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The extent of a doctor's duty of care to inform a patient about alternative possible treatments

IN BRIEF

McCulloch and others (Appellants) v Forth Valley Health Board (Respondent) (Scotland)
[2023] UKSC 26

This case concerned the extent to which a doctor is required, under the duty of care owed to a patient, to inform the patient about alternative possible treatments to the one that is being recommended.

In *Montgomery v Lanarkshire Health Board (2015) UKSC 11* ("Montgomery"), the Supreme Court held that a doctor is 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.

Following that decision, the main issue in this case was what test should be applied when assessing whether an alternative treatment is reasonable and requires to be discussed with the patient. More specifically, does a doctor 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 (thus complying with what is sometimes referred to as the 'professional practice test' set out

The UKSC upheld the findings of the lower courts that a doctor who has taken the view that a treatment is not a reasonable alternative treatment for a particular patient will not be negligent in failing to inform the patient of that alternative treatment if the doctor's view is supported by a responsible body of medical opinion.

in *Bolam v Friern Hospital Management Committee (1957) 1 WLR ("Bolam")* and in the Scottish case of *Hunter v Hanley 1955 SC 200 at 206 ("Hunter")*)?

On 23rd March 2012, Mr McCulloch, aged 39, was admitted to the Forth Valley Royal Hospital complaining of chest pains, nausea and vomiting. Dr Labinjoh, a consultant cardiologist at the hospital, was asked to review an echocardiogram that had been performed on Mr McCulloch. Her review of Mr McCulloch indicated that his presentation did not fit with a standard diagnosis of pericarditis (an inflammation close to the heart). During the next few days, Mr McCulloch's condition improved. On 30 March, he was discharged home on antibiotics.

A couple of days later Mr McCulloch was readmitted to hospital complaining of the reoccurrence of chest pain. He was given intravenous fluids and antibiotics under the care of the medical team. On 2nd April, a nursing entry stated 'Nil further chest pain'. The next day, Dr Labinjoh visited Mr McCulloch in the Acute Admissions Unit, having reviewed a further echocardiogram. He looked much better than when she had previously seen him and, in answer to her questions, he denied having any chest pain.

That being the case, she saw no reason to prescribe any additional medical treatment. In her professional judgement, she did not regard it as appropriate to prescribe non-steroidal anti-inflammatory drugs ("NSAIDs"), such as ibuprofen, because Mr McCulloch was not in pain at the time she saw him and there was no clear diagnosis of pericarditis.

On 6th April, Mr McCulloch was discharged home and remained on antibiotics. On 7th April he suffered a cardiac arrest at home from which he died.

His widow and other family members brought an action against Forth Valley Health Board alleging that they were vicariously liable for Mr McCulloch's death, which they say was caused by negligent treatment by Dr Labinjoh. They alleged that Dr Labinjoh was in breach of her duty of care by failing to inform Mr McCulloch that NSAIDs were a possible treatment option for him. It is alleged that had he been so advised he would have taken a NSAID and would not have died.

The expert evidence indicated that, while some doctors would have prescribed NSAIDs to Mr McCulloch, there was also a responsible body of medical opinion that supported Dr Labinjoh's approach given that Mr McCulloch was not in pain and there was no clear diagnosis of pericarditis.

The Lord Ordinary and the Inner House held that Dr Labinjoh was not negligent in failing to inform Mr McCulloch about the possible treatment by NSAIDs.

The Supreme Court unanimously dismissed the claimants' appeal.

The correct test to decide what is a reasonable alternative treatment is what can be referred to as the 'professional practice test' which is set out in *Bolam* in England and Wales and *Hunter* in Scotland. A doctor who has taken the view that a treatment is not a reasonable alternative treatment for a particular patient will not be negligent in failing to inform the patient of that alternative treatment if the doctor's view is supported by a responsible body of medical opinion.

Taking a hypothetical example to help explain, in more detail, how the court regards the law as working: a doctor will first seek to provide a diagnosis (which may initially be a provisional diagnosis) having, for example, examined the patient, conducted tests, and having had discussions with the patient. Say that, in respect of that diagnosis, there are ten possible

treatment options; the doctor, exercising his or her clinical judgment, decides that only four of them are reasonable and that decision to rule out six is supported by a responsible body of medical opinion. The doctor is not negligent by failing to inform the patient about the other six even though they are possible alternative treatments. The narrowing down from possible alternative treatments to reasonable alternative treatments is an exercise of clinical judgment to which the professional practice test should be applied. The duty of reasonable care would then require the doctor to inform the patient not only of the treatment option that the doctor is recommending but also of the other three reasonable alternative treatment options (plus no treatment if that is a reasonable alternative option) indicating their respective advantages and disadvantages and the material risks involved in each treatment option.

It was submitted by counsel for the appellants that the professional practice test was not the correct test to apply and that it is for the court to determine what are the reasonable alternative treatments about which the patient should be informed. But the Supreme Court rejected that submission for a number of reasons including: (i) consistency with what was said in *Montgomery*; (ii) consistency with the two stage test set out in the Court of Appeal decision in *Duce v Worcestershire Acute Hospitals NHS Trust (2018) EWCA Civ 1307*; (iii) consistency with medical expertise and guidance; (iv) avoiding an unfortunate conflict in the doctor's role – in the sense that acceptance of the submission might lead to a doctor having to inform the patient about a treatment that the doctor, supported by a responsible body of medical opinion, considers to be clinically inappropriate for the patient; (v) avoiding bombarding the patient with information; and (vi) avoiding making the law uncertain for doctors who have to apply it. In essence, the Supreme Court rejects the submission of the appellants because it would constitute an unwarranted extension of the law on the duty of care to inform that was laid down in the *Montgomery* case.

Applying that law to the facts of this case, Dr Labinjoh was not negligent because her view, that prescribing NSAIDs for Mr McCulloch was not a reasonable treatment option for him because he was not in pain and there was no clear diagnosis of pericarditis, was supported by a responsible body of medical opinion. She was therefore not in breach of her duty of care by not informing him of that possible option.

Graeme Watson a Partner with **Clyde & Co (Scotland)** and a member of the FOIL Clinical Negligence SFT comments: *This is a welcome decision for all medical professionals, with the Supreme Court providing certainty and clarity around the limits of the Montgomery test for informed consent. The alternative – with doctors having to discuss treatment that they considered inappropriate – would have placed them in a very challenging position. This decision provides good guidance for day-to-day practice and of course will assist with ongoing litigation.*

The full judgment is available at: [McCulloch and others \(Appellants\) v Forth Valley Health Board \(Respondent\) \(Scotland\) - Press Summary \(supremecourt.uk\)](#)

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