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CURRENT DEVELOPMENTS: CASE COMMENT

Medical negligence and disclosure of alternative treatments

McCulloch v Forth Valley Health Board [2023] UKSC 26

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Introduction

Recent years have witnessed significant developments in medical negligence jurisprudence. In 2015, the Supreme Court in *Montgomery v Lanarkshire Health Board*[1] famously departed from the House of Lords decision in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*[2] by ruling that the professional practice test set out in *Bolam v Friern Hospital Management Committee*[3] no longer applied to the doctor's duty to give advice to the patient. In particular, the Supreme Court in *Montgomery* held as follows:

> The 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. 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.[4]

While it is clearly settled in *Montgomery* that the doctor must disclose reasonable alternative treatments to the patient,[5] the question arises as to 'whether an alternative can be reasonable even when many, but not all, medical professionals believe that there is no obvious advantage to adopting it'.[6] As was rightly predicted then, 'the breadth of any reasonable alternatives will undoubtedly provide the battleground for much future litigation'.[7] Almost a decade later, the Supreme Court in *McCulloch v Forth Valley Health Board*[8] finally had the opportunity to lay down the applicable legal test in assessing the reasonableness of alternative treatments that the doctor must disclose to the patient.

*I am grateful for helpful feedback from the anonymous reviewer.

[1][2015] UKSC 11, [2015] AC 1430.

[2][1985] AC 871.

[3][1957] 1 WLR 582.

[4]*Montgomery v Lanarkshire Health Board*, above n 1, at [87].

[5]R Heywood and J Miola 'The changing face of pre-operative medical disclosure: placing the patient at the heart of the matter' (2017) 133 Law Quarterly Review 296 at 307.

[6]R Bagshaw 'Modernising the doctor's duty to disclose risks of treatment' (2016) 132 Law Quarterly Review 182 at 185.

[7]CP McGrath '"Trust me, I'm a patient …": disclosure standards and the patient's right to decide' (2015) 74 Cambridge Law Journal 211 at 214.

[8][2023] UKSC 26, [2023] 3 WLR 321.

1. Summary of the case

The facts of *McCulloch* are as follows. Mr McCulloch, aged 39, died after suffering a cardiac arrest at his home.[9] His widow and other family members brought a claim in medical negligence against Forth Valley Health Board, alleging that a consultant cardiologist (Dr Labinjoh) was negligent in failing to advise Mr McCulloch of the option of treating him with non-steroidal anti-inflammatory drugs.[10] In Dr Labinjoh's view, the prescription of non-steroidal anti-inflammatory drugs was not a reasonable alternative treatment as there was no clear diagnosis of pericarditis and Mr McCulloch was not in pain.[11] Importantly, the expert witnesses had differing views as to whether it was reasonable to prescribe non-steroidal anti-inflammatory drugs to a patient who was not in pain.[12] In particular, while the medical expert for Mr McCulloch's widow and other family members (Dr Flapan) 'regarded it as usual practice to prescribe [non-steroidal anti-inflammatory drugs] to a patient who was not in pain because treatment of the inflammation would reduce the size of the pericardial effusion',[13] the medical expert for Forth Valley Health Board (Dr Bloomfield) 'did not consider that there was any benefit from [non-steroidal anti-inflammatory drugs] if they were not required for pain relief'.[14]

Both the Outer House and the Inner House of the Court of Session held that the professional practice test set out in *Bolam* should be applied in assessing the reasonableness of alternative treatments that the doctor must disclose to the patient, agreeing with Lord Boyd's decision in *AH v Greater Glasgow Health Board*[15] that 'a doctor was not under a duty to advise the patient of an alternative treatment if it was not considered by the doctor to be a reasonable alternative'.[16] On the facts of *McCulloch*, given that Dr Bloomfield's opinion, which was 'neither unreasonable nor illogical', supported Dr Labinjoh's view that the prescription of non-steroidal anti-inflammatory drugs was not a reasonable alternative treatment, Dr Labinjoh was not negligent in failing to advise Mr McCulloch of that option.[17] Dissatisfied, Mr McCulloch's widow and other family members appealed to the Supreme Court.

In a unanimous judgment given by Lord Hamblen and Lord Burrows (with whom Lord Reed, Lord Hodge and Lord Kitchin agreed), the Supreme Court dismissed the appeal and agreed with both the Outer House and the Inner House of the Court of Session that 'the professional practice test … 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'.[18] In other words, this means that a doctor will not be negligent if the doctor does not advise the patient of an alternative treatment which in the doctor's view is not reasonable provided that the doctor's view is 'supported by a responsible body of medical opinion'.[19] The Supreme Court gave six reasons in support of the professional practice test. First, the professional practice test is consistent with its earlier decision in *Montgomery*.[20] Second, the professional practice test is consistent with the Court of Appeal decision in *Duce v Worcestershire Acute Hospitals NHS Trust*.[21] Third, the professional practice test is consistent with the submissions made by the General Medical Council and the British Medical Association (both of which intervened in *McCulloch*) about 'the importance of clinical judgment in determining reasonable alternative treatment options'.[22] Fourth, the professional practice test prevents 'an unfortunate conflict in the exercise

[9]Ibid, at [6].
[10]Ibid, at [5].
[11]Ibid, at [22].
[12]Ibid, at [29].
[13]Ibid, at [30].
[14]Ibid, at [31].
[15][2018] CSOH 57, 2018 SLT 535.
[16]*McCulloch v Forth Valley Health Board*, above n 8, at [35]–[38].
[17]Ibid, at [39]–[40].
[18]Ibid, at [83].
[19]Ibid, at [56].
[20]Ibid, at [59]–[62].
[21]Ibid, at [63]–[66].
[22]Ibid, at [67]–[70].

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of a doctor's role' by not requiring the doctor to advise the patient of an alternative treatment which in the doctor's view is not reasonable.[23] Fifth, the professional practice test prevents the doctor from 'bombarding the patient with information'.[24] Sixth, the professional practice test avoids uncertainty and prevents the doctor's task from being 'inappropriately complex and confusing'.[25]

2. Commentary

While the Supreme Court's judgment in *McCulloch* is defensible and should be applauded for confirming the applicable legal test in assessing the reasonableness of alternative treatments that the doctor must disclose to the patient, there are two striking features about the judgment. First, the Supreme Court did not consider comparative case law from other common law jurisdictions. This is significant, as the test set out in *Montgomery*[26] appears to have been interpreted differently by Singapore's apex court (viz, the Singapore Court of Appeal) in *Hii Chii Kok v Ooi Peng Jin London Lucien*,[27] a decision which followed the footsteps of the UK in departing from the professional practice test set out in *Bolam* in respect of the doctor's duty to give advice to the patient.[28] Sundaresh Menon CJ, giving the unanimous judgment of the five-member coram of the Singapore Court of Appeal, cited verbatim the test set out in *Montgomery*[29] and interpreted it as follows:

> Rejecting the *Bolam* test, the UK Supreme Court [in *Montgomery*] stated its preference for a variant of the test proposed in Lord Scarman's dissent in *Sidaway* … It added (or adopted) one refinement to that test, which was … that in addition to risks or alternative treatments which a reasonable patient in a similar position would wish to know of, the doctor was also expected to advise the patient as to risks or alternative treatments which the specific patient would in fact have wished to know of for reasons known, or which should have been known, to the doctor.[30]

Based on this interpretation of *Montgomery* adopted by the Singapore Court of Appeal in *Hii Chii Kok*, the professional practice test set out in *Bolam* does not apply to the medical disclosure of *both* risks *and* alternative treatments. Instead, alternative treatments 'which a reasonable patient in a similar position would wish to know of' and 'which the specific patient would in fact have wished to know of for reasons known, or which should have been known, to the doctor' should be disclosed to the patient.[31] In a later part of its judgment in *Hii Chii Kok*, the Singapore Court of Appeal then went on to say that '[t]he option of non-treatment should also be communicated if it is an alternative that the reasonable patient, situated as the patient in question was, would regard as material'.[32] Once again, this suggests that the assessment of the reasonableness of alternative treatments (such as the option of non-treatment) should be undertaken from the patient's perspective. In this regard, the Singapore Court of Appeal's interpretation of *Montgomery* in *Hii Chii Kok* is contrary to that in *AH*,[33] a decision which was endorsed by both the Outer House and the Inner House of the Court of Session,[34] as well as the Supreme Court in *McCulloch*.[35] As mentioned above, Lord Boyd held in *AH* that 'what would

[23]Ibid, at [71].
[24]Ibid, at [72]–[73].
[25]Ibid, at [74]–[77].
[26]*Montgomery v Lanarkshire Health Board*, above n 1, at [87].
[27][2017] SGCA 38, [2017] 2 SLR 492.
[28]Ibid, at [126].
[29]*Montgomery v Lanarkshire Health Board*, above n 1, at [87].
[30]*Hii Chii Kok v Ooi Peng Jin London Lucien*, above n 27, at [128].
[31]Ibid, at [128].
[32]Ibid, at [142].
[33]GKY Chan 'Recent judicial developments in Singapore tort law' (2020) Journal of the Malaysian Judiciary 278 at 294.
[34]*McCulloch v Forth Valley Health Board*, above n 8, at [37]–[38].
[35]Ibid, at [71].

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amount to reasonable alternatives in *Montgomery* is to be defined by the doctors rather than the patient'.[36] It is submitted, therefore, that the Supreme Court in *McCulloch* could have considered comparative case law from other common law jurisdictions, especially how *Montgomery* has been interpreted by courts in different jurisdictions (such as Singapore). Indeed, as was aptly observed, '*Hii* [*Chii Kok*] could be used to influence future interpretations of *Montgomery*' even though '[t]he Singapore decision is not binding on UK courts'.[37]

Apart from the absence of comparative case law from other common law jurisdictions, another striking feature about the Supreme Court's judgment in *McCulloch* is that it did not cite any academic writings, which are divided on the applicable legal test in assessing the reasonableness of alternative treatments that the doctor must disclose to the patient. On the one hand, some commentators are in favour of the professional practice test set out in *Bolam*. For instance, Amirthalingam takes the view that the reasonableness of alternative treatments should be determined by the doctor, who 'may lawfully decide not to inform the patient of an existing alternative if it is considered unreasonable based on peer professional standards'.[38] According to Amirthalingam, 'the duty to advise of treatment options should be governed by *Bolam* … as this is within the sphere of professional judgment. Respecting patient autonomy does not equate with freedom of choice for the patient'.[39] In a similar vein, Austin opines that 'the views of the medical profession will continue to play a role in determining whether an alternative treatment amounted to a reasonable alternative'.[40]

On the other hand, some commentators such as the learned authors of *Mason and McCall Smith's Law and Medical Ethics* have queried whether the applicability of the professional practice test set out in *Bolam* in respect of the medical disclosure of alternative treatments 'aligns with the patient autonomy ethos of *Montgomery*'.[41] Notably, the result of applying the professional practice test to the medical disclosure of alternative treatments is 'a divergence of approach between the requirement to disclose a "material risk" to a patient and that of disclosing a reasonable alternative treatment'.[42] By contrast, a single test that applies to the medical disclosure of *both* risks *and* alternative treatments, whereby 'both would be judged in relation to what the patient would want to know, by reference to their particular characteristics', promotes consistency and 'adheres to the ethos of *Montgomery*: that there should be an individualistic, patient-centred approach to informed consent'.[43]

As can be seen, there is a wealth of academic writing on the applicable legal test in assessing the reasonableness of alternative treatments that the doctor must disclose to the patient and it would have been desirable if the Supreme Court in *McCulloch* had considered such academic writings in its judgment. As Lord Burrows (who gave the judgment in *McCulloch* with Lord Hamblen) said in his Lionel Cohen Lecture 2021, 'it has been abundantly clear to [him] how useful practical legal scholarship can be in helping to decide a case'.[44] For instance, in the recent Supreme Court decision in *Paul v Royal Wolverhampton NHS Trust*,[45] where the question that had to be determined was 'whether a doctor, in providing medical services to a patient, … owes a duty to close members of the patient's family to take care to protect them against the risk of injury that they might suffer from the experience

[36]Chan, above n 33, at 294.

[37]LV Austin '*Hii Chii Kok v (1) Ooi Peng Jin London Lucien; (2) National Cancer Centre*: modifying *Montgomery*' (2019) 27 Medical Law Review 339 at 340.

[38]K Amirthalingam 'Upending the medical duty to advise: legislating the standard of care in Singapore' (2022) 22 Medical Law International 189 at 200–201.

[39]Ibid, at 213.

[40]Austin, above n 37, at 351.

[41]AM Farrell and ES Dove *Mason and McCall Smith's Law and Medical Ethics* (Oxford: Oxford University Press, 12th edn, 2023) pp 232–233.

[42]Z Jaffer and R Reed-Berendt 'Defining the boundaries of *Montgomery*: a Scottish approach' (2022) 38 Journal of Professional Negligence 105 at 110.

[43]Ibid, at 110.

[44]Lord Burrows 'Judges and academics, and the endless road to unattainable perfection' (2022) 55 Israel Law Review 50 at 57.

[45][2024] UKSC 1, [2024] 2 WLR 417.

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of witnessing the death or injury of their relative from an illness caused by the doctor's negligence',[46] Lord Burrows revealed that he was 'assisted by academic writings' in preparing his dissenting judgment.[47] A similar point about academic writings was also made by Carr LJ in her Harris Society Annual Lecture 2023, during which she highlighted their importance in 'helping [judges] to reach law that is conceptually, morally, and legally sound'.[48]

Conclusion

McCulloch is a long-awaited judgment for those who were left uncertain about the applicable legal test in assessing the reasonableness of alternative treatments that the doctor must disclose to the patient after the Supreme Court handed down its landmark decision in *Montgomery* almost a decade ago. When all is said and done, doctors will probably heave a sigh of relief, as *McCulloch* has somewhat limited the expansion of liability on the part of doctors in medical negligence cases. Nevertheless, as history has shown, the twists and turns in medical negligence jurisprudence are likely to continue into the future. An issue which remains hitherto unresolved, for instance, is whether the doctor's duty to disclose alternative treatments to the patient extends to 'treatments which are not funded by the [National Health Service] but might be available privately or overseas'.[49] One should certainly not rule out a possible threequel from the Supreme Court.

[46]Ibid, at [22].

[47]Ibid, at [245].

[48]Lady Justice Carr '"Delicate plants", "loose cannons", or "a marriage of true minds"? The role of academic literature in judicial decision-making' (2023) 23 Oxford University Commonwealth Law Journal 1 at 16.

[49]J Herring *Medical Law and Ethics* (Oxford: Oxford University Press, 9th edn, 2022) p 205.

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