McCulloch v Forth Valley Health Board – Montgomery watered down?

Mr McCulloch died in April 2012 after suffering a cardiac arrest. He had reported chest pain and received treatment at Forth Valley Hospital. His treating cardiologist, Dr Catherine Labinjoh, decided that his presentation was inconsistent with pericarditis. He was discharged a few days later, but then readmitted. Dr Labinjoh saw him the following day. Her evidence was that he was walking around the ward and looking well. He denied chest pain. She decided not to offer or prescribe non-steroidal inflammatory drugs ("NSAIDs") but said in evidence that if he had complained of chest pain, she would have prescribed NSAIDs. The following day, he suffered a fatal cardiac arrest.

His widow brought a medical negligence claim against the Health Board on several grounds, but the primary argument was Dr Labinjoh's alleged failure to discuss reasonable alternative treatments for pericarditis. It was agreed at the court of first instance that the standard treatment for pericarditis was NSAIDs. Dr Labinjoh's position was that she did not discuss the option of NSAIDs as, at the time of the second admission, his presentation was not consistent with pericarditis. Mr McCulloch did not have chest pain and her practice was only to prescribe NSAIDs for pericarditis when pain was reported. Her actions/decision-making was supported by the expert cardiology witness for the Health Board.

The Pursuers argued that NSAIDs were a reasonable alternative treatment which ought to have been discussed with the patient, in line with *Montgomery v Lanarkshire Health Board* [2015] UKSC 11. The discussion should have taken place whether or not it was the doctor's personal practice to prescribe NSAIDs.

The Defenders argued that the decision on what were reasonable alternative treatments and what should be discussed with the patient came down to the skill and judgment of the doctor, and that their duty of care should be governed by the "professional practice test" of negligence in *Hunter v Hanley* 1955 SC 200.

Both the Outer House and Inner House agreed with the Defenders and the pursuers appealed to the Supreme Court.

UKSC appeal

At the Supreme Court, arguments were restricted to which legal test should be used to determine what are reasonable alternative treatments and the extent to which a doctor is required to discuss possible alternative treatments with a patient. The BMA and GMC were both represented as interveners.

For the family it was argued that the doctor is under a duty to take reasonable care to disclose all reasonable alternative treatments, this ought to take into account a range of factors including but not limited to:

- Alternative treatments that a reasonable person in the patient's position would be likely to attach significance to in the context of making his or her decision
- Alternative treatments that the particular patient would be likely to attach significance to in the context of making such decision
- 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.

For the Health Board it was argued that the assessment of reasonable alternative treatments is an exercise of professional skill and judgement and is to be judged by the standard *Hunter v Hanley* test. If a doctor is aware of a treatment but decides that it is not appropriate for the patient and therefore does not discuss it with him/her, this is not a breach of duty of care if a body of reasonable medical professionals would also have decided not to discuss it.

Supreme Court Judgment

The judgment was given on 12 July 2023 by Lord Hamblen with Lord Reed, Lord Hodge and Lord Kitchin agreeing.

The court held that in making a decision about what treatment options to discuss with the patient, a doctor is using their expertise and professional skill and judgement and that, therefore, the professional practice test as set out in *Hunter v Hanley* applies. However, paragraph 58 of the court's decision states:

"It is important to stress that it is not being suggested that the doctor can simply inform the patient about the treatment option or options that the doctor himself or herself prefers. Rather the doctor's duty of care, in line with Montgomery*, is to inform the patient of all reasonable treatment options applying the professional practice test."*

The Court found that Dr Labinjoh, in exercising her professional expertise, skill and judgment, had decided that NSAIDs were not a reasonable treatment option - and that she was supported in her opinion by a reasonable body of medical practitioners. She was not, therefore, negligent in failing to discuss this treatment option with Mr McCulloch. If however she had considered them to be a reasonable treatment, but

preferred another course of treatment, then, failing to discuss NSAIDs with him would have been negligent.

The Supreme Court made clear that it is not for the court to determine what the reasonable treatment options that the patient should be informed of were but stated that this was a matter of professional practice. The stated justifications included:

- consistency with good practice encompassed in medical expertise and guidance
- ensuring that doctors are not required to discuss alternatives which they considered to be clinically inappropriate
- avoiding placing doctors in a position of conflict or uncertainty about the application of the law
- avoiding the need for patients to be flooded with information.

The court expressly stated that the *Montgomery* decision was being upheld and not modified in any way by their decision, stating that:

"*Viewed through the lens of a reasonable alternative treatment, the approach we favour is saying that, in* Montgomery*, not only should the pursuer have been informed of the risk of vaginal delivery but she should also have been informed of the reasonable alternative treatment of caesarean section".*

Notwithstanding the above, it is difficult not to interpret the Supreme Court decision as a retreat from Montgomery and putting a more clinician-centred approach at the heart of consent cases.

Going forward, the questions that should be asked in any consent case could be summarised as follows:

- What were the reasonable alternative treatment options that ought to have been disclosed given the particular circumstances of the patient? [*McCulloch/Hunter v Hanley*]
- If a reasonable treatment option was not discussed, is there a body of medical professionals who also would not have discussed the particular treatment? [*McCulloch/Hunter v Hanley*]
- If there is such a body, does that body have a logical basis? [*Bolitho*]
- Were there any material risks of injury inherent in any of these treatments (or lack thereof) that ought to have been disclosed given the particular circumstances of the patient? [*Montgomery*]