

DEBRIEF: A Kings Chambers Podcast Factsheet

EPISODE 2 – CONSENT AFTER MONTGOMERY

The Supreme Court’s decision in [Montgomery v Lanarkshire Health Board \[2015\] 1 AC 1430; \[2015\] UKSC 15](#) emphasised the importance of patient autonomy and confirmed what cases such as Pearce, and Chester v Afshar, had indicated, that the Bolam test did not apply to the obtaining of consent to treatment. Specifically the court held:

“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 duty is therefore to take “reasonable care”, but to make the patient aware of “material risks”, and the question of what is material depends on not only what a reasonable person in the patient’s position would consider relevant, but also what the doctor ought to be aware the particular patient would be likely to think significant.

The Supreme Court noted that “materiality” could not be reduced to percentages, that dialogue was crucial, and that although there was a therapeutic exception (doctors do not need to give advice that would itself be harmful) will apply only in very limited circumstances.

Subsequent cases, listed below, have considered the question of reasonable care (Worrall), what risks a doctor ought to know about (Duce), what constitutes a reasonable alternative (Bayley), materiality (A, Tasmin and Hassell), dialogue and the consent process (Thefaut) and causation (Webster, and Duce).

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Cases referenced in the Podcast

- [Duce v Worcester Acute Hospitals NHS Trust \[2018\] EWCA Civ 1307](#)
- [Thefaut v Johnston \[2017\] EWHC 497 \(QB\)](#)
- [Mrs A v East Kent Hospital University NGS Foundation trust \[2015\] EWHC 1038](#)
- [Hassell v Hillingdon Hospital NHS Foundation Trust \[2018\] EWHC 164 \(QB\)](#)
- [Chester v Afshar \[2004\] UKHL 41](#)
- [Webster v Burton Hospitals NHS Foundation Trust \[2017\] EWCA Civ 62](#)
- **Bayley v George Eliot Hospital [2017] EWHC 3398 (HHJ Worster sitting as Deputy High Court Judge).** **Note:** this case is available on Lawtel (a subscription service)
- **Tasmin v Barts Health NHS Trust [2015] EWHC 3135 (QB).** **Note:** this case is available on Lawtel (a subscription service)

Speaker Profiles



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Nigel is ranked as a leading QC by Chambers UK and the Legal 500. He is Head of Kings Chambers and sits as a Deputy High Court Judge and a chair of the Bar Tribunal and Adjudication Service. He has appeared in the Supreme Court and Court of Appeal. He has given many lectures and seminars around the country on subjects including human rights, loss of earning capacity and proving reduction in life expectancy.



Helen Mulholland

Helen is an accomplished and highly regarded practitioner, who undertakes complex and high value work. Helen practices predominantly in clinical negligence, with a particular interest in issues of mental capacity and mental health. She prosecutes and defends clinical negligence claims, and represents interested parties at the coroner's court.



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Richard acts for claimants and defendants in the full range of clinical negligence and personal injury cases, including fatal and life-shortening conditions. He also acts for families and other interested parties in inquests and is a member of the Personal Injury Bar Association and the Professional Negligence Bar Association.

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