Case Comment

Webster (A Child) v Burton Hospitals NHS Foundation[1]

(CA (Civ Div), Jackson LJ, Simon LJ, Flaux LJ, 13 February 2017, [2017] EWCA Civ 62)

Nathan **Tavares**

Subject: Personal injury . **Other related subjects:** Negligence.
Keywords: Birth defects; Brain damage; Clinical negligence; Doctors; Informed consent; Medical advice
Cases:
Webster v Burton Hospitals NHS Foundation Trust [2017] EWCA Civ 62; [2017] Med. L.R. 113 (CA (Civ Div))
Montgomery v Lanarkshire Health Board [2015] UKSC 11; [2015] A.C. 1430 (SC)

J.P.I.L. C93 Sebastian Webster was born on 7 January 2003. He had profound physical and cognitive impairment, caused by a brain injury which occurred between 72 and 48 hours prior to delivery. It was not disputed that if he had been delivered on 4 January he would have avoided the injury.

An ultrasound scan had been carried out on 18 November 2002. The foetus was small for the gestational age, there was asymmetry in the circumferences of the head and abdomen, and excess liquor. Sebastian's mother, Heather Butler, was under the care of Mr James Hollingworth a consultant obstetrician and gynaecologist. Following the scan, Mr Hollingworth did not note those anomalies and it was admitted that he had acted negligently in failing to arrange further scans.

Heather Butler was admitted to hospital on 26 December feeling unwell. The next day was the expected date of delivery. She had assumed she would be delivered that day. The claimant's case was that James Hollingworth should have offered the possibility of induction of labour on 27 December which, if accepted, would have avoided the brain injury.

The hospital argued that further ultrasound scans would have provided reassurance, but that the anomalies relied on would not have given rise to the need for any heightened vigilance or advice about dangers which might be avoided by induction. At trial HH Judge Inglis found that if the mother had been advised that***J.P.I.L. C94*** she should proceed to induction, or that there were increased risks in waiting, she would have wanted to proceed. He found that James Hollingworth was not justified in categorising the 18 November scan as normal. However, adopting the *Bolam* test, he concluded that a body of consultant obstetricians would not have been deflected from their usual conservative course and could not be said to have acted irrationally or illogically. He did not consider that a discussion with the mother would have changed the outcome.

The claimant appealed and submitted, in the light of *Montgomery v Lanarkshire Health Board* [2] on the nature of a doctor's duty to advise in respect of treatment, that the issue was what advice should properly have been given to the mother and what would have happened in consequence.

The Court of Appeal noted that Judge Inglis had followed the *Bolam* approach of basing his judgment on whether Mr Hollingworth had acted in accordance with a responsible body of expert opinion. However, following the decision in *Montgomery*, they accepted that was no longer the correct approach.[3] The doctor's obligation, other than in cases where it would damage the patient's welfare, was to present the material risks and uncertainties of different treatments, and to allow patients to make decisions that would affect their health and well-being on proper information. The significance of the risks and uncertainties, including the possibility of alternative treatment, were sensitive to the characteristics of the patient.[4]

The question was whether the Court of Appeal could assess the conclusion the judge would, or should, have reached on the issue of liability if he had adopted that approach. That involved identifying what information James Hollingworth should have presented to Heather Butler on 27 December, and what her response would have been. Judge Inglis found that the information should have included a list of anomalies and complications which could not be avoided by earlier delivery, but also the increased risk of perinatal mortality, including antepartum mortality, based on a very small statistical base.

They held that Mr Hollingworth should have told the mother that there was "an emerging but recent and incomplete material showing increased risks of delaying labour in cases with [that] combination of features". If she had been given that information, she would have wanted to be delivered on 27 December, even if the information had been couched in terms of contrary arguments in favour of non-intervention.
That conclusion was supported by Heather Butler's clear evidence, her background, which included a university degree in nursing, and her willingness to take responsibility for her pregnancy. In those circumstances, the hospital's submission that, rather than agreeing to induce his patient, Mr Hollingworth would have sought a second opinion, was rejected. The judge's decision on liability was reversed and the appeal was allowed.

Comment

As is well known, *Montgomery* was a landmark case in medical law. It represented a change in what had previously been understood to be the nature of a doctor's duty to advise their patient in respect of treatment. The move is away from paternalism on the part of doctors, to autonomy and appropriately informed choices on the part of patients. When treatment advice is given in the way that is now expected, there is little room for the *Bolam* defence. As Lord Kerr stated in *Montgomery*:[5]
"The doctor's advisory role cannot be regarded as solely an exercise of medical skill without leaving out of account the patient's entitlement to decide on the risks to her health which she is willing to run (a decision which may be influenced by non-medical considerations). *Responsibility for determining the nature and extent of a person's rights rests with the courts, not with the medical professions*.***J.P.I.L. C95*** "
Advice about treatment options does not involve purely medical considerations; it also involves value judgments. The patient is entitled to, and should, take into account his or her own values when weighing up the merits of any treatment options, and such values may not always coincide with the medical advice. These issues were neatly dealt with in the judgment of Lady Hale[6] who also said expressly that the *Bolam* test is "inapposite" when such value judgments are involved.
There have now been a number of first instance decisions applying the test as set out in *Montgomery*, and notwithstanding the guidance given by the Supreme Court, judges have not always found it easy apply in practice. In the instant case the Court of Appeal though the trial judge was clearly in error by applying the *Bolam* test. A perusal of other first instances decisions shows that he may not be alone in what he did.
In *Spencer v Hillingdon Hospital NHS Trust* [7] the issue concerned what a patient ought to have been told about the potential complications that might arise from the surgery he had just received, and the trial judge decided that the appropriate test was *Bolam* "in the light of *Montgomery*".[8] He then modified *Bolam* by applying *Bolam* tinged with concern as to whether the ordinary sensible patient would be justifiably aggrieved not to have been given the information in issue. This was not a consent issue per se, but the judge appeared to be persuaded that *Montgomery* principles might need to be considered in all cases where advice is given by medical and nursing staff.
In the case of *Grimstone v Epsom*,[9] McGowan J appeared to apply *Bolam* in deciding what information a surgeon should have given the claimant about success rates of proposed surgery. It is understood that permission to appeal has been granted to the losing claimant.
It may be supposed that there remains a tendency by judges to defer to medical clinicians when deciding what advice should be given to patients, and hence a reluctance to dispense with the *Bolam* test. Clearly any decision about what advice and information should have been given to a patient requires medical evidence, but judges need to make their own determination of what constitutes material information the claimant would want to know.
This brings us on to the second part of the appeal which concerned what the claimant would have done if properly advised, and whether the appellate court could determine that issue. Fortunately the trial judge had made sufficient findings in his judgment to enable the Court of Appeal to assess what the claimant's actions would have been if properly advised.
The case reminds us that in any case regarding consent or advice, it is very important to have clear evidence from a suitably qualified expert as to what advice should have been given, hypothetically, had there not been a breach of duty. One cannot adduce evidence from the lay client in a vacuum as to what appropriate advice would have been. Furthermore, the evidence about the advice needs to be tailored for the individual taking on board their circumstances to the extent that they ought to have been known by the defendant. In this

regard it is interesting to note that when the Royal College of Surgeons issued its new guidance on consent in October 2016, the press release stated "Surgeons are now required to get to know their patient sufficiently to understand their patient's views and values and support them in making decisions about their treatment" and this advice is contained in the guidance.[10]

Practice points

- The *Montgomery* principle ought to, and probably does, extend to all claims involving advice from medical and nursing practitioners, not just the consenting process. This probably applies to what complications and/or side effects to look out for in any given form of treatment.***J.P.I.L. C96***
- The *Bolam* test does not (or ought not to) apply to cases where *Montgomery* issues arise. Judges need to assess what information would have been material to the claimant.
- It is important to have appropriate expert evidence as to exactly what advice and/or information should have been given to patients, and to address the lay evidence to that hypothetical advice/information.

Nathan Tavares
J.P.I. Law 2017, 2, C93-C96

1.
A child and protected party, by his mother and Litigation Friend, Heather Butler.
2.
Montgomery v Lanarkshire Health Board [2015] UKSC 11; [2015] A.C. 1430 HL.
3.
Montgomery v Lanarkshire Health Board [2015] UKSC 11; [2015] A.C. 1430 HL followed.
4.
Montgomery v Lanarkshire Health Board [2015] UKSC 11; [2015] A.C. 1430 HL followed.
5.
Montgomery v Lanarkshire Health Board [2015] UKSC 11; [2015] A.C. 1430 HL at [83] (emphasis added).
6.
Montgomery v Lanarkshire Health Board [2015] UKSC 11; [2015] A.C. 1430 HL at [115].
7.
Spencer v Hillingdon Hospital NHS Trust [2015] EWHC 1058 (QB).
8.
Spencer v Hillingdon Hospital NHS Trust [2015] EWHC 1058 (QB) at [68].
9.
Grimstone v Epsom and St Helier University Hospitals NHS Trust [2015] EWHC 3756 (QB).
10.
Royal College of Surgeons, Consent: Supported Decision-Making—a good practice guide, https://www.rcseng.ac.uk/library-and-publications/college-publications/docs/consent-good-practice-guide/ [Accessed 6 April 2017].