MONTGOMERY V LANARKSHIRE HEALTH BOARD[1]

An update on the issues on amendment

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[1] [2015] UKSC

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1. INTRODUCTION

1.1 It is now about 18 months since the decision in Montgomery. This paper seeks to review its impact generally, and to discuss certain procedural aspects relating to it. In particular, some consideration will be given to the question of the challenges for a Claimant (or Pursuer) who may wish to either amend an existing claim to introduce a claim based on Montgomery, or bring a fresh claim when prior proceedings have been determined against him. In the interests of full disclosure, I appeared for the GMC who intervened in the Supreme Court in Montgomery; and I am instructed for the Pursuer in the case of Clark v Greater Glasgow Health Board, referred to below. There may therefore be detected an inadvertent bias as to what is said.

1.2 It is recognised that the majority of those attending the conference are familiar with (and only with) English procedures. This paper will be based substantially upon the position in England under not only the CPR, but under common law principles. There will be short reference to similar principles in Scottish procedures and substantive law [for which no apology is tendered as Montgomery is, of course, a Scottish case]. It would appear that whilst there may be nuanced differences between the two jurisdictions, the substance of the law would appear to be very similar.

1.3 A further reason for doing more than merely mentioning the position in Scotland is that an appeal is due to be heard in the Inner House of the Court of Session early next year where many of the issues in this paper will probably be discussed. In the event that the Pursuer is unsuccessful in the Inner House, it is likely that an application will be made to Appeal to the Supreme Court. If that happens and the application is successful (either for leave or for permission of the Supreme Court to Appeal) then it is hard to imagine that the principles discussed below will not be considered from both a Scottish and English perspective. The case in Scotland which is referred to is Clark v Greater Glasgow Health Board[3]. A similar case in England (Georgiev) will also be considered. It is necessary below to say a few words about these cases to put them in context.

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[3] Clark v GGHB [2016] CSOH 24. As with all Scottish cases, they can be found on the Scotcourts.gov.uk website, although it has to be said that the search engine on that site is poor. It is recommended that searches are carried out by the name of the case, with "scotcourts" inserted in Google.

1.4 The word "Claimant" is used in this paper to cover both English Claimants and Scottish Pursuers.

This paper seeks to address the following issues:

- If a Claimant is currently bringing a claim which is not yet concluded, what considerations might be relevant in determining whether amendment of the existing claim should be allowed?
- If a Claimant has already brought a claim [and, of course, of necessity on this hypothesis has failed], is he entitled to bring a fresh claim? What principles apply?
- What is the relevance of limitation (if any) in either scenario, and to what extent is lack of capacity or lack of majority an issue?
- Might there be relevance in the failure of legal advisers to have brought a consent claim previously?

2.1 It is clear that Montgomery is a case of significant importance throughout the world. Not only has it been applied in Australia (who rightly claim that Australia was ahead of the game per Rogers v Whittaker) and in New Zealand, but it is gaining traction in the USA[4]. The case is shortly to be considered by the Supreme Court of Singapore, and has already been discussed in the High Courts in Malaysia. The effect is therefore truly international and its impact is beyond doubt in both legal and of course in medical practice. The importance of Montgomery has not been confined to medical cases. In Baird v Stephen W R Hastings[5], a decision of the Court of Appeal in Northern Ireland, under reference to Montgomery it was stated:

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[4] Journal of the American Medical Association [JAMA] "The New Era of Informed Consent : Getting to a Reasonable-Patient Standard Through Shared Decision Making", Erica Spatz. May 17, 2016 Volume 315, Number 19

> *"The UK case serves as a reminder that at the heart of a reasonable- patient standard is respect for patients' informational needs; preferences, values, and goals; safety; and autonomy. By truly embracing this standard through the promotion of shared decision making, patients, the health system, and society will benefit."*

[5] Neutral Citation No. [2015] NICA 22

> *"[34] The doctor/patient relationship is not a full or true analogue of a solicitor/client relationship since the therapeutic duties owed by a doctor to a patient raises different questions from those arising between a solicitor and client. However, a solicitor is bound to take reasonable care to ensure that the client understands the material legal risks that arise in any transaction which the client has asked the solicitor to handle on his behalf. As in the doctor/patient relationship the test of materiality is whether a reasonable client would be likely to attach significance to the risks arising which should be reasonably foreseeable to the competent solicitor. As in the medical context, the advisory role of the solicitor must involve proper communication and dialogue with the client."*

2.2 Those attending this conference should be intimately familiar with the facts and much of the reasoning in Montgomery, and there is no merit in revisiting them in this paper other than to emphasise a few main points. There is plainly no substitute for reading the case itself, and what follows may be disputed as being a correct interpretation of the principles in the case. The following two points appear to be important in Montgomery for present purposes.

2.3 Central to the decision in Montgomery is the idea that a failure to obtain consent is *not* an issue of negligence in the sense that it is instructed by what a responsible body of doctors would or would not do. It is (as was observed by the court) a human right: it is not to be instructed by the opinion of the profession. Therefore it can and will be argued that even if there was a substantial body of medical opinion that would *not* have disclosed the risks, this is an irrelevance to the question of the strength of the Claimant's claim. This situation could of course be explicable: doctors were simply doing what the law (not least in Sidaway) authorised them to do. And the reality is that the justices made new law.

2.4 What is said in Montgomery is a legal fiction (in overruling Sidaway) to the effect that in a jurisprudential sense all the court was doing was telling us what the law has *always* been. Judges do not "make" law (in theory). Only parliament can do so. They simply tell us what it has always been.

It was put rather pithily to the contrary though by Bentham[6] when he said:

> *"It is the judges that make the common law, just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way judges make laws for you and me."*

2.5 More recently, in Deutsche Morgan Grenfell v Inland Revenue Commissioners[7] it was stated by Lord Hoffman when asking the questions about whether judges make law that there are really two questions to be considered:

> *"One is whether judges change the law or merely declare what it has always been. The answer to this question is clear enough. To say that they never change the law is a fiction and to base any practical decision upon such a fiction would indeed be abstract juridical correctitude. But the other question is whether a judicial decision changes the law retrospectively and here the answer is equally clear. It does. It has the immediate practical consequence that the unsuccessful party loses, notwithstanding that, in the nature of things, the relevant events occurred before the court had changed the law: see In re Spectrum Plus Ltd [2005] 2 AC 680 . There is nothing abstract about this rule."*

This rather important observation has an effect on the discussion below.

2.6 A list of recent important cases is appended and a file will be provided with those cases included. The various cases will be referred to by the name of the Claimant and full citation will be found in the list.

3. SEEKING TO AMEND AN EXISTING CLAIM

3.1 In many ways, the Georgiev and the Clark cases have similarities. There are, though, significant differences too apart from their geographic locations. In both, an application was made to amend shortly after the decision in Montgomery was issued by

[6] Volume 5 of Collected Works of Jeremy Bentham
[7] [2007] 1 AC 558, at para [23]

the UKSC. The application was allowed in Georgiev (on appeal) but refused by Lord Stewart in Clark. As observed above, a date for the appeal in Clark is early 2017.

Georgiev: the essential facts and the basis for the decision

3.2 The claim in Georgiev was on behalf of a child who had suffered catastrophic injury at birth. The claim form and particulars were served in October 2013. Directions to trial were made with a trial date scheduled for April 2016.

In April 2015 (very shortly after the decision in Montgomery) a letter was sent to the defendants indicating that it was intended that an application to amend would be made introducing a consent claim. Master Cook refused the application when eventually made and the decision was subsequently appealed successfully.

3.3 It was emphasised on appeal that there were a number of well established principles on the question of amendment.

- It was no longer the case that the courts assumed that any prejudice to the party opposing amendment could be cured by a finding in relation to costs. This was a feature of the wider principles in the overriding objective.
- With very late amendments, the burden was on the party seeking to amend to show that the proposed new case had considerable prospects of success.
- If there was a risk to the trial date, then that was a heavy factor against allowing the amendment. It was legitimate for the parties to expect that the trial dates be kept.
- There had to be a good explanation for the delay.
- The CPR introduced a general expectation that cases are disposed of efficiently[8].

3.4 It was also argued by counsel for the Claimant that if the amendment was refused, then the Claimant would still be entitled to bring a fresh claim to that effect. There would then be two separate litigations in which common issues would be determined (such as causation) and it would be a waste of court resources to do so when

8. These principles were essentially derived from recent authority. See Qua Su Ling v. Goldman Sachs International [2015] EWHC 759 (Comm) Carr J

they could be presented in the one claim. It was this factor which swayed the judge on appeal to allow the amendment to take place. It was a matter of significance that the child's claim was not statute barred on account of both his minority and incapacity in terms of section 28 of the Limitation Act 1980 which would permit this claim to be brought.

Clark: the essential facts and the basis for the decision

3.5 The Claimant in Clark was born in 1992. Of perhaps importance for the purposes of limitation (usually referred to as "time bar" in Scotland), she was both of age (over 16) and despite her profound injury had capacity to instruct her claim, being able to communicate via computer. Her case was as originally presented on the basis of traditional negligence (a failure to note significant changes on the CTG trace, it being alleged by the defenders that there were no ominous changes prior to the sudden rupture of the uterus). When the case was awaiting judgment ("at *avizandum*") the Montgomery decision was issued. Instructions were then given to counsel to seek to amend the pleadings to introduce such a claim based on consent. It was argued on her behalf that the facts which were required to prove the consent claim would not require much in the way of further inquiry, but that further evidence should be led prior to judgment being given. The sole issue, according to the pursuer, was whether the mother if she had been told of the known risks would have chosen a caesarean section and avoided the risk of uterine rupture.

3.6 The Claimant's mother had given birth to her older sibling by caesarean section. It was at the material time well known in the medical profession that this gave rise to an increased risk of uterine rupture should a vaginal birth be attempted (known at the time as "trial of scar" or "trial of labour", but now "vaginal birth after caesarean" or "VBAC"). The mother, it was said, was not told of this risk which was between 1 in 200 and 1 in 500, although some papers indicated it to be as high as 1 in 100. If rupture of the uterus occurs, it is a catastrophic event which often leads to death of mother and child, or at least catastrophic injury.

3.7 The amendment was refused on the grounds of lateness; and that the principal of finality required that all claims be presented at once in an action. It was hinted by the

judge that counsel who appeared for the Claimant had been negligent in not pleading the case of consent previously (counsel for the Claimant was in fact counsel for the defenders in Montgomery). But after some jousting with the judge after his judgment was published and then removed from the internet, he clarified that he was absolutely not suggesting that that was so. It will be noted, therefore, that Miss Clark had what might be thought to be a cast iron case to be compensated for her injury; yet she is without remedy. As no one could have pled the case prior to the decision in Montgomery, no blame could be attributed to her.

3.8 The principles of amendment in Scotland are not materially different to those in England other than this. Scottish procedure does not have the overriding objective, and does not have the same case management procedures as in England with the consequent expectation that directions will always be obeyed. Thus the rigid expectation of compliance with directions is not a part of Scottish procedure. And the appeal will be based upon an incorrect exercise of discretion of Lord Stewart by failing to give due weight to the strength of the new claim; the absence of remedy; the justification for not pleading the case before; and the absence of prejudice to the defenders other than having to face a claim which they would otherwise have escaped.

3.9 As was expected, when the main judgment was issued, the pursuer lost on the negligence claim. The content of that judgment is not capable of appeal, and therefore the only claim that Miss Clark has is based upon the consent argument.

3.10 In one other case, an unsuccessful pursuer[9] sought to amend a consent claim on appeal. This was refused without any substantial judgment on the issue being given. In this extraordinary decision, the Inner House apologized to the pursuer for the abject quality of the Lord Ordinary's judgment but confessed to being unable to do anything about it. They refused to remit the case to a new judge to determine the case of new.

4. LIMITATION AND TIME BAR ISSUES

4.1 In paragraph [24] of Georgiev, the court was at pains to remind us that where section 28 of the Act applied (i.e. the Limitation period only commences at the age of 18,

[9] McLeod's Representative v Highland Health Board [2016] CSIH 25

or only when any other disability ceases), the court will not prevent a proper claim being brought other than where there is abuse of the court process. Accordingly, there is an assumption and presumption that the claim can be brought in those circumstances despite an earlier claim being made.

4.2 In Clark, however, the argument is rather more complex on its facts. Broadly, the same provisions apply in Scotland under the Scottish legislation[10]. The difficulty in Clark is that she in fact has capacity, and more than three years had passed since her sixteenth birthday (the age of majority in Scotland).

4.3 On both sides of the border, it is would appear that the court has to give careful consideration to the question of amendment after a time limit has expired. Section 35(5)(a) of the Limitation Act permits rules of court to be made which allow a claimant to add a new claim after the expiry of the time, where the new claim arises out of the same facts as are already in issue on any claim previously made. CPR 17.4(2) provides those rules. In Scotland, the expiry of a time limit which would otherwise give rise to a time bar argument, is merely one factor to be taken into account in the exercise of discretion to allow or refuse amendment.[11] Generally a party will not be allowed to amend where it will defeat the other party's right to avoid time barred claims.

4.4 The easier cases for us to consider would appear to be those where the claimant is incapacitated either through minority or through other disability (usually mental incapacity). But what of cases where the claimant – like Miss Clark – is not disabled? What arguments are open to those like her?

5. WHEN DOES THE CLOCK START TICKING?

5.1 Clearly there is the option when a claim has obviously time barred of asking the court to disapply the limitation periods. In England, the relevant provisions are section 33 of the Act of 1980; and in Scotland, section 19A of the 1973 Act. But before one

[10] Prescription and Limitation (Scotland) Act 1973. A claim must be brought within three years of the date of the injury or the date upon which a person with reasonable diligence should have known that they had a claim in law. No account is taken of any time during which the party was suffering from a disability to litigate (i.e they are entitled to do nothing until they are 16 years old, or suffering from incapacity).

[11] A very recent authority, earlier this month (Perth and Kinross Council v Scottish Water Ltd, Inner House) indicates that what is important is the substance and not the form. In that case an amendment after the time limit was proposed to change the defender from Scottish Water Limited, to Scottish Water.

considers these provisions, which assume that the time has in fact commenced, when does it actually commence - on the assumption that the claimant was not disabled within three years of the proposed amendment?

5.2 Although what is said here is relevant in particular to amendments, it is also (as we are assuming we are within three years of the decision in Montgomery) relevant to fresh claims. It is far from inconceivable that there are individuals who received advice prior to Montgomery that their claims were without merit; but since Montgomery they do have good claims. There is still a period of about 18 months during which what is about to follow may be of immense importance which takes us up to Montgomery's third birthday.

5.3 Section 11(4) of the Act of 1980 provides that the action has to be brought within three years of "(a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured".

5.4 Section 14 provides:

> **"14.— Definition of date of knowledge for purposes of sections 11 and 12.**
> (1) ……in sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—
> (a) that the injury in question was significant; and
> (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
> (c) the identity of the defendant…."
>
> (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant….
>
> and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."

5.5 Similar provisions apply in Scotland.

5.6 So the question would appear to be this: is it the case that the clock starts only when the Claimant knew that he or she had a claim based on consent? And if that is correct, can it only be said to be the case when the Montgomery decision was advised?

5.7 Needless to say, that is the primary argument presented on behalf of Miss Clark: that neither she nor her legal advisers were aware of the right to present that case until the Montgomery decision was available. Indeed, it was pointed out that prior to that point in time, the Inner House decision in Montgomery (which was binding on the Outer House) would have prevented any amendment taking place.

6. THE ARGUMENTS FOR DEFENDANTS

6.1 Of course a defendant will have open the argument that notwithstanding the decision in Montgomery being recent, a claimant or his advisers should have pled such a case long before and it was thus time barred. Lord Stewart makes reference to a number of texts and authorities where the "writing was on the wall" regarding consent claims. His pithy suggestion that "any canny Scots pleader" would have pled such a case was typical of his vernacular. And he did of course point out that perhaps the Clark case should have been Montgomery before Montgomery. It is not good enough, he said, to sit back and watch others do the heavy lifting.

6.2 It will be difficult for a Claimant to proceed with a claim which alleges lack of consent more than three years previously, once the third birthday of Montgomery has passed. The only exception to that is where (in a Georgiev type claim) where there is a trial which will cover essentially the same ground as the new consent claim. But these will be few and far between.

6.3 A recent and important case on negligence of legal advisers shows not only the difficulties that the lawyers may encounter, but the difficulty that a claimant may encounter in trying to blame them for failing to plead a consent claim. In Chinnock, a

decision of the Court of Appeal, the claimant had sued both her solicitors and counsel. It was said that they had incorrectly advised her that she had no claim in law (prior to Montgomery), yet in fact she had a good claim that she could not now pursue. She had originally sought advice in 2001. New solicitors and counsel were instructed who identified on negligence grounds that, in their view, there were in fact reasonable prospects of success. By the time the claim against the legal advisers was heard, Montgomery had been decided. But, it was emphasised in the Court of Appeal as follows:

> *"[50]……. The barrister's conduct must be judged by reference to the material before him/her and any further material or information which the barrister ought to have obtained. The court trying the professional negligence action must have regard to the state of the law when the barrister was acting or advising, not the state of the law at the date of trial.*
> *[51] This last point is important. The law in relation to a doctor's duty to provide information and advice has developed substantially in the last fourteen years. I must look at that pocket of law as it was in July 2001. It may be helpful to note how the law has developed since then, but I can hardly criticise counsel for failing to foresee those developments."*

7. OTHER AMENDMENT CASES

7.1 Jones v Royal Wolverhampton NHS Trust: An application to amend was allowed, where the trial was three months away. Mr.Justice Green concluded that the Montgomery case fundamentally changed the law and it would be artificial to determine the case on a Bolam/Bolitho basis when things had moved on.

7.2 Barrett v Sandwell and West Birmingham Hospitals NHS Trust: A consent argument was presented without there being any pleading to that effect. However, the judge considered that as witness statements made clear that the consent argument was to be presented, he did not see it as a bar to considering the claim based on Montgomery. He did, however, conclude that even if the doctor had discussed alternatives, the Claimant would have accepted the treatment he did in fact undergo. The implication of his judgment is that he considered that there had been a breach, but neither party considered that Chester v Afshar was relevant to the case.

8. ONCE AND FOR ALL LITIGATION: RES JUDICATA?

8.1 This section of the paper considers the situation where a Claimant has already presented a claim – say on negligence – and has lost. Is he barred from taking fresh proceedings? The res judicata rules are a feature of abuse of process, and it is clear that abuse is but one type of res judicata formulation.

8.2 It is intended to refer to the position in England, with footnotes as to position in Scotland which is rather more complicated and will be essentially left aside.

8.3 The objection to a fresh claim being made arises from the well known principles in Henderson v Henderson (1843) 3 Hare 100. The essence of the plea of res judicata is that the claimant in the claim is subject to estoppel. But one must distinguish *issue* estoppel from *cause of action* estoppel. The former encompasses the concept where the prior action contained an issue common to it and the subsequent proposed litigation. But the latter describes the situation where the entire cause of action is identical. It is the latter situation which can create difficulty.

8.4 The most important recent discussion of res judicata is to be found in Virgin Atlantic v Zodiac. For present purposes, the formulation by Lord Sumption at paragraph [18] is important:

> "Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles …."

8.5 It will be noted therefore that there are a number of judgments to be made before concluding that something is barred by operation of the rule.

8.6 First, is it the same issue in the second action [viz. cause of action estoppel]? The argument for a claimant will be that the formulation of the claim is different: the first

(failed) action is one on negligence; and the new one is a breach of duty which does not base itself on negligence but on the right of the patient.

8.7 Second, could the Claimant have brought this new point in the earlier action? There is no doubt that he could have done and thus this particular limb of the Sumption analysis is met. For the Claimant, it will be argued of course that until Montgomery, Sidaway prevented that being argued. The court will no doubt have to judge between the competing arguments in this regard.

8.8 Third, *should* the Claimant have brought the new point earlier? This question is closely connected with the immediately preceding one and the same arguments will be relevant to both.

8.9 Finally, can it be said that over all there is an element of abuse of process. This is a high test for a defendant to meet, and it cannot be considered in the abstract. It will depend upon the answer to the above questions.

8.10 In Scotland, the court will consider whether the issues have been previously determined (See Short's Trustee v Chung 1999 SC 471: "the plea of *res judicata* as based upon considerations of public policy, equity and common sense, 'which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis'.")

9. CONCLUSION

9.1 From a procedural perspective, Montgomery can create a number of challenges. The following can be stated albeit tentatively.

- Where a Claimant has never litigated before, if he is disabled by minority or other disability, it is likely he can bring a claim.
- Where he is currently litigating, provided a trial will not be materially prejudiced (and even if it may be so but there is a desire to stop multiple litigations), he is probably going to be permitted to amend.

- Even if he cannot amend, he may be able to bring subsequent or parallel proceedings unless it can be argued that there is an abuse of process.
- Adult claimants without disability are probably able to bring consent claims until the third birthday of the Montgomery decision either arguing that the clock did not start until that decision was issued, or that section 33 should allow them to do so.
- Children and those with disability would only be faced with arguments of res judicata in subsequent claims; but it will be difficult for such an objection to succeed without an allegation of abuse of process.

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APPENDIX

1. Clark v GGHB [2016] CSOH 24
2. Baird v Stephen W R Hastings [2007] 1 AC 558
3. Qua Su Ling v. Goldman Sachs International [2015] EWHC 759 (Comm) Carr J
4. Chinnock v Veale Wasbrough and Karen Rea [2015] EWCA Civ 441
5. Jones v Royal Wolverhampton NHS Trust [2015] EWHC 2154 QB
6. Georgiev v Kings College Hospital NHS Foundation Trust [2016] EWHC 104 QB
7. Virgin Atlantic v Zodiac [2014] AC 160 (SC (E))