Leigh Day

Montgomery – A Solicitor's View

Claire Fazan

Montgomery – what does it change in terms of how the solicitor prepares the case?

Leigh Day

Lady Hale:

- *“the need for informed consent was firmly part of English Law. The case has provided us with the opportunity…to confirm that confident statement..”*

- *"It is now well recognised that the interest which the law of negligence protects is a person's interest in their own physical and psychiatric integrity, an important feature of which is their autonomy, their freedom to decide what shall and shall not be done with their body….*

- *"An important consequence of this is that it is not possible to consider a particular medical procedure in isolation from its alternatives. Most decisions about medical care are not simply yes/no answers. There are choices to be made, arguments for and against each of the options to be considered, and sufficient information must be given so that this can be done."*

- “Pregnancy is a particularly powerful illustration……..That is not necessarily to say that the doctors have to volunteer the pros and cons of each option [vaginal delivery or caesarean section] in every case, but they clearly should do so in any case where either the mother or the child is at heightened risk form a vaginal delivery. In this day and age, we are not only concerned about risks to the baby. We are equally, if not more, concerned about risks to the mother. And those include the risks associated with giving birth, as well as any after effects.”

- “Dr McLellan referred to……it’s not in the maternal interest for women to have caesarean sections. Whatever Dr McLellan may have had in mind, this does not look like a purely medical judgement. It looks like a judgement that vaginal delivery is in some way morally preferable to a caesarean section: so much so that it justifies depriving the pregnant woman of the information needed for her to make a free choice in the matter. ..”

- Lords Kerr and Reed:

"Since Sidaway….One development which is particularly significant in the present context is that patients are now widely regarded as persons holding rights, rather than passive recipients of the care of the medical professions. They are also widely treated as consumers exercising choices…"

- *"…other changes…should also be born in mind….it has become far easier, and far more common, for members of the public to obtain information about symptoms, investigations, treatment options, risks and side effects via such media as the internet, …patient support groups, and leaflets issued by healthcare institutions. The labelling of pharmaceutical products and the provision of information sheets is a further example…..it would therefore be a mistake to view patients as uninformed, incapable of understanding medical matters, or wholly dependent upon a flow of information from doctors. The idea that patients were medically uninformed and incapable of understanding medical matters was always a questionable generalisation…..To make it the default assumption on which the law is to be based is now manifestly untenable*."

Leigh Day

- Patients… “should be treated so far as possible as adults who are capable of understanding that medical treatment is uncertain of success and may involve risks, accepting responsibility for the taking of risks affecting their own lives, and living with the consequences of their choices..

- …this approach entails a duty on the part of doctors to take reasonable care to ensure that a patient is aware of **material risks** of injury that are inherent in treatment……a duty of care to avoid exposing a person to risk of injury which she would otherwise have avoided, but it is also the counterpart of the patient's entitlement to decide whether or not to incur that risk. The existence of that entitlement, and the fact that its exercise does not depend exclusively on medical considerations, are important. They point to a fundamental distinction between, on the one hand, the doctor's role when considering possible investigatory or treatment options and, on the other, her role in discussing with the patient any recommended treatment and possible alternatives, and the risks of injury which may be involved."

- “The former role is an exercise in professional skill and judgement: what risks of injury are involved in an operation, for example, is a matter falling within the expertise of members of the medical profession. ……. 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.”**

Bolam doesn’t apply.

Leigh Day

- *"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."***

- *"First, it follows from this approach that the assessment of whether a risk is material cannot be reduced to percentages. The significance of a given risk is likely to reflect a variety of factors besides its magnitude: for example,* ***the nature of the risk, the effect which its occurrence would have upon the life of the patient, the importance to the patient of the benefits sought to be achieved by the treatment, the alternatives available, and the risks involved in those alternatives.*** *The assessment is therefore fact-sensitive, and sensitive also to the characteristics of the patient."*

Leigh Day

- *"Secondly, the doctor's advisory role involves dialogue, the aim of which is to ensure that the patient understands the seriousness of her condition, and the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, so that she is then a position to make an informed decision. This role will only be performed effectively if the information provided is* ***comprehensible****. The doctor's duty is not therefore fulfilled by bombarding the patient with technical information which she cannot understand…."*

The Consent Process

Leigh Day

- GMC guidance (currently being reviewed and consulted on as I understand)

  - The amount of information about risk that you should share will depend on what the individual patient wants and need to know and the nature of the risks associated with the treatment options. It is important to focus on the patient's individual circumstances and the risk to them personally, rather than the population level risks.
  - When communicating with patients you should consider their needs add maximise their ability to understand and retain the information.
  - Record what has been discussed and any specific requests from patient.

Has Montgomery really changed things?

Is it really just about the law catching up that it is about informed choice and not just consent?

Leigh Day

- How consenting is done obviously will vary on the urgency of the circumstances- such as urgent life-saving procedures such as dealing with an aneurysm before it ruptures.
- It should not be done for the first time in the anaesthetic room immediately prior planned to surgery and never should have been

- In planned procedures -such as for example orthopaedic or spinal surgery - it should be a continuing process and certainly should not be first raised when the patient is in hospital having taken the day off work and is all prepared for surgery.

- The Decision Record – should one be used?

CDF proposal 2015 was for a record to be made of the appointment and advice starting with the out patient appointment, further appointment, admission and outcome.

Informed consent cases were always very difficult – have they become easier?

- Probably not.
- Prospects of success may now be harder to predict because the test is not Bolam.

Have they added a string to the bow in what would otherwise be simple Bolam negligence or Bolitho cases?

- Probably, but in a limited number of cases because we were probably already approaching cases in this way.

Has Montgomery clarified the information we want to obtain from our clients before we consider running a consent case.

Probably, although a properly prepared consent case or case where intervention should have been offered should have covered all these points before.

Is what I want to know different post Montgomery?

- Probably not.

Causation

Leigh Day

- We still have to prove causation. In this case it was *"but for"* causation that was satisfied but the Court left open the possibility of succeeding on causation on another basis such as Chester in another case.

Can we now apply hindsight – *"if I had known then what I know now…."*

- Possibly no more than we always could do in terms of the risks that should have been warned about, but it may well go to the nature and focus of the discussion that should have been had – eg perineal injury risk and the potential day to day impact of that on the mother's life.
- Will it open the way to these?

Experts

Leigh Day

Do we need experts still?

- Yes.

Why? What are/were the risks?

Taking Client's Instructions

Leigh Day

- What did the doctor/nurse/health professional say about the proposed procedure (reasons/potential benefits/risks) and when did they do this?
- What did the client understand that meant.
- What did they say about the alternatives to the proposed procedure (reasons/potential benefits/risks) and when did they do this?
- What did the client understand that meant?
- What questions did the client ask and when?
- What answers did they get and when?
- What did they understand from those answers.
- What did the client take into consideration when making the decision to consent? What was important/material to them?
- What does the client think now that they should have been told? Why?
- Why did they not ask that at the time?
- Why would it have mattered at the time?