Landmark case makes it clear that **informed** consent is firmly part of English and Scots law

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**The Supreme Court has recently published its judgment in the case of *Montgomery v Lanarkshire Health Board*.** The case, involving allegations in relation to birth-related injuries, has attracted a lot of publicity because of the £4.25 million award. But it is also highly significant in medico-legal terms in that it crystallises the law in relation to consent – more specifically issues around the amount of information a patient is entitled to be told before making a treatment decision.

Briefly, Mrs Montgomery’s son was born after a failure of the head to descend due to shoulder dystocia, necessitating forceps delivery aided by symphysiotomy. Twelve minutes passed between the head appearing and delivery, during which time the cord was completely or partially occluded. After birth her baby was diagnosed with significant cerebral palsy.

Mrs Montgomery’s grounds for alleging negligence were i) she should have been given advice regarding the risk of shoulder dystocia, being just over 5 feet tall and diabetic, and ii) it was negligent not to perform a Caesarean section when abnormities were noted on the CTG.

The main focus of the appeal was on the issues of the information given to Mrs Montgomery when she had expressed concern about being able to delivery her baby vaginally – though she had not asked specific questions regarding shoulder dystocia. Initially she had lost her case both at trial and on appeal. She then took her case to the Supreme Court where she was successful and her appeal allowed.

**This case is important to all doctors involved in consent discussions with patients as it sets out very clearly what is expected in terms of information disclosure: the focus being on matters the patient would regard as significant which may not be the same as the doctor’s opinion.**

The key statements in the judgment pull together previous case law and guidance from, amongst others, the GMC. **There is a move away from non-disclosure of a risk based on percentages: “... it follows … that the assessment of whether a risk is material cannot be reduced to percentages.”** **The judgment also states that it cannot be left to the doctor to determine what is reasonable to disclose; the move is to what a patient would attach importance to. In addition, the Courts have the final say in “determining the nature and extent of a person’s rights….not the medical professions.”**

At paragraph 87 the judgment states:

“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.”

The patient does not have to ask specific questions – and it has been pointed out that it is unreasonable to expect a lay person to know what questions to ask - but if they are expressing some concerns the questions which would naturally flow from those concerns must be explored and answered fully.

There are some exceptions: where the patient has made it clear they do not wish to be informed of risks of injury, where the disclosure would (in the reasonable exercise of medical judgment) be seriously detrimental to the patient’s health, and in an urgent or emergency situation.

Whilst this specific judgment is about an obstetric case, **the principles apply to consent in all fields of practice.**

The judgment makes specific comment about what is expected in the dialogue with the patient and the doctor’s role, when at paragraph 90 it states:

**“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 reasonably be expected to grasp, let alone by routinely demanding her signature on a consent form.”**

**All doctors involved in discussions with patients about consent will therefore need to be sufficiently well-informed and trained in how to obtain fully informed consent.**

**They must be able to identify when a patient may need more information in order to make a decision about the treatment they agree to have.**

The judgment runs to 38 pages and clearly this blog provides only the briefest commentary – but at paragraph 107 the message is very clear:

“…… **This case has provided us with the opportunity, not only to confirm… [that the need for informed consent was firmly part of English law], but also to make it clear that the same principles apply in Scotland.”**

**This judgment provides the stimulus for doctors to reflect on their practice regarding consent. As usual we would advise that members keep clear, relevant and unambiguous notes of consent discussions and carefully check any proformas or standard information leaflets that are in use.**

Should a member have any questions arising from this blog please contact the MDDUS for specific advice as necessary.