AMPERSAND

ADVOCATES

MCCULLOCH V FORTH VALLEY HEALTH BOARD – REVISITING AND EXPLAINING *MONTGOMERY*

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McCulloch v Forth Valley Health Board [2023] UKSC 26; 2023 SLT 725

(1) The proof and the reclaiming motion in the Court of Session

(2) The application to appeal to the Supreme Court

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(6) Observations

(1) The proof and the reclaiming motion in the Court of Session

- Death 7 April 2012 after cardiac arrest
- Idiopathic pericarditis and pericardial effusion. Cardiac tamponade
- Inpatient twice prior to death
- First admission 23 March: complex presentation, very ill, ICU care
- Presentation included moderate pericardial effusion which reduced in size
- Discharged home 30 March: diagnosis of acute pericarditis plus pleuropneumonitis with secondary bacterial lower respiratory tract infection

- Discharged with antibiotics, follow up review by physician in 4 weeks
- Readmitted on 1 April with severe chest pains
- Another echocardiogram, interpreted by Dr Labinjoh consultant cardiologist
- Still an effusion but not concerning
- Consistent with his improved clinical presentation when seen by Dr Labinjoh on 3 April
- He denied chest pain or other cardiac symptoms
- NSAIDs such as ibuprofen were not indicated, in the absence of pain
- Discharged home by another doctor on 6 April, cardiac arrest 7 April

- Proof January 2020, alleged duties on Dr Labinjoh on 3 April 2012
  a. discuss with him the option of pericardiocentesis
  b. treat his pericardial effusion with colchicine, an anti-inflammatory drug
  c. treat his pericardial effusion with non-steroidal anti-inflammatory drugs (NSAIDs) such as ibuprofen
  d. discuss with him the option of commencing treatment with colchicine or NSAIDs with the aim of reducing his pericardial effusion, and
  e. place him on cardiac monitoring and order a further echocardiogram prior to his discharge

- Proof over 8 days before Lord Tyre
- Alleged duty to discuss option of pericardiocentesis not insisted upon
- 7 May 2020 Opinion [2020] CSOH 40 - decree of absolvitor
- Applying *Hunter v Hanley* and *Bolitho,* Lord Tyre rejected the defender's expert on one issue and found one breach of duty- Dr Labinjoh should have ordered that there be a further echocardiogram prior to discharge (Opinion at [92—[96])
- BUT no causation proved (Opinion at [99])
- Pursuers' argument that failure to discuss reasonable treatment options of colchicine and NSAIDs

- [87] in *Montgomery* 2015 SC 63 includes:

  "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."

- So [87] explained the test for whether risks were material and to be discussed

- Pursuers' argument- reasonable treatment options were to be judged factually by the court, not by the professional practice test
- Professional practice test: *Bolam v Friern Hospital Management Committee* [1957] 1WLR 582 and *Hunter v Hanley* 1955 SC 200
- Argument that Dr Labinjoh had failed to discuss what were in fact reasonable treatment options

- Defender's argument- *Montgomery* set out the basis on which material risks of treatment to be discussed with patient were to be determined, by the court

- BUT the assessment of what were reasonable treatment options, and their risks and benefits, fell within the expertise of the medical profession
- This continued to be determined by the professional practice test
- This followed from *Montgomery* at [82] and [83]
- Doctor's two distinct roles: (1) considering investigatory or treatment options, in exercise of medical skill and judgment; (2) discussing treatment options, not solely an exercise of medical skill
- The first role was governed by the professional practice test
- If a treatment was reasonable as determined by the professional practice test, and was available, it required to be discussed with the patient

- Consistent with the Court of Appeal in *Duce v Worcestershire Acute Hospital NHS Trust* [2018] PIQR P18- its analysis of the duty to inform of material risks set out in *Montgomery*
- And Lord Boyd's decision in *AH v Greater Glasgow Health Board* 2018 SLT 535- alternatives to be discussed were those that the doctor considered reasonable, exercising his skill and experience, and which were available, by reference to the professional practice test (Opinion [43]-[45])
- Lord Tyre agreed with Lord Boyd's approach and rejected the pursuer's argument as to the test to apply (Opinion [109]- [111])

- Pursuers, now appellants, reclaimed in respect of Lord Tyre's errors
    a. in his assessment of the failure of Dr Labinjoh to commence treatment with NSAIDs
    b. in his application of the legal test to be applied to the question of information disclosure to Mr McCulloch, in terms of *Montgomery*
    c. in his approach to causation
    d. in his assessment of the expert evidence presented by Dr Bloomfield for the defender
- Defender, now respondent, resisted each ground of appeal and cross-appealed the one finding of breach of duty against Dr Labinjoh

- Reclaiming motion heard 10 and 11 March 2021
- 1 April 2021 Inner House issued its Opinion: 2021 SLT 695
- Refused the reclaiming motion and allowed the cross-appeal

- Appellants' ground of appeal that Dr Labinjoh required to prescribe NSAIDs
- The court considered in detail the evidence (Opinion [45]-[47])
- This included Mr McCulloch's complex presentation, very different from the straightforward case of acute pericarditis with chest pain which can be self-limiting i.e. gets better without any treatment

- And lack of clear evidence that NSAIDs had a benefit beyond pain relief in treatment of pericarditis
- Court concluded that Lord Tyre did not err

- Appellants' ground of appeal in relation to the correct test to apply to determine what treatments had to be disclosed as reasonable alternatives, in terms of *Montgomery*
- Court agreed with Lord Tyre, and with Lord Boyd in *AH v GGHB*: professional practice test applied to the decision as to what were reasonable treatment options (Opinion [40])

"In our opinion Lord Boyd's analysis is correct….If alternative treatments are options reasonably available in the circumstances the patient is entitled to be informed of the risks of these accordingly. But where the doctor has rejected a particular treatment, not by taking on him or herself a decision more properly left to the patient, but upon the basis that it is not a treatment which is indicated in the circumstances of the case, then the duty does not arise. The doctor may of course, have made an error, but if so the consequences of that error, and an assessment of whether there was negligence, would be assessed on the standard *Hunter v Hanley* basis."

- Appellants' ground of appeal on causation
- Argument that Lord Tyre did not consider matters in the round, with reference to the Court of Appeal decision *Schembri v Marshall* [2020] PIQR P16
- Argument for a benevolent test to causation, where the court is addressing a counter-factual/ hypothetical situation, and a claimant is disadvantaged in the available evidence because of the breach of duty
- Respondent argued that *Schembri v Marshall* did still require proof on the balance of probabilities that the death would have been avoided, and that Lord Tyre had clearly considered matters in the round (Opinion [99])

- The Court confirmed the need to prove causation on a balance of probabilities, Lord Tyre had approached the evidence on causation on this basis and not erred (Opinion [59])

(2) <u>The application to appeal to the Supreme Court</u>

- May 2021. Two grounds of appeal: (1) the lower courts erred in their application of the approach approved by the Supreme Court in *Montgomery*; (2) the lower courts did not make findings on the issue of causation, and causation should be determined by reference to *Schembri v Marshall* and the Court of Appeal decision *Drake v Harbour* (2008) 121 Con LR18

- So focus was on the failure to advise of NSAIDs as a treatment option, no other duties. New formulation of the proposed legal test:

a. the doctor is under a duty to take reasonable care to disclose to the patient any, that is all, reasonable alternative treatments;
b. what constitutes a 'reasonable alternative treatment' is to be determined by the court unshackled from the professional practice test;
c. the court will take into account a range of factors including: (i) alternative treatments that a reasonable person in the patient's position would be likely to attach significance to; (ii) alternative treatments that the particular patient would be likely to attach significance to; (iii) alternative treatments that the doctor appreciates, or should appreciate, a responsible body of medical opinion would consider reasonable even though the doctor reasonably elects to recommend a different course of action.

- New factors c. (i) and (ii)- same as for material risks
- New factor c.(iii) alternative treatments that the doctor appreciates, or should appreciate, a responsible body of medical opinion would consider reasonable even though the doctor reasonably elects to recommend a different course of action
- Respondent opposed application for permission to appeal.
- Ground of appeal (1) was wrong in law
- Ground of appeal (2) on causation was bound to fail. At [60] of its Opinion, the Inner House had held that in respect of NSAIDs “we can see no basis on which the pursuers could have succeeded”

- Inadequate evidence as to the efficacy of NSAIDs to support that they would have reduced the pericardial effusion, and no findings in fact as to their efficacy
- 21 June 2021- application to appeal refused
- July 2021- appellants applied to the Supreme Court for permission to appeal, in similar terms
- Respondent opposed the application
- 29 April 2022 the Supreme Court granted permission to appeal
- GMC and BMA were granted permission to intervene

(3) The arguments on the legal test to be used to determine what are reasonable alternative treatments to be discussed with a patient

- At [3] of the Court's judgment: "The main issue which arises on this appeal is what legal test should be applied to the assessment as to whether an alternative treatment is reasonable and requires to be discussed with the patient. More specifically, did the doctor in this case fall below the required standard of reasonable care by failing to make a patient aware of an alternative treatment in a situation where the doctor's opinion was that the alternative treatment was not reasonable and that opinion was supported by a responsible body of medical opinion?"

- Appellants explained their proposed legal test for reasonable treatments
- In relation to factor c.(iii), they explained that a doctor had to reasonably know, judged by the *Bolam* test, of the existence of a possible treatment, before that treatment became one which potentially the doctor should discuss with the patient.
- So the doctor's knowledge of the existence of a possible treatment is governed by the professional practice test
- Possible treatments having been so identified, the court decides what treatments the patient should be told about by reference to factors c.(i) and (ii)

- *Duce v Worcestershire Acute Hospitals NHS Trust* at [33], two-stage test in relation to duty to inform of material risks from *Montgomery*:

  "(1) What risks associated with an operation were or should have been known to the medical professional in question. That is a matter falling within the expertise of medical professionals [83].

  (2) Whether the patient should have been told about such risks by reference to whether they were material. That is a matter for the court to determine [83]. This issue is not therefore the subject of the *Bolam* test and not something that can be determined by reference to expert evidence alone [84]-[85]."

- Appellants argued for similar two-stage test in the duty to inform of reasonable alternative treatments
- Stage 1- knowledge of existence of possible treatment, matter of medical expertise
- Stage 2- reasonableness of treatment options, determined by the court
- Stage 2 not subject to professional practice test, that would offend against the express guidance in *Montgomery*

- Respondent, by reference to *Duce,* argued that there was a two-stage test
- Stage 1- doctor determines what treatment options are clinically appropriate and the risks and benefits

- Requires professional expertise, subject to professional practice test
- Clinically appropriate treatments are reasonable treatments
- Stage 2- doctor requires to advise patient of all the reasonable treatments identified, and their material risks and benefits
- If the doctor has identified a treatment as clinically appropriate, it should be discussed with the patient
- This approach is consistent with *Montgomery* and with *Duce*

- BMA's written submissions
- What treatment options were clinically appropriate was a matter of professional skill and judgment, judged by the professional practice test

- BUT then doctor determines whether the clinically appropriate treatments should be discussed with the patient
- Reference to what a reasonable person in the patient's position would be likely to attach significance to, and/ or what the doctor is aware that this particular patient would be likely to attach significance to
- Practical difficulties in advising of all clinically appropriate treatments
- BMA had not sought to be present at the hearing, relied on its written submissions
- When asked, I submitted that the BMA's approach filtered the treatment options to be discussed, and that was inconsistent with *Montgomery*

- GMC's submissions
- Doctor required to consider what treatment options were clinically appropriate, relies on clinical judgment
- In written submission, did not offer a view as to the legal test for reasonable alternative treatments, but said reasonableness cannot be shorn of professional judgment
- In oral submission, GMC went further- doctor required to use professional judgment tested on the professional practice test to decide what were reasonable treatment options, then required to discuss all of these options with their risks/ benefits

(4) The Supreme Court judgment

- Unanimous- appeal refused
- [56] The correct legal test to apply to the assessment of whether an alternative treatment is reasonable and requires to be discussed is the professional practice test as applied by the lower courts
- In this case, Dr Labinjoh's view that NSAIDs were not a reasonable alternative treatment was supported by a responsible body of medical opinion, so no breach of duty to inform
- Having identified reasonable treatments, the doctor must inform the patient of all those treatments and their advantages/ disadvantages, and their material risks

- Six reasons for Court's decision
- (i) Consistency with *Montgomery* [59]- [62]
- Reasonable alternative / clinically appropriate / clinically suitable treatments
- From *Montgomery* at [83], to be determined with professional skill and judgment

- (ii) Consistency with *Duce* [63]- [66]
- Two-stage test: stage 1 identification of reasonable alternative treatments, requiring professional skill and judgment; stage 2 advising of all such treatments

- (iii) Consistency with medical professional expertise and guidance [67]- [70]

- (iv) Avoiding an unfortunate conflict in the doctor's role [71]
- But note that doctor would not require to provide treatment he did not consider to be beneficial (GMC guidance)

- (v) Avoiding bombarding the patient with information [72]- [73]

- (vi) Avoiding uncertainty [74]- [77]

- Doctors require to be able readily to understand what is required in their advisory role
- Appellants' suggested approach would be too complex and confusing
- Concern about defensive medicine

(5) <u>The arguments on causation, not dealt with by the Supreme Court</u>

- Given that there was no breach of duty, questions on causation did not arise [52]
- Appellants' position: had he been told about NSAIDs, Mr McCulloch would have wished to take them, would have taken them and so survived

- Respondent's position: the evidence did not support this chain of events
- And in relation to the efficacy of NSAIDs, this was considered in detail by the lower courts- the Inner House concluded that the appellants could not have succeeded on causation
- Appellants' reliance on *Drake v Harbour* and *Schembri v Marshall*
- Respondent argued that reliance on these authorities was misplaced, appellants still required to prove the necessary causal links on balance of probabilities

(6) Observations

- Court has clearly set out its view of the correct and straightforward approach
- In considering a claim for failure to disclose information about reasonable alternative treatments, for the issue of breach of duty parties require to ascertain the following:

a. What were the reasonable treatment options for the particular patient's condition, on the professional practice test?
b. Was the patient told about all of the reasonable treatment options?
c. Was the patient told about the advantages/ disadvantages and the material risks of such treatment options?

- Correct interpretation of *Montgomery,* not medical paternalism
- As was the respondent's position throughout this case, determining what are clinically appropriate treatments is a matter requiring professional skill and judgment, not an issue of medical paternalism
- Only once clinically appropriate treatment options have been identified that the patient is given the opportunity to choose between all of them
- Patient centred approach

- Causation arguments – may be revisited