

Advising on alternative treatments for patients – what is the legal test to be applied?

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An analysis of *McCulloch v Forth Valley Health Board*

On 12 July 2023, the Supreme Court handed down its judgment in the case of **McCulloch and others (Appellants) v Forth Valley Health Board (Respondent) (Scotland) (“McCulloch”)**. The Supreme Court had been asked to consider what legal test should be applied when assessing whether an alternative medical treatment is reasonable and therefore needs to be discussed with the patient. In short, the Court decided that:

- a doctor has a duty of care to inform a patient of the “reasonable alternative treatments”, in addition to the treatment recommended, and
- the legal test for determining what are “reasonable alternative treatments” is the test laid down in the case of *Bolam*, i.e. whether the doctor has acted in accordance with a practice accepted as proper by a responsible body of medical opinion. The Court referred to this as the “professional practice test”.

We have explored the judgment in more detail below.

Facts of the case

Neil McCulloch died on 7 April 2012 after suffering from a cardiac arrest. Prior to his death, he had been treated at Forth Valley Royal Hospital (“FVRH”). He was first admitted on 23 March 2012, after becoming acutely unwell with severe chest pains, nausea and vomiting. Tests showed abnormalities compatible with pericarditis.

Mr McCulloch was first seen by Dr Labinjoh, an experienced Consultant Cardiologist at FVRH, on 26 March. She reviewed an echocardiogram and considered that his presentation did not fit with a diagnosis of pericarditis. She reviewed a further echocardiogram and saw Mr McCulloch face to face on 3 April 2012, during which he denied any chest pain, palpitations, breathlessness, dizziness or blackouts. Dr Labinjoh concluded that there were no convincing features of tamponade or pericardial constriction. She did not prescribe any non-steroidal anti-inflammatory drugs (“NSAID”), such as ibuprofen. NSAIDs can be prescribed for pericarditis, but as Mr McCulloch was not in pain and as there was no clear diagnosis of pericarditis, Dr Labinjoh did not prescribe them. Very sadly, Mr McCulloch died on 7 April 2012.

The claim

Mr McCulloch’s widow brought the claim against the Forth Valley Health Board (“FVHB”), alleging that his death was caused by negligence. It was alleged that (a) Dr Labinjoh should have advised Mr McCulloch of the option of treatment with NSAIDs on 3 April 2012 and (b) if Mr McCulloch had been advised to take NSAIDs, he would have done so and would not have died.

At the first hearing, it was agreed by all the experts that it is standard practice to prescribe NSAIDs for pericarditis. However, one expert said that, if a patient is not in pain, then it is unclear what the benefit of prescribing an NSAID would be. There were also good reasons not to prescribe NSAIDs to Mr McCulloch (he had a history of gastro-intestinal symptoms).

The Lord Ordinary decided that, when considering a doctor’s obligation to discuss alternative treatment options, the applicable legal test is whether the practice of the doctor is supported by a responsible body of professional opinion (i.e. the *Bolam* test). He therefore concluded

that, on the facts of the case, NSAIDs were not a reasonable alternative treatment that were required to be discussed with Mr McCulloch. Accordingly, the claim was dismissed. The Inner House upheld the decision of the Lord Ordinary.

The Supreme Court's decision

The Supreme Court agreed with the lower courts, rejected the appeal and determined that the correct legal test to be applied as to whether an alternative treatment is required to be discussed with the patient, is the Bolam test.

Dr Labinjoh took the view that prescribing NSAIDs was not a reasonable alternative treatment because Mr McCulloch had no relevant pain and there was no clear diagnosis of pericarditis. As that view was supported by a responsible body of medical opinion (as established by the expert evidence at the first hearing), there was no breach of the duty.

In coming to this decision, the Supreme Court revisited the decisions in *Montgomery* and *Duce*. A distinction was drawn between:

- Identifying reasonable alternative treatment options, which is a matter of professional skill and judgment to which the professional practice/Bolam test should be applied, and
- Informing patients of those reasonable treatment options and of the material risks of such alternative treatments. This issue is not the subject of the Bolam test but rather the test for "materiality" as set out in *Montgomery*, i.e. 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 of the doctor is or should reasonably be aware that the particular patient would likely attach significance to it.

The Supreme Court heard submissions from the BMA and the GMC. It was argued by the BMA that considering options for treatment is a matter of professional skill and judgment rather than patient autonomy. The GMC, while making clear the need for a collaborative discussion with the patient, observed that "once a diagnosis has been made, the doctor will require to consider what treatment options are clinically appropriate. That again turns on clinical judgment, based on knowledge and experience ... a consideration of reasonableness in this context cannot be shorn of professional judgment."

We anticipate that the intervening medical organisations will welcome the Supreme Court ruling, since a finding in the alternative, i.e. doctors being required to provide patients with details of all possible available treatment options, would have placed a huge operational strain on an already stretched workforce.

Summary

1. Once a diagnosis (or provisional diagnosis) has been given, there may be a range of possible treatment options. A doctor needs to decide which of those are reasonable. **The narrowing down from possible alternative treatments to reasonable alternative treatments is an exercise of clinical judgment, to which the Bolam/professional practice test applies**, i.e. a doctor who has taken a view that a treatment is not a reasonable alternative treatment for a particular patient will not be negligent in failing to inform the patient of that alternative treatment if the doctor's view is supported by a responsible body of medical opinion.
2. In narrowing down the treatment options, a doctor cannot only inform a patient of the treatment option or options he or she prefers.
3. Once a range of reasonable treatments have been identified, the doctor must inform the patient not only of the treatment option that the doctor is recommending but also of the other reasonable alternative treatment options (plus no treatment if that is a reasonable alternative option), and the risks involved. The *Montgomery* duty of care to inform applies here.

If you have any questions about this case, please do get in touch.

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