Montgomery v Lanarkshire Health Board
[2015] AC 1430, [2015] UKSC 11

Summary

The claimant, Nadine Montgomery, was suing on behalf of her son, who had been born disabled as a result – she claimed – of the negligence of the doctor, Dr Dina McLellan, who was handling Montgomery's pregnancy and who was employed by the defendant health board. Montgomery was diabetic, a condition that often results in the babies of diabetics being born heavier than usual, with an unusual amount of weight concentrated around their shoulders. This can create problems when the baby is due to be born – the shoulders of the baby can become too large to pass through the mother's pelvis; this phenomenon is known as shoulder dystocia.

In meeting with her doctor, Montgomery – who was just over five feet in height – expressed worries about her ability to give birth normally. Dr McClellan failed to mention the risk of shoulder dystocia – which is about 9-10% in the case of diabetic mothers, and can be resolved in 70% of those cases through something called a 'McRoberts manouevre', which involves widening the mother's pelvis through spreading and raising her legs, and pushing down on the baby to dislodge it. Some cases can present greater difficulties, with the result that in the case of a baby of a diabetic mother suffering shoulder dystocia, there is a 0.2% risk of the baby ending up being paralysed, and a 0.1% risk of the baby suffering cerebral palsy or death. Dr McClellan did not mention the risk of shoulder dystocia to Montgomery as her view was that even were shoulder dystocia to occur, the risks of the baby suffering severe damage were very small, and that were she to mention the possibility of shoulder dystocia, she thought that Montgomery would immediately opt for delivery by a caesarean section. Dr McLellan would have offered Montgomery a caesarean if she thought that the birth weight of the baby would be 4kg or above, but due to a failure to take account of the exact number of days old that the baby would be when he was born, she thought that the baby would be 3.9kg at birth; in fact he was 4.25kg. So Montgomery was never offered the option of having her baby by caesarean section.

As it turned out, the birth turned into 'every obstetrician's nightmare' ([21]), with the baby's shoulder getting blocked when the baby's head was only halfway out of Montgomery's body. Attempts to push the baby back in so as to deliver the baby by caesarean proved ineffective. With a huge amount of wrestling, the baby was eventually pulled free of Montgomery, but had been deprived of so much oxygen in the birth process that he developed cerebral palsy. Montgomery sued the defendant health board, claiming that Dr McClellan had been negligent in not warning of the risk of her son's birth being disrupted by shoulder dystocia, and of the risks to her son's health were that to happen. Montgomery's claim was dismissed in the Scottish courts that heard her case on the ground that: (1) Dr McClellan had *not* been negligent in failing to warn Montgomery of the risks of shoulder dystocia, and (2) even if Dr McClellan's failure to warn Montgomery *had* been negligent, warning Montgomery of the risks of shoulder dystocia would have had no impact on her son's health, as such a warning would *not* have resulted in Montgomery asking to have a delivery by caesarean section. In reaching conclusion (1), the Scottish courts followed the decision of the House of Lords in *Sidaway* v *Board of Governors of the Bethlem Royal Hospital* [1985] AC 871, which ruled that a failure to warn a patient of a risk associated with some medical procedure would not amount to negligence if: (i) there was a respectable body of medical opinion that supported the view that failing to inform the patient of the risk was a proper thing to do; and (ii) the patient had not specifically asked about the risk in question.

The UKSC allowed Montgomery's claim. Lords Kerr and Reed gave the leading judgment (with the agreement of Lords Neuberger, Clarke, Wilson, and Hodge). They ruled that on issue (1), the House of Lords' decision in *Sidaway* should no longer be followed. Instead, a failure to warn a patient of a risk associated with a medical procedure should normally be held to be negligent if the risk was 'material' in nature, where 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' ([87]). In judging whether a risk was material, it would not be enough to look at the percentage size of the risk – the nature of the risk, the impact on the patient were the risk to materialise, and the alternatives to running the risk would all also be relevant ([89]). In the case where a doctor was under a duty to warn a patient of a particular risk, the doctor could only discharge the duty by warning the patient of the risk in 'comprehensible' terms, and would not discharge that duty 'by bombarding the patient with technical information which she cannot reasonably be expected to grasp' ([90]).

Only two exceptions were mentioned to the 'materiality' test for determining whether a doctor was negligent in failing to disclose a medical risk to a patient. (i) A 'doctor is not obliged to discuss the risks inherent in a treatment with a person who makes it clear that she would prefer not to discuss the matter' ([85]). (ii) A 'doctor is [not] required to make disclosures to her patient if, in the reasonable exercise of medical judgment, she considers that it would be detrimental to the health of her patient to do so' ([85]). However, this 'therapeutic exception' to a doctor's duty to disclose material risks to her patient 'should not be abused' by being invoked in cases where 'the doctor [prevents] the patient from making an informed choice where she is liable to make a choice which the doctor considers to be contrary to her best interests' ([91]).

Applying these tests to the facts of *Montgomery*, the UKSC held that Dr McClellan *had* been negligent in failing to inform Montgomery of the risks associated with having a natural birth in her case. The risk of shoulder dystocia in this case was plainly material, and there was no 'question…of Dr McClellan's being entitled to withhold information about the risk because its disclosure would be harmful to the patient's health' ([95]). On issue (2) – the issue of whether Dr McClellan's negligent failure to warn Montgomery caused any harm – the UKSC held that the Scottish courts had overlooked the evidence of Dr McClellan that she had not warned Montgomery of the risk of shoulder dystocia in this case because she thought that doing so would result in Montgomery asking to have her delivery by caesarean section. If that was the case, then causation of harm was clearly made out as delivery by caesarean section would have had none of the adverse consequences for Montgomery's son that a natural birth had had.

Comments

There is an unpleasant streak of self-righteousness running through the judgments in this case, with Lords Kerr and Reed claiming that their decision 'treats [patients] 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' ([81]) and Baroness Hale, in her supporting judgment, claiming that 'Gone are the days when it was thought that, on becoming pregnant, a woman lost, not only her capacity, but also her right to act as a genuinely autonomous human being' ([116]) – but one wonders whether *Montgomery* will live to be one of those decisions that the courts come to regret. In widening the scope of a doctor's duty

to warn a patient of risks associated with her treatment, the UKSC has not only (and happily) expanded the vulnerability of doctors to being sued for breach of *that* duty, but also (and unknowingly) created the potential for doctors to be sued for breach of *other* duties.

First, suppose that C is diagnosed with cancer. C's doctor, D, informs her of the diagnosis and recommends chemotherapy. C tells D, 'Whatever you think is best, I'll go along with – I don't really want to think about it, to be honest. It's all so difficult to take in.' If D does not at that point explain the risks associated with chemotherapy, and C undergoes three months' worth of gruelling chemotherapy – three months of hell which prevent C taking any pleasure in spending time with her family – and at the end of that, C's cancer has spread so severely that it untreatable: will C be able to sue D for failing to tell her about the risks that the chemotherapy might not work, and the impact that having chemotherapy would have on her ability to lead a normal life before her cancer finally took its toll? If C were to sue D, D would try to rely on the first exception to the materiality test – you don't have to tell patients about material risks if the patient makes it clear she would prefer not to discuss the matter ([85]). But, the UKSC said, 'Deciding whether a person is so disinclined may involve the doctor making a judgment' ([85]) – could D be held liable for making the wrong judgment: for concluding that C's words meant that she did not want to talk about risks that, by definition, she was completely unaware of? The UKSC also said that 'the skill and judgment' that a doctor is required to show in determining whether C did not *really* want to talk about the risks of chemotherapy is 'not of the kind with which the *Bolam* test is concerned' ([85]) – so were D to be sued here by C, D would not be able to defend himself by arguing that a respectable body of medical opinion would have supported his not pressing on C information about the risks of chemotherapy. So how is D supposed to establish that he was not negligent in this kind of case? No one really knows.

Secondly, suppose that the facts of *Montgomery* reoccur, and C's doctor – knowing about the UKSC's decision in *Montgomery* – promptly informs C of the risks that if she gives birth naturally, the delivery may be affected by shoulder dystocia, and what the implications of that might be. Equally promptly, C tells her doctor, D, that she would like to have a delivery by caesarean section. But – contrary to what Baroness Hale seems to have assumed in her judgment (at [113]) – having a baby by caesarean is not a costless procedure. It too involves risks – of subsequent complications from scar tissue, and of complications (and the need to have future babies by caesarean section as well – and D, being aware of those risks and the UKSC's decision in *Montgomery*, explains those risks to C. C tells D, 'On balance, I would still like to have a caesarean'. C's baby is delivered by caesarean section, and – although the operation was carried out impeccably – C does experience the complications that D warned her about. Scar tissue develops inside C's abdomen, in the area where C was operated on, and this requires C to have a further operation to deal with the scar tissue. This operation, combined with the original caesarean, weakens the muscles in C's stomach wall so much that she is told that if she gets pregnant again, a natural delivery will be extremely dangerous. She does get pregnant again, and has the delivery by caesarean, and that results in further medical complications for C. At this stage, C wants to sue D. There are a number of ways in which C could frame her claim against D. She could argue: (i) that D was negligent in failing to *really* bring home to her the risks associated with having a caesarean that would have allowed her to make an informed decision as to whether or not have a caesarean; (ii) D was negligent in failing to inform C that it was D's professional opinion that she should not have a caesarean and should the run the risk of her birth being disrupted by shoulder dystocia; (iii) D was negligent because, given that it was her professional opinion that it would be best for C to have a natural birth, she should have tried to change C's mind about having a caesarean, even after C had decided, in light of the risks involved, to have a caesarean. It is

very hard to see how the courts would deal with these different claims, all of which are a result of D's trying to comply with the UKSC's judgment in *Montgomery*.

So *Montgomery* has the potential to involve the courts, and doctors, in a morass of litigation for a long while time to come. And if that happens, the real pity of the decision in *Montgomery* is that it could all have been avoided. After all, Dr McClellan's mistake in estimating the birth weight of Montgomery's son would have provided just as good a basis for suing for damages in *Montgomery* as Dr McClellan's failure to warn Montgomery about the risks associated with shoulder dystocia. And it is not so clear that the courts could not have found that Dr McClellan's failure to warn Montgomery could not have been held to have been negligent under the approach adopted by the House of Lords in *Sidaway*. There is a well-established exception to the *Bolam* test for medical negligence – which *Sidaway* basically gave effect to – which applies in the case where the 'responsible body of medical opinion' on which the defendant relies to argue that she was not negligent in treating her patient is demonstrably irrational or perverse. It is arguable that a body of medical opinion that says that it is proper not to warn a diabetic patient of the risk of shoulder dystocia is demonstrably irrational or perverse, given the potential severity of the consequences of a birth being disrupted by shoulder dystocia. Time will tell whether the wiser course in *Montgomery* would have been to rely on these much narrower grounds for allowing the claimant's claim.

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