

Hastings (Appellant) v Finsbury Orthopaedics Ltd and another (Respondents) (Scotland) [2022] UKSC 19 On appeal from: [2021] CSIH 6

Date: 29 June 2022

Justices

Lord Reed (President), Lord Kitchin, Lord Stephens, Lady Rose, Lord Lloyd-Jones

Background to the Appeal

This appeal concerns a metal-on-metal ("MoM") prosthetic hip called the MITCH-Accolade product. The MITCH-Accolade product was manufactured by the respondents. The appellant, Mr Hastings, underwent a total hip replacement using the MITCH-Accolade product in 2009. The appellant claims that the replacement hip used in that operation was defective. He seeks damages under the Consumer Protection Act 1989 (the "CPA"). At first instance, the issues in this case were limited to the question of whether the product used in the appellant's operation was 'defective' within the meaning of the CPA [1]-[2].

It was common ground at proof that the statistical evidence presented to the court was not sufficient of itself to establish that the MITCH-Accolade product was defective. As a result, the appellant presented his case on two main bases. First, he sought to prove that the MITCH-Accolade product was defective by demonstrating certain design flaws. Secondly, he relied on matters which were said to constitute prima facie evidence that the MITCH-Accolade product was defective. In particular, the appellant relied on three matters: (1) expressions of professional concern by the orthopaedic community, (2) the conduct of the respondents in withdrawing the MITCH-Accolade product from the market and (3) certain notices and alerts issued by regulators and by the respondents [16]-[18]. At proof, the respondents relied upon evidence of biostatistics from Professor Platt which was unchallenged by the appellant. The parties were agreed that Professor Platt's evidence demonstrated that there was no reliable statistical evidence that the revision rate of the MITCH-Accolade product was out of line with the relevant benchmarks. The 'revision rate' of a prosthesis is the percentage chance that revision surgery will be required to replace the prosthesis in a given time period [22]-[27].

At first instance, the Outer House held after a preliminary proof that the appellant had failed to prove that the MITCH-Accolade product was defective for the purposes of the CPA [34].

The Inner House refused the appellant's reclaiming motion [35]-[36]. The appellant now appeals to the Supreme Court. The appellant submits that, notwithstanding the evidence of Professor Platt, it was open to the appellant to prove his case by reference to the evidence that established a prima facie case that the MITCH-Accolade product was defective [37]. On appeal, the appellant has not sought to pursue his case regarding the alleged design flaws in the MITCH-Accolade product. The central question which arises on this appeal is thus whether the courts below were correct to find that, notwithstanding the prima facie evidence, the appellant has failed to prove that the MITCH-Accolade product is defective [17]-[18].

Judgment

The Supreme Court unanimously dismisses the appeal. Lord Lloyd-Jones gives the judgment with which all the other members of the Court agree.

Reasons for the Judgment

Legal principles

This appeal is unusual in that the legal issues concerning the application of the CPA are largely agreed. The basic principles may be summarised as follows. The CPA (and the EU directive which it implemented) have introduced a system of no-fault liability in respect of defective products. The test of whether a product is defective is whether the safety of the product is not such as persons generally are entitled to expect. The burden of proof is on the consumer to establish a defect and a causal link to the injury [15].

This case

The nature of the MITCH–Accolade product is such that there can be no entitlement to an absolute level of safety. The test of entitled expectation is whether the level of safety of the MITCH–Accolade product would not be worse, when measured by appropriate criteria, than existing non–MoM products that would otherwise have been used. On appeal, the sole criterion of entitled expectation relied upon is the revision rate [19]-[21].

The appellant failed to establish his case on a statistical basis. The question which now arises for consideration is whether the rejection of the statistical evidence nevertheless leaves prima facie evidence on which the appellant can rely to prove his case. The Supreme Court considers that it does not. The three matters relied upon as prima facie evidence are addressed in turn [41].

The generalised expressions of professional concern do not assist the appellant in establishing that the MITCH–Accolade product was defective because they related to the performance of MoM prostheses in general [42]-[43]. The first instance judge found that the withdrawal of the MITCH–Accolade product from the market was brought about by commercial considerations. As a result, the withdrawal does not provide any support for the appellant’s case that the product was defective [44]-[47]. Nor do the notices and alerts issued by regulators and the respondents assist the appellant. The evidence on which these notices and alerts were based appears to support a failure to meet the applicable standard of entitled expectation. However, Professor Platt’s reasons for considering that the appellant’s case of a breach of entitled expectation was not made out on a statistical basis apply equally to this category of prima facie evidence. Professor Platt’s evidence contradicts the information which formed the basis of the alerts and safety notices [48]-[62]. The appellant submits that because there is limited available data on revisions in respect of the MITCH–Accolade product the true revision rate could be considerably different from the estimates based on the available data. However, the first instance judge rejected the appellant’s arguments regarding the limited available data. The judge held that the appellant had failed to prove the existence of a defect. Ultimately, this appeal is no more than an attempt to appeal against the judge’s findings of fact which supported that conclusion. The appellant has failed to provide any basis for the Supreme Court to interfere with those findings. The appeal is therefore dismissed [63]-[66].

References in square brackets are to paragraphs in the judgment

Note

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available online. [Decided cases](#)