

Issue of consent | spelling out the facts, reducing risk for patients



A ruling in Spring 2015 established the duty for all health professionals to take reasonable care to ensure patients are made aware of all material risks so they can make an informed choice over treatment. Fred Tyler represented the family involved in this landmark case on consent, which has significant implications for the medical profession.

Mrs Nadine Montgomery brought this action in the Court of Session in Scotland on behalf of her son, Sam[†]. Mrs Montgomery is diabetic and of small stature. It is well known that diabetic mothers can give birth to larger than average babies, which gives rise to a risk of shoulder dystocia, where the baby's head is delivered but the shoulder becomes stuck. That is what happened to Sam. As a result, he suffers from cerebral palsy.

Whilst Mrs Montgomery had asked in general terms about the risks of giving birth naturally, she did not ask specifically about shoulder dystocia. Had she done so, the consultant would have told her about it. And had an elective caesarean section been requested by Mrs Montgomery, it would have been offered and Sam would not have been injured.

A bench of seven judges was convened in the Supreme Court as it was being asked to overturn the case of *Sidaway v Board of Governors for Bethlem Hospital & Others [1985] ACV 871*. Essentially, *Sidaway* decided that in relation to advice, as well as diagnosis and treatment, the test to be applied was whether or not the doctor had acted in accordance with a practice accepted as proper by a responsible body of medical practitioners. The Appellant argued that the appropriate test was a patient-centred test.

Material risk: what's reasonable?

The Supreme Court accepted that the appropriate test is patient-focused: the doctor has 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 treatments. Whether or not a risk is material depends on whether a reasonable person in the position of the patient would be likely to attach significance to the risk, or the doctor should reasonably be aware that the particular patient would attach significance to it. This coincides with Guidance issued by the General Medical Council dating back to 1998. The test of the ordinarily competent doctor no longer applies to the issue of consent.

Patients are no longer required to ask *specific* questions about the risks (of which they may be ignorant) and the onus is on the doctor to spell out those risks if they are material to the patient concerned. Doctors will be required to carefully record in the patient's notes what was discussed regarding treatment and risks.

The doctor remains able to withhold information on risks if disclosure would be seriously detrimental to the patient's health or in an emergency situation.

Summary

Many doctors will be unhappy with the decision, while others will take it in their stride. As the

Supreme Court said in its decision: “This may not be welcomed by some healthcare providers; but the reasoning of the House of Lords in *Donoghue v Stevenson [1932] AC 562* was no doubt received in a similar way by the manufacturers of bottled drinks.”*

* Refers to the famous “snail in the bottle” case from which the modern legal interpretation of negligence emerged: it established the principles of one person owing another a duty of care, and foreseeability.

*Montgomery v Lanarkshire Health Board [2015] UKSC 11

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