

Montgomery v Lanarkshire Health Board (Scotland) [2015] UKSC 11

Key Points

- Failure to warn – the ethics of withholding information from a patient when patient is likely to attach particular significance to the risk.
- Causation – considering patient's probable reaction to being informed of risk.

Background

In 1999 Nadine Montgomery was expecting her first baby. Mrs Montgomery gave birth to a baby boy on 1 October 1999 at Bellshill Maternity Hospital, Lanarkshire. As a result of complications during the delivery, the baby was born with severe disabilities. In the present case, Mrs Montgomery sought damages on behalf of her son for the injuries which he sustained. She attributed those injuries to negligence on the part of Dr Dina McLellan, a consultant obstetrician and gynaecologist employed by Lanarkshire Health Board, who was responsible for Mrs Montgomery's care during her pregnancy and labour.

Medical Complications

Mrs Montgomery suffered from insulin dependent diabetes. She was told that she was having a larger than usual baby. But she was not told about the risks of her experiencing mechanical problems during labour. In particular she was not told about the risk of shoulder dystocia given that she was diabetic.

In a very small percentage of cases of shoulder dystocia, the umbilical cord becomes trapped against the mother's pelvis. If, in consequence, the cord becomes occluded, this can cause the baby to suffer from prolonged hypoxia, resulting in cerebral palsy or death. The risk of this happening is less than 0.1%.

Dr McLellan testified that she did not warn Mrs Montgomery of the risks of shoulder dystocia, because whilst that risk was high, the risk to the baby was minimal. Dr McLellan testified that if she did warn Mrs Montgomery of the risk of shoulder dystocia, she would undoubtedly have asked for a caesarean section, which carried its own risks.

During labour, when the baby's head failed to descend naturally, Dr McLellan used forceps. Therefore, the baby's shoulder became impacted at a point when half of his head was outside the perineum. Dr McLellan had never dealt with that situation before. An anaesthetist gave Mrs Montgomery a general anaesthetic so as to enable the Zavanelli manoeuvre (that is, pushing the baby back into the uterus, in order to perform an emergency caesarean section) to be attempted. However, Dr McLellan decided that she had no other option but to try to complete the delivery. She pulled the baby's head and, in order to release the shoulders, she attempted to perform a symphysiotomy (that is, cutting through the pubic symphysis so as to allow the two halves of the pelvis to be separated). 12 minutes after the baby's head first appeared, Dr McLellan succeeded in delivering the baby.

During those 12 minutes, the umbilical cord was completely or partially occluded, depriving him of oxygen. After his birth, he was diagnosed as suffering from cerebral palsy of a dyskinetic type, which had been caused by the deprivation of oxygen. He also suffered a brachial plexus injury

resulting in Erb's palsy (that is, paralysis of the arm). All four of his limbs are affected by the cerebral palsy. It was held that if Mrs Montgomery had had an elective caesarean section, her son would have been born uninjured.

The Law

Mrs Montgomery claimed that Dr McLellan was negligent in that:

- She ought to have advised Mrs Montgomery of the risk of shoulder dystocia and the alternative possibility of delivery by elective caesarean section; and
- She had negligently failed to perform a caesarean section in response to abnormalities indicated by cardiotocograph ("CTG") traces.

At first instance, the court found no fault on both grounds of negligence.

Mrs Montgomery appealed. The present appeal focused on the first ground of fault, in particular:

- Whether Dr McLellan failed to warn Mrs Montgomery of the risk of shoulder dystocia; and
- If so, whether her failure to warn caused the baby's injuries.

Failure to Warn

When a doctor is questioned specifically by a patient about the risks involved in a particular proposed treatment, the practitioner must answer as truthfully and fully as the patient requires. The court rejected Mrs Montgomery's submission that she had specifically asked Dr McLellan of the risks in vaginal delivery and about other options. He accepted that Mrs Montgomery had been anxious about her ability to deliver such a large baby vaginally, and had expressed her concerns to Dr McLellan more than once. However, in the court's opinion, such concerns did not raise a duty on Dr McLellan to explain the risks.

On appeal, however, it was held that Dr McLellan had a duty to advise Mrs Montgomery of the risk of shoulder dystocia. In reaching this conclusion, the court made reference to the Australian case of *Rogers v Whitaker* (1992) 175 CLR 479 in which it was considered whether a reasonable person in the patient's position would be likely to attach significance to the risk. In the present case, Mrs Montgomery's express concern over the size of her unborn baby should have led Dr McLellan to discuss the risks associated with the vaginal delivery of a large baby and the options open to her so that she was in a position to make an informed decision.

Causation

The issue to be considered next is whether Dr McLellan's failure to warn Mrs Montgomery of the risk of shoulder dystocia caused the baby's injuries.

The trial judge found that, even if Mrs Montgomery had been informed of the risk of shoulder dystocia and had been told of the alternative of a caesarean section, she would not have elected to undergo that procedure. Specifically, the trial judge was referring to Mrs Montgomery's reaction had she been advised of the minimal risks to her baby that may occur as a result of shoulder dystocia.

On appeal, a different approach was taken. The proper issue to consider is what Mrs Montgomery's reaction would have been if she had been told of the significant risk of shoulder dystocia. Dr McLellan unequivocally answered this question in stating that Mrs Montgomery would have elected

to proceed with a caesarean section, as most of her diabetic patients do. Her statement was consistent with the expert evidence.

The court held that the reasonable conclusion from the above assessment is that had Mrs Montgomery been advised of the risk of shoulder dystocia and the alternative of an elective caesarean section, she probably would have elected to proceed with a caesarean section. It was not in dispute that the baby would then have been born unharmed.

Conclusion

The appeal was allowed.

Lessons Learnt

The Supreme Court discussed the ethics of withholding information from a patient in cases where disclosure would be harmful to a patient's health. It was not in question that doctors are entitled to withhold information for this reason. The disclosure or withholding of information was regarded as an aspect of medical care and a matter of clinical judgment, the appropriate standards of which are to be set by the medical profession. However, a doctor is not entitled to prevent his or her patients from making an informed decision, but must explain the alternatives and the considerations for and against each of them.

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