INFORMED CHOICE

MAX COSSTICK EXAMINES A RECENT CASE ON CONSENT TO MEDICAL TREATMENT

> Doctors must try to find out what matters to patients so they can share relevant information about the benefits and harms of proposed options

It is now nearly 10 years since the Supreme Court handed down its judgment in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11. The landmark decision confirmed there was a need to obtain a patient's informed consent for medical treatment, that reasonable care must be taken to ensure the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. Specifically, the Supreme Court averred that:

'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.'

Undoubtedly, the decision in *Montgomery* was partly influenced by the Human Rights Act 1998 — with specific reference being made to article 8, the right to respect for private and family life — as well as a general societal change and an acknowledgment that the public now had greater access to information about symptoms, treatment options, and risks. There had perhaps been an incremental shift over the years, away from a view of patients as passive recipients of treatment (a view that only grants agency to medical practitioners), towards a view which upholds patients' bodily autonomy. This is seen in the decisions in cases such as *Sidaway v Bethlem Hospital* [1985] AC 871 and *Pearce & Anor v United Bristol Healthcare NHS Trust* [1998] EWCA Civ 877.

GMC guidance

The impact of the Supreme Court's decision in *Montogomery* has been ubiquitous, but where does it leave us now in 2024?

The latest guidance for clinicians by the General Medical Council provides seven principles of decision-making and consent:

1. All patients have the right to be involved in decisions about their treatment and care and be supported to make informed decisions if they are able.

2. Decision making is an ongoing process focused on meaningful dialogue: the exchange of relevant information specific to the individual patient.

3. All patients have the right to be listened to, and to be given the information they need to make a decision and the time and support they need to understand it.

4. Doctors must try to find out what matters to patients so they can share relevant information about the benefits and harms of proposed options and reasonable alternatives, including the option to take no action.

5. Doctors must start from the presumption that all adult patients have capacity to make decisions about their treatment and care. A patient can only be judged to lack capacity to make a specific decision at a specific time, and only after assessment in line with legal requirements.

6. The choice of treatment or care for patients who lack capacity must be of overall benefit to them, and decisions should be made in consultation with those who are close to them or advocating for them.

7. Patients whose right to consent is affected by law should be supported to be involved in the decision-making process, and to exercise choice if possible.

Montgomery made it clear that a patient should be advised of any reasonable alternative or variant treatments, but it was less clear on what constitutes a reasonable alternative treatment.

The Court of Appeal's finding in *Sidra Bilal & Hassaan Aziz Malik (Administrators on behalf of the estate of Mukhtar Malik, deceased) v St George's University Hospitals NHS Foundation Trust* [2023] EWCA Civ 605 provided some guidance on this issue. Following spinal surgery in 2015, Mr Malik suffered with paraesthesia and became wheelchair dependant until his death from illness - secondary to his spinal condition - in 2021. It was alleged by the estate of Mr Malik that (inter alia) he had not been informed of alternative treatments and, if properly advised on the risks of the surgery and the potential benefits, Mr Malik would have opted for alternative treatment altogether.

Mr Malik's estate sought to overturn the first instance decision of the High Court that (inter alia) a competent and respectable body of skilled (in this case) spinal surgeons must determine what constitutes a reasonable alternative treatment option - in other words, a *Bolam* decision approach. The appeal failed on grounds not strictly relevant to consent, but Lady Justice Davies did consider the question of informed consent, commenting that *'it is for the doctor to assess what the reasonable alternatives are;* it is for the court to judge the materiality of the risk inherent in any proposed treatment, applying the test of whether a reasonable person in the patient's position would be likely to attach significance to the risk.'

Lady Justice Davies' comments in *Bilal* were endorsed by the Supreme Court in *McCulloch and others v Forth Valley Health Board [2023] UKSC 26.* Mr McCulloch's estate brought a claim for failure to discuss the option of using non-steroidal anti-inflammatory drugs. The claim failed in both the inner and outer house of the Court of Session and reached the Supreme Court. The unanimous conclusion was that clinicians are not obliged to provide a patient with a complete list of all conceivable treatment options, but that 'the professional practice test (derived from *Hunter v Hanley and Bolam*) is the correct legal test in determining what are the reasonable treatment options that a doctor has a duty of reasonable care to inform a patient about.'

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A recent case

In the more recent decision of *CNZ v Royal Bath Hospitals NHS Foundation Trust* [2023] EWHC 19 (KB) the claimant had cerebral palsy, having suffered a period of acute profound hypoxia at birth. Mr Justice Ritchie found two separate Montgomery breaches. The first was due to a failure to discuss the option of caesarean section, following the successful delivery of the claimant's mother's first twin. The second was due to a failure to heed the claimant's mother's request for a caesarean section in a timely manner, which Mr Justice Ritchie described as 'too paternalistic'.

CNZ had been born in February of 1996, three years before the claimant in Montgomery had been born. Mr Justice Ritchie accepted that the Montgomery principle did apply in 1996 and recognised the 'movement from paternalism to patient choice... the growth of the internet (Berners-Lee released his system in 1993), the changes in societal values and the passing of the Human Rights Act 1998' that came in the 1990s as possible tipping points.

In *Parsons v Isle of Wight NHS Trust* [2023] EWHC 3115 (KB), the claimant sustained a spinal injury as a result of ten failed attempts at an epidural - three taking place while the claimant was conscious, and a further seven when the claimant had been induced under general anaesthetic. It was found, by Mr Justice Ritchie, that there was a failure to provide reasonable alternatives to an epidural, and, crucially, a failure to obtain the claimant's consent to the further attempts made while unconscious.

Childbirth setting

The recent decisions in *CNZ* and *Parsons* show a willingness by the Courts to apply *Montgomery* in an acute setting in both the delivery room and the operating theatre; which until recently, it had appeared loath to do. Of course, this has major implications on a woman's right to choose the method of delivery in an intrapartum setting, not just antenatally.

The issues of choice, consent, and bodily autonomy raised in *Montgomery* are no better highlighted than in the context of childbirth. As Lady Hale emphasised in the conclusion to the *Montgomery* judgment, in respect of bodily autonomy and consent, 'Pregnancy is a particularly powerful illustration. Once a woman is pregnant, the foetus has somehow to be delivered. Leaving it inside her is not an option.' There has been a major move away from the medicalisation of maternity services and the recent developments in the common law represent a progressive change in societal values.

The concept of bodily autonomy and a patient's right to choose what happens to their body is one of the most important, fundamental issues in medical care. It remains to be seen what the next development in this contentious area of medical litigation will be.

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