, then Mr Katsimihas' advice to opt for fusion would have been irrational, but the expert witnesses at the trial agreed that that advice was reasonable.

49. I would not have placed as much weight as the Judge appeared to place on the fact that the first witness statement did not address the issue. As I have said, the lack of challenge in the Defence could explain it. However, that does not invalidate the

Judge's concern that the second witness statement, though belatedly addressing the issue, contained inadequate explanation of the proposition that Mr Watts would have gone against the surgeon's strong recommendation.

50. I do not read the Judge's reference to "lack of reasoning" as an erroneous failure to realize that Mr Watts had given reasons for what he says his choice would have been. Instead, I think it refers to a failure by Mr Watts in his evidence to engage with the fact that the surgeon was strongly recommending fusion, and perhaps also with the fact that fusion was likely to relieve back pain as well as leg pain so that the two procedures were not precisely equivalent to each other. What was missing was a sufficient explanation of why those facts did not outweigh the potential benefits of microdiscectomy.

51. Meanwhile, I agree with the Judge that Mr Watts' answers in cross-examination failed to make good his case. Worryingly for any Judge, the answers at first showed a lack of understanding of what the hypothesis consisted of. That logically made the evidence in the second witness statement (evidence that he would have acted in a particular way in the hypothetical situation) less convincing, because that statement may well have been founded on a false premise. Then, when the hypothesis was finally set out clearly, that was Mr Watts' chance to address it directly. In response he said that he could not answer the question. That answer, not explored by his counsel in re-examination, readily explained and justified the Judge's conclusion.

52. It follows that the Judge's conclusion was not clearly wrong, and ground 1 therefore fails. That in turn means that the appeal cannot succeed.

Ground 2

53. Nevertheless, I will set out my conclusions on ground 2, which would remain material if my decision on ground 1 were overturned.

54. By ground 2, the Appellant challenges the Judge's conclusion that, in the medium or long term, he would not have been any better off he if had undergone microdiscectomy rather than fusion.

55. The Judge's conclusion was expressed in this way:

> "85. It is clear from the evidence that prior to fusion Mr Watts had a vulnerable back and that subsequent to fusion he has had further problems not related to the fusion. This would not have been any different had Mr Watts undergone microdiscectomy. It is also more probable than not that Mr Watts' back pain (as opposed to leg pain) would have continued after a microdiscectomy. Both procedures are more likely than not to succeed. I can observe that on the balance of probability there would be more post recovery pain and suffering from the

more major operation but I am unable to find beyond the short term that Mr Watts would have been better off with microdiscectomy."

56. Mr Cottrell contends that the Judge erred by:

    i. not considering expert evidence on the issue;

    ii. failing to heed an agreement of the spinal experts that at least part of the continuing symptoms were caused by the fusion operation;

    iii. failing to heed evidence of the Appellant's pain management expert; and

    iv. failing to provide adequate reasons.

57. In my judgment points i and ii merge into each other. In oral argument it also became clear that the evidence of the pain consultants was of secondary if any importance, thereby laying to rest point iii. This ground of appeal depends on showing that, in the light of the expert evidence of the spinal surgery experts, the Judge's decision was wrong or insufficiently reasoned.

58. Mr Cottrell took me to the following points in the evidence:

    i. The report of Mr Webb, the spinal surgery expert instructed by Mr Watts, dated 15 January 2016, said that without a CT scan he could not detect whether "solid fusion has occurred", but:

        > "[the] surgery has not been successful and it appears to have caused a deterioration of his symptoms. It is a risk of any major surgery that in the region of 5% to 10% of patients may be made significantly worse after surgery".

    ii. The joint statement of Mr Webb and of Mr Rhys Davies, the spinal surgery expert instructed by the Respondent, dated October 2019, which at paragraph 21 expressed agreement "that the effect of the surgery … is that the Claimant is now worse off than he was before".

    iii. Under paragraph 22 of the joint statement, Mr Webb said "in all probability, his two level fusion has cause [sic] increased stresses above the fusion and as a consequence the level of pain above the fusion would be increased". Mr Rhys Davies, however, pointed out that the problem was two levels above the fusion, not one level as is more common, and so Mr Watts "may well have developed an issue at this level with or without fusion surgery".

    iv. In cross examination Mr Webb rejected the proposition that Mr Watts would have been in the same position with microdiscectomy, claiming that his

original report said that "he would have been significantly better with a microdiscectomy".

v. In cross examination, Mr Rhys Davies said that one could assume that the pain which was in the area of the surgery "is, in part, related to the operation", but he added that he believed Mr Watts would have had as much back pain after microdiscectomy.

59. Mr Cottrell submits that this evidence yielded the unavoidable conclusion that the operation caused some continuing pain. While there was also evidence that there would have been continuing pain after a microdiscectomy, that evidence did not enable the Court to identify its extent. Therefore the Judge could not assume that it would have equalled (or exceeded) the pain actually suffered, and was bound to assess and compensate that suffering.

60. Mr Barnes, in response, submits that the issue for the Judge was not whether the operation caused continuing pain. It was instead whether the alternative operation (which on the Appellant's case he would have had if given the correct advice) would have achieved a better outcome. The onus was on him to prove that it would.

61. Mr Barnes points to the following points in the evidence:

i. No report by Mr Webb said that Mr Watts would have been better off after a microdiscectomy.

ii. Mr Rhys Davies at paragraph 3.3 of his report dated February 2019 said that the continuing symptoms "would have occurred anyway".

iii. The question of the probable outcome after microdiscectomy was directly put to both experts at question 23 of the joint statement. Mr Webb did not identify a different outcome. Mr Rhys Davies said that Mr Watts would have required fusion within 5 years in any event.

iv. Then, in answer to more questions about the hypothetical scenario, Mr Webb said that either type of surgery on the balance of probabilities would have relieved the leg pain, while Mr Rhys Davies said:

> "… the claimant would have had back pain and leg pain whether he had had a discectomy or a fusion. He appears to have been made worse. However, both his CT and his MRI scan demonstrate a solid fusion without any ongoing neural compression at the L4/5 and L5/S1 levels. The surgery planned by Mr Katsimihas has therefore successfully been carried out however it is well recognised that despite these facts patients can have ongoing symptoms and certainly some of Mr Watts's ongoing

symptoms are related to issues potentially at other anatomical sites namely his Sl joints and the L2/3 level."

v. The evidence of the pain specialists unsurprisingly did not add anything of substance to the evidence of the surgeons on causation (and Mr Cottrell at the appeal hearing did not suggest otherwise).

62. Mr Barnes submits that evidence that the fusion operation caused some continuing pain was only half of what was needed. Mr Watts, he submits, cannot also identify evidence proving that microdiscectomy would have led to a better outcome. On the contrary, the weight of the evidence at least justified the Judge's conclusion that it would not.

63. I agree that the crucial question was whether, on the balance of probabilities, there would been a better outcome if Mr Watts had undergone microdiscectomy instead of fusion.

64. It seems to me that there was a lack of clarity in the expert evidence on this question.

65. That may be because attention was focused on other questions. Mr Webb in his original report criticised both the decision to offer fusion and the way in which it was carried out, though those criticisms would not be upheld by the Judge. A focus on those questions, whether by Mr Webb himself or by his instructing solicitors in their instructions which I have not seen, could help to explain the lack of discussion of questions of causation, including this key question raised by ground 2.

66. Causation, i.e. the question of whether Mr Watts would have experienced as much long-term back pain if he had not undergone the fusion operation, was squarely addressed in the first report of Mr Rhys Davies. However, although he said that the long-term pain would have occurred in any event, he did not fully analyse how it would have been caused, though he did say that "pain and disability" was "an unfortunate but recognisable risk of the surgery".

67. The Appellant's pain consultant, Dr Souter, considered that his chronic pain condition would probably not have occurred in the absence of his disc prolapse and subsequent surgery, though he would have suffered intermittent low back pain, having regard to his medical history and other factors.

68. The Respondent's pain consultant, Dr Sanders, considered that "long-term lumbar back pain was the most likely outcome even in the absence of the index event". Neither pain expert was asked for an opinion on what would have happened specifically after a microdiscectomy.

69. The joint statement of the surgical experts was always going to be a very important document. In this case it did not fulfil its function of identifying the key issues and, on

each, stating whether the experts agreed or disagreed and, if they disagreed, the reasons for the disagreement. In my view the experts were asked far too many questions, causing the document to be weighed down with material that did not identify their positions on the decisive issues. Some of the experts' answers did not begin by identifying agreement or disagreement and/or were discursive rather than concisely identifying the differences between their positions.

70. Nevertheless, the essential question for ground 2 was asked at point 23 of the document:

> "lf the Claimant had undergone a microdiscectomy, what would the outcome have been, on the balance of probability? In answering this question, please consider (i) whether the Claimant is likely to have required a decompression and [fusion] in any event, and if so when; and (ii) if appropriate, a consideration of acceleration and/or exacerbation of injury."

71. Unfortunately, the two follow-up questions seem to have distracted the experts from the crucial first question, to which they said only: "We have already discussed the outcome of both surgeries." That was a reference back to question 5(v), where they had been asked to identify the "prospect that [microdiscectomy] would result in the claimant being worse off than before in respect of back pain". Both experts had put that prospect at 5-10%. Mr Webb and Mr Rhys Davies then went on to debate the question of whether fusion would eventually have been needed in any event.

72. Judge Ralton asked Mr Webb a number of questions about the effects of the two procedures. He elicited, again, the fact that microdiscectomy could not be expected to help with constitutional back pain. He asked if it was known why some patients continued to have pain even after an anatomically successful fusion operation. Mr Webb said that it was thought to be genetic but there was no anatomical explanation.

73. In cross examination, Mr Rhys Davies was asked about what would have happened after a microdiscectomy. However, that discussion focused on whether fusion would eventually have taken place anyway and on whether other back problems had been accelerated. So far as I can see, Mr Peter did not put to Mr Rhys Davies the proposition that whereas the fusion had in fact caused some worsening of the back pain, microdiscectomy on the balance of probabilities would not have caused such deterioration because the risk of it doing so was only 5-10%.

74. Nobody asked either surgical expert whether the fact that Mr Watts was one of the unlucky 5-10% to experience deterioration after fusion meant that he would have been any more likely to experience deterioration after microdiscectomy.

75. In my view, this evidential picture made the Judge's task very difficult. With some reluctance, I am unable to uphold his conclusion on this issue of causation.

76. Mr Cottrell is right to emphasize the key point that, after the fusion operation, the pain did not merely continue. This is one of the unlucky cases, a cohort estimated at 5-10%, in which the pain became worse.

77. It follows that if Mr Watts had persuaded the Judge that with correct advice he would have chosen microdiscectomy (or if he succeeded on ground 1 of his appeal and then so persuaded the Court), his claim would have succeeded unless, on the balance of probabilities, microdiscectomy would have been followed by a deterioration that was at least as bad.

78. The Judge held that he experienced "further problems … not related to the fusion" and that these would have occurred in any event. No doubt that was right. But what mattered was the problems which were related to the fusion. Their existence was proved by the surgical experts' joint statement, which said at paragraph 21 that the fusion made his condition worse. The Judge did not indicate or explain any departure from that part of the statement.

79. So the Judge's crucial finding was the next one, that it was "more probable than not that Mr Watts' back pain (as opposed to leg pain) would have continued after a microdiscectomy". However, that finding did not address the fact, proved by the joint statement, that the back pain did not just "continue" but got worse, and that this was an effect of the surgery.

80. And, if the Judge was saying that the deterioration also would have occurred after a microdiscectomy, there is no explanation of how that finding was reached in the teeth of the agreed medical evidence that the chance of deterioration after microdiscectomy was only 5-10%.

81. I see no evidential basis for inferring that such deterioration after microdiscectomy was more likely to occur in the case of Mr Watts because he in fact experienced an equally improbable deterioration after fusion. In any event, the Judge did not suggest that as an explanation.

82. Nor do I perceive the Judge arriving at a sufficiently explicit or reasoned conclusion that any continuing symptoms not related to the surgery would have equalled or exceeded the effects of the surgery so quickly as to mean that the surgery did not cause any measurable pain and suffering. The evidential basis for any such conclusion, and its relationship with the experts' joint statement, would have required detailed explanation.

83. In my judgment, the Judge was not compelled to find that microdiscectomy would have led to a better outcome, not least because there was evidence from Mr Rhys Davies to the contrary. However, I conclude that the Judge did not give sufficient reasons to explain his conclusion on this difficult issue.

Conclusion

84. It seems to me that the failure of ground 1 means that the appeal must be dismissed, but I will invite written submissions on that and any other consequential matters.