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INFORMED CONSENT IN THE POST MONTGOMERY WORLD

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Montgomery v Lanarkshire Health Board 2015 SC (UKSC) 63

- Overruled previous House of Lords authority – *Sidaway v The Board of Governs of the Bethlam Hospital* [1985] AC 871
- Test for whether a doctor (in this case) has obtained the informed consent of the patient is no longer applied by reference to the *Hunter v Hanley* test
- Rather, the test is to consider what the reasonable patient might wish to know. This is a matter for the court

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Montgomery

- Paragraph 87
- "An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it"

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R v Lanarkshire Health Board [2016] CSOH 133

- Medical negligence claim where pursuer gave birth to a brain damaged child and alleged negligence on the part of the treating obstetrician
- As so often, the allegations of negligence were largely predicated upon an interpretation of the CTG trace

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Allegations of fault – five in number

- "(1) It was the duty of Dr O, the registrar who attended at 1600 hours to call for the advice of a consultant who would have initiated a Caesarean procedure.
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- (2) Further, she had a duty when she attended at 1645 to have commenced delivery by C section at 1645 hours.
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- (3) Further, it was the duty of Dr O to have commenced the delivery by C Section following her review of the First Pursuer at 1720 hours.
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- (4) Further, it was the duty of Dr O to have commenced delivery by assisted vaginal delivery (given full dilation) or by C Section at or around 1822 hours in consequence of the prolonged deceleration which commenced at 1818 hours and not to have elected to do a FBS in these circumstances.
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- (5) Further and in any event at each of her attendances with the First Pursuer at 1645, 1720 and 1818 hours, Dr O failed in her duty to discuss with the First Pursuer the non reassuring features, and the options, including urgent delivery by caesarean (or assisted vaginal delivery at the later time) to enable the First Pursuer to make an informed decision about, and to give her informed consent to, the continuing progress of her labour."

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Outcome

- Lord Brailsford found the defenders liable in relation to the fourth and fifth grounds of fault
- Defenders have marked reclaiming motion
- The fifth ground of fault is the consent case
- At about 18.18, a sudden bradycardia showed on the trace
- Held that this ought to have required a discussion between Dr O and the pursuer about further management of labour which did not take place

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- Held further that the two options were either to proceed to immediate vaginal delivery
- Or to proceed with another fetal blood sample (as happened) and proceed to stage 2 of the delivery, if satisfactory (which it was)

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- Held per Lord Brailsford
- “In my view these alternatives should have been explained to KR and the risks associated with each also explained. Had this been done KR would have been provided with sufficient information to permit her to make an informed choice as to which course she opted to take. The fact that this approach was not taken renders this case, in my opinion, fairly within the ratio of Montgomery. I am accordingly satisfied that the Pursuer has established this part of her case.”

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- What Lord Brailsford is essentially saying is that no discussion = negligence = success for the pursuer
- Is that right though ?
- Most obvious problem is that ignores the question of causation
- In considering that we have to rewind a bit to what happened earlier on in the labour

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- Pursuer's evidence was that, at 16.45, she heard the words "meconium stained liquor" and knew that meant her baby was distressed and stated that she needed a caesarean section
- This account was not accepted by Dr O or the midwifery staff. Indeed, Lord Brailsford expressly rejected that account
- By way of contrast, there was no evidence as to what the pursuer might have said to further management of her labour had the discussion which the court held ought to have taken place when the bradycardia developed

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- Before considering the questions of negligence and causation, there must be evidence of whether there was a "material risk" and which a reasonably prudent patient would wish to know about. That will involve medical evidence
- Secondly, it will be necessary to know what the content of the desired conversation would have been
- In this case, there was no evidence as to the content of this conversation
- Can this issue be determined in an evidential vacuum ?
- Especially if the pursuer's evidence elsewhere of what she said was rejected by the court

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Britten v Tayside Health Board [2016] SC DUN 75

- Decision of Sheriff SG Collins QC, sitting in Dundee Sheriff Court on 28 September 2016
- Pursuer had suffered from bipolar disorder since 1990 involving ongoing medical treatment, including hospital admissions
- He suffered with problems with his left eye, including pain, photophobia and inflammation which was treated with steroid eye drops

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- By 2005, there were two possible means of treatment which no longer involved the use of eye drops as his condition had deteriorated
- Firstly, the use of oral steroids which had a risk as it was associated with adverse psychiatric events
- Alternatively, the use of of steroid injection, where there was a lower risk of being associated with adverse psychiatric events but did carry other medical risks

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- The Sheriff held that the pursuer was not advised by the treating doctor of the possibility of steroid injection as an alternative to treatment by oral steroids
- The pursuer was not advised of the relative risks or benefits as between these two treatments
- The pursuer took the oral steroids and became increasingly mentally unwell, requiring admission to a psychiatric hospital

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Outcome

- Held that the pursuer's bipolar disorder was caused by the oral steroids he took in 2005
- However, the Sheriff held that, even had the pursuer been advised of the alternative treatment by steroid injections and had the risks and benefits of these two treatments been fully explained to him, he would still have chosen to have treatment by way of oral steroids

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- Held per the Sheriff :
- "It seems to me that the question of whether an alternative treatment is or is not reasonable must be a matter for the court to assess on the basis of the evidence presented to it. That will include the views of the medical experts, but also the evidence of the Pursuer, so as to determine whether a reasonable person, in the Pursuer's position, might reasonably consent to such treatment"

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- "Seeking to apply the principles derived from Montgomery in the present case, it seems to me that in order to succeed in his claim the Pursuer has, in summary, to establish (1) that he was not properly advised of the risks to his mental health of treatment with oral steroids at the material times; or (2) that steroid injection was a reasonable alternative treatment which was available, but (3) the Pursuer was not advised of this alternative nor of the potential and relative risks and benefits of such treatment vis a vis treatment by oral steroids; and in either case (4) that treatment by oral steroids caused the relapse in his bipolar disorder and so caused him loss, and (5) that but for the failure to properly advise him of the availability of treatment by steroid injection and the potential and relative risks of such treatment he would not have consented to treatment by oral steroids and so would not have sustained this loss"

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Britten v *R v Lanarkshire Health Board* contrasted

- Unlike in *R*, in *Britten* there was (considerable) discussion about
- (a) the risks and benefits of the two alternatives;
- (b) what the desired conversation would have entailed; and
- (c) a detailed examination of the pursuer of what he would have done had the desired conversation taken place and why

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A few English decisions….

- *Spencer v Hillingdon NHS Trust* [2015] EWHC 1058 (QB)
- Claimant sustained DVT after inguinal surgery causing a pulmonary embolus and claimed he was not advised of the risk.
- Claimant had pneumatic boots fitted intra operatively to reduce the risk of clotting
- Court held that no advice given including as to what the symptoms might be and found for the claimant even though he was not someone deemed to be at high risk of embolus as such
- But fact that general policy of the hospital to fit such boots intra operatively a "tacit admission" by the hospital that he fell within the cadre of those at risk

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- *A v East Kent Hospitals Trust* [2015] EWHC 1038 (QB)
- Birth case where claimant said she was not advised of a chromosomal disorder at 28 weeks gestation and whether she would have sought an amniocentesis if given this information
- Did this amount to a "material risk" as per *Montgomery* ?

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- Court held no. Risk was only 1 in 1,000 (court rejected expert evidence that risk was between 1-3% which would have mandated being mentioned to the claimant)
- Court also held that the claimant would not have elected for amniocentesis even if advised of the risk given that involved more risk to her baby being born disabled than proceeding with a normal pregnancy

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- *Tasmin v Barts Health NHS Trust* [2015] EWHC 3135 (QB)
- Another birth case
- Issue was whether mother ought to have been advised as to proceed with a fetal blood sample
- A slightly troubled lengthy labour with fetal heart rate decelerations. Syntocinon used for many hours. Bradycardia resulting in C section

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- Claimant said that 2 requests for C section were ignored and that, at the very least, FBS should have been undertaken which would have led to C section
- Court found for the defendants
- Rejected evidence that parents had requested a C section
- The offer of a FBS should have been made. However, had the sample been taken, they would have been normal and shown no evidence of fetal hypoxia and so advice would have been to proceed with normal labour and not C section

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- FBS per se did not pose a “material risk” requiring advice of risk to be given
- Court accepted expert evidence that offering C section in lieu of FBS is not good medical practice
- If the claimant was right, the option of a C section would have to be offered in every similar case, even where the result of the fetal blood sampling was normal. That would be inconsistent with national guidance and standard obstetric practice
- Places some limits on the application of informed consent ?

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What is [medical] treatment?

- In *Tasmin*, defendants argued that *Montgomery* did not apply at all as a FBS is not "medical treatment"
- Online dictionary – treatment is "medical care given to a patient for an illness or injury"
- Rejected by the court as FBS was part of labour which is clearly medical treatment
- Where do you draw the line, if any though ?
- Do investigative procedures which do not treat in any way fall within Montgomery ?
- Does medical treatment = medical care ?

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Expansion of *Montgomery* - non medical negligence cases ?

- *O'Hare v Coutts & Co* [2016] EWHC 2224 (QB)
- Failure to give advice on financial risk
- "The reasoning in *Montgomery* is not, in my judgment, irrelevant outside the medical context"
- *Baird v Hastings* [2015] NICA 22
- Solicitors' negligence case

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- “The doctor/patient relationship is not a full or true analogue of a solicitor/client relationship since the therapeutic duties owed by a doctor to a patient raises different questions from those arising between a solicitor and client. However, a solicitor is bound to take reasonable care to ensure that the client understands the material legal risks that arise in any transaction which the client has asked the solicitor to handle on his behalf. As in the doctor/patient relationship the test of materiality is whether a reasonable client would be likely to attach significance to the risks arising which should be reasonably foreseeable to the competent solicitor. As in the medical context, the advisory role of the solicitor must involve proper communication and dialogue with the client.”

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