Consent:

What does it look like now?

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12 King's Bench Walk
September 2023

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Montgomery v Lanarkshire Health Board [2015] UKSC 11 para 87

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- 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.

Three important additions:

1. Assessment of materiality of risk cannot be reduced to percentages – will reflect a variety of factors besides its magnitude (nature of risk, effect it will have, importance of treatment to the patient, alternatives and their risks)

2. The information provided must be comprehensible

3. The entitlement of a doctor to withhold information as to a risk if its disclosure would be seriously detrimental to the patient's health must not be abused

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GMC Guidance

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- You MUST give patients the information they want or need about:

    a. the diagnosis and prognosis;

    b. any uncertainties about the diagnosis or prognosis, including options for further investigations;

    c. options for treating or managing the condition, including the option not to treat;

    d. the purpose of any proposed investigation or treatment or what it will involve;

    e. the potential benefits, risks and burdens, and the likelihood of success, for each option; this should include information, if available, about whether the benefits or risks are affected by which organisation o r doctor is chosen to provide care;

    f. whether a proposed investigation or treatment is part of a research programme or is an innovative treatment designed specifically for their benefit;

    g. the people who will be mainly responsible for and involved in their care, what their roles are, and to what extent students may be involved;

    h. their right to refuse to take part in teaching or research;

    i. their right to see a second opinion;

    j. any bills they will have to pay;

    k. any conflicts of interest that you or your organisation may have.

Incorrect/inaccurate information

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- **Connolly v Croydon Health Services NHS Trust [2015] EWHC 1339 (QB)**
  - C was consented for and underwent an angiogram as a diagnostic procedure for suspected angina → arterial dissection
  - C argued she had not given valid consent as she was provided misleading information before the angiogram
  - Whilst the information C was given prior to the angiogram was misleading, her consent was not vitiated by it
  - "32. Implicit within the scope of the duty to provide sufficient information to permit a patient to make a proper informed choice is the obligation to provide accurate information. The giving of inaccurate or misleading information to a patient may vitiate their consent and amount to negligence that gives rise to a cause of action if causation of damage is established. However, English law has avoided adopting the American doctrine of informed consent. (See Lord Diplock in Sidaway [Supra] at 894.)

Incorrect/inaccurate information

- **Thefaut v Johnston [2017] EWHC 497 (QB)**
  - C alleged she was led to consent by comforting and over-optimistic advice which caused her to be reassured
  - She argued that she would not have undergone back surgery at all had she been properly advised – she would have known that the chances of full recovery from her back pain were nowhere near as optimistic as she had been led to believe
  - The judge found that there had been a material overstatement of the chances of success and outcome regarding the effect of surgery on C's back pain, as well as a substantial overestimation of the chances of success given in relation to leg pain
  - D had also failed to advise C on the inherent risks of surgery
  - C succeeded on causation –a reasonable patient would have declined surgery or at least deferred it pending a second opinion

Incorrect/inaccurate information

Pepper v Royal Free London NHS Foundation Trust [2020] EWHC 310

- C underwent Whipple's procedure following D's dx of pancreatic cancer.
- Dispute as to nature of consent given:
  - C alleged she only consented to procedure if intraoperative biopsy revealed malignancy.
  - D argued she consented to the procedure if the biopsy revealed malignancy OR if the surgeon believed that the pancreas looked very suspicious, biopsies not being conclusive

Claim dismissed mostly on the basis of D's contemporaneous documentation

Missing Information

- **Hassell v Hillingdon Hospitals NHS Foundation Trust [2018] EWHC 164 (QB)**
  - C successfully argued that the surgeon had not properly advised her of the risk of being paralysed from spinal surgery, or been advised of more conservative treatment options, and, had this been done, she would have opted for conservative treatment
  - In particular, the surgeon incorrectly thought C had already had some conservative treatment, which the judge found C would have corrected had a proper dialogue taken place
  - Also, at paragraph 68, the judge found that the surgeon was not a good communicator of risks of operations, based upon his oral evidence

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Missing Information

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Ollosson v Lee [2019] EWHC 784 (QB)

- No need to give percentage risks when use of everyday language adequately conveys the magnitude of the risk
- Vasectomy with attendant "small" risk of chronic testicular pain
- C could have asked for further clarification

Mordel v Royal Berkshire NHS Foundation Trust [2019] EWHC 2591

- Sonographer undertaking screening for Down's
- Found that she was under a duty to satisfy herself that C was consenting on the basis of proper information and checking whether there had been a discussion between patient and MW, whether she had the booklet and whether she understood the purpose of the screening

Missing Information

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Plant v El Amir [2020] EWHC 2902

- C had AMD, worse in left eye
- First op on right eye only → glaucoma
- Found that D had failed to:
  - Tell C of the published data which did not support reasonable outcomes for patients with AMD
  - Give her adequate information from which she could have established that the procedure had significant risks
  - Explain the risks of surgery on the better eye
  - Tell her that surgery could not improve her left eye
  - Tell her she would not be able to read again

Late information

Gallardo v Imperial College Healthcare NHS Trust [2017] EWHC 3147 (QB)

- Patient's right to be informed about the outcome of any treatment, the prognosis and the options for follow up care and treatment.
- Information should only be withheld in exceptional circumstances, for clear and persuasive therapeutic reasons.
- Patient only learned of his true condition nine years after the removal of a tumour.
- Causation: hadn't been advised about the need for monitoring and risk of recurrence.

Departures from established practice

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- **Price v Cwm Taf University Health Board [2019] EWHC 938 (QB)**
  - C disputed the need for a second right knee arthroscopy that he had undergone, and argued that an arthroscopy was not indicated for a patient such as him and was contrary to the NICE guidelines
  - C argued that the consent form did not mention any benefits, nor did it mention that that operation was not indicated by the NICE guidelines, and thus he was not given the information necessary to provide informed consent
  - On appeal, the judge held that the operation was not pointless, and upheld the trial judge's finding that informed consent was given, and the failure to mention of benefits was an error
  - Paragraph 31: "In a clinical negligence case, the court's judgment about the content of the dialogue leading to a patient's consent will be fact sensitive. Whatever the position might be in other cases, I cannot see how the absence of a reference to these NICE Guidelines in these circumstances amounted to an infringement of Mr Price's personal autonomy or vitiated Mr Price's ability to make decisions for himself."

Departures from established practice/experimental treatment

- **Snow v Royal United Hospitals Bath NHS Foundation Trust [2023] EWHC 42 (KB)**
  - 135 pages long!
  - Laparoscopic low anterior resection of rectal cancer with a transanal total mesorectal excision → permanent impotence, urinary and faecal incontinence
  - D made limited admissions – failed to consent him re urinary and sexual dysfunction
  - HHJ Roberts found multiple breaches of consent duties:
    - The operation was experimental, the success and safety unknown
    - Total departure from NICE and no good reason given
    - Consented on day of operation
    - Surgeon did not tell C of his extremely limited experience
    - Surgeon did not offer the other options

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Information dependent on the current state of knowledge

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- **Bayley v George Eliot Hospital NHS Trust [2017] EWHC 3398 (QB)**
  - C alleged, *inter alia*, that there had been a failure to advise her of alternative treatment options, namely an ilio-femoral venous stent to treat her DVT
  - It was held that there was only a duty to inform patients of "reasonable alternative" options
  - What is a reasonable alternative depends upon the facts and circumstances of the case
  - Paragraph 63: "What is a reasonable alternative treatment in this case includes a consideration of (amongst other things) the patient and her condition at the relevant time, her treatment, <u>the state of medical knowledge about ilio-femoral venous stenting at the relevant time</u>, and the published papers."

Information dependent on the current state of knowledge

- **Duce v Worcestershire Acute Hospital NHS Trust [2018] EWCA Civ 1307**
  - understanding amongst gynaecologists in 2008 of the risk of chronic pain following TAH BSO

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Reasonable alternative treatment options

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- **Tasmin v Barts Health NHS Trust [2015] EWHC 3135 (QB)**
  - Failure to offer a foetal blood sample during a difficult delivery was a breach of duty, despite it having been discussed and what it entailed

- **CNZ v Royal Bath Hospitals NHS Foundation Trust [2023] EWHC 19**
  - The retrospective effect of Montgomery – troubling?
  - Birth injury in 1999, standards of the day
  - Mother was healthy, had had NVDs and twins were cephalic
  - Practice in 1999 was not to offer ECS to mothers of this type – only to discuss it if she requested it and only to allow it if she insisted on it
  - Experts agreed not compatible with Montgomery but neither of them would have offered it

Reasonable alternative treatment options

- CNZ continued
  - Para 264: concerned about applying today's standards to an historical case but was bound by Montgomery
  - Found it was a reasonable treatment option on the basis that the obstetric team would have agreed to it if mother insisted i.e. must be reasonable
  - But found on the facts it had been discussed and she was reasonably and appropriately counselled against it
  - Subsequently found that during labour she should have been offered CS and should have acceded to parents' request for CS

Reasonable alternative treatment options

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- **Powell v University Hospitals Sussex NHS Foundation Trust [2023] EWHC 736**
  - Revision TKF → infection → amputation
  - C claimed that she should have been told about the alternative option of removal of the implant alone
  - Judge agreed and found D had presented her with a fait accompli
  - Failed on factual causation: D would reasonably have advised her to go for his option and she would have followed that advice on the evidence

Reasonable alternative treatment options

- **Bilal v St George's University Hospital NHS Foundation Trust [2023] EWCA Civ 60** and **McCulloch v Forth Valley Health Board [2023] UKSC 26**

- What is the test to be applied to the Montgomery requirement that reasonable alternative treatment options should be discussed?
  - Montgomery itself says that Bolam isn't the test for the doctor's advisory role hence material risk requirement
  - SC held that the test of whether an alternative treatment was reasonable and needed to be discussed was the Bolam test, CA in Bilal made the same finding
  - The court cannot disregard medical expertise and clinical judgment as to what the reasonable treatment options are and simply impute its own judgment
  - Bilal put it: material risks are judged from patient's perspective whereas it is for the dr to assess what the reasonable alternatives were - which is judged by ref to Bolam – and then it is for the court to judge the materiality of the risk inherent in any proposed treatment, considering whether a reasonable person in patient's position would attach significance to the risk

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Causation

- **Chester v Afshar [2004] UKHL 41**
  - C was referred for surgery due to back pain, but she suffered a rare complication – cauda equina
  - The trial judge found that the surgeon failed to warn C of the small risk of this, and, had she been warned of the risks, she would not have undergone the surgery at the time she did
  - Lord Hope at paragraph 86: “I start with the proposition that the law which imposed the duty to warn on the doctor has at its heart the right of the patient to make an informed choice as to whether, and if so when and by whom, to be operated on. Patients may have, and are entitled to have, different views about these matters.”
  - Lord Hope at paragraph 87: “The injury was intimately involved with the duty to warn. The duty was owed by the doctor who performed the surgery that Miss Chester consented to. It was the product of the very risk that she should have been warned about when she gave her consent. So I would hold that it can be regarded as having been caused, in the legal sense, by the breach of that duty.”

Chester v Afshar – attempts to extend the principle

- **Correreia v University Hospital of North Staffordshire NHS Trust [2017] EWCA Civ 356**
  - *Inter alia*, C argued that to fall within the *Chester v Afshar* principle, it would be sufficient for her to show that the injury was within the scope of the surgeon's duty to warn at the time of obtaining consent
  - The Court of Appeal rejected this and found that it was necessary for a claimant to evidence and plead what they would have done if warned of the risk
- **Duce v Worcestershire Acute Hospitals NHS Trust [2018] EWCA Civ 1307**
  - *Inter alia*, C appealed against the judge's finding that, even if she had been properly warned of the risks, she would have gone ahead with surgery
  - The Court of Appeal rejected C's proposed expansion of the interpretation of *Chester v Afshar*, which would have excluded the requirement for C to prove what she otherwise would have done and when
  - C's suggestion that there was a free-standing right to damages for injury sustained following a failure to warn was dismissed

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Different day, different surgeon

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- **Crossman v St George's Healthcare NHS Trust [2016] EWHC 2878 (QB)**
  - Failure to follow the conservative management plan
  - Risk of nerve injury very small
  - Had he had the operation on a later date, he would not have sustained the same injury on the BOPs i.e. succeeded on "but for" causation
  - Would not have succeeded on Chester v Afshar principle, reminder that that is exceptional and limited. This was not removal of the right of autonomy.
- **Jones v Royal Devon and Exeter NHS Foundation Trust [2015] 9 WLUK 420**
  - Patient consented to operation on the basis that a particular surgeon with particular expertise would be doing it
  - Breach in not being told he would not be carrying it out and she would not have undergone it if she'd known
  - The risk was very small and on the BOPs it would not have occurred had her chosen surgeon done it
  - Experience counts

Damages

- No freestanding cause of action for failure to consent alone
  - **Shaw v Kovac [2015] EWHC 3335 (QB)**
    - C argued that damages should be awarded for the deprivation of opportunity to give informed consent
    - Failed at first instance and on appeal
    - Would undermine principles of compensatory damages
    - If knowledge of the invasion of personal autonomy worsened suffering, can be reflected in PSLA award

Damages

- No freestanding cause of action for failure to consent alone
  - **Diamond v Royal Devon and Exeter NHS Foundation Trust** [2019] EWCA Civ 585
    - C underwent mesh repair of a hernia
    - C was not advised of the option of a suture repair (which had a high risk of failure) and the trial judge found that C was not asked if she planned to become pregnant in the future
    - The Court of Appeal upheld the trial judge's finding that C would have proceeded with a mesh repair even if she had been properly consented and that C "has convinced herself that she would have opted for the suture repair had she been provided with all the relevant information" (paragraph 21)
    - Importantly, C argued at trial that "a negligent non-disclosure of information by a doctor of itself creates a right for the patient to claim damages" (paragraph 11), which was rejected by the trial judge and Court of Appeal (paragraphs 33-41)

Thank you!

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