MONTGOMERY v. LANARKSHIRE[1] HEALTH BOARD - COMPLETE PATIENT AUTONOMY IN THE PATIENT'S INTEREST?

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Consent to medical treatment has always been at the centre of medical malpractice and medical negligence suits. It is a cardinal principle of law that a medical professional may only provide treatment to a patient with their consent. It was in 1955 in Hunter v. Hanley[2] that Courts started regulating a doctor's practice by stating what would amount to a deviation from normal practice. No sooner, in 1957 came the *Bolam Test* in the case Bolam v. Friern Hospital Management Committee[3] which categorically laid down the fundamental legal standard by which medical practices would be judged by courts in claims of negligence.

Ever since, there has been over a dozen cases governing medical professionals and the doctor-patient relationship. To name a significant few - Sidaway v. Board of Governors of the Bethlem Royal Hospital[4] (1985), Rogers v. Whittaker[5] (1992), Bolitho v. City and Hackney Health Authority[6] (1997), Pearce v. United Bristol Healthcare NHS Trust[7] (1999), Wyatt v. Curtis[8] (2003) and Chester v. Afshar[9] (2004). And then came in Montgomery[10] in 2015 which, laid down the final say of the court with respect to Consent. This article is a short attempt to understand Montgomery's impact in the present society.

[1] [2015] UKSC 11, [2015] All ER (D) 113 (Mar)
[2] [1955] SLT 213, [1955] ScotCS CSIH_2, 1955 SC 200
[3] [1957] 1 WLR 582
[4] [1985] AC 871 [1985] 1 All ER 643
[5] [1992] HCA 58, (1992) 175 CLR 479.
[6] [1998] AC 232, [1997] 4 All ER 771
[7] [1999] PIQR P 53
[8] [2003] EWCA Civ 1779, [2003] All ER (D) 493 (Oct)
[9] [2004] UKHL 41, [2004] 4 All ER 587
[10] [2015] UKSC 11, [2015] All ER (D) 113 (Mar)

The Montgomery Legacy

In Montgomery, the Hon'ble Supreme Court discusses in great detail the law laid down in Sidway and critically analyzed Lord Scarmans' opinions. Lord Scarmans' opinion found its way in many cases post Sidway - Bolitho v City and Hackney Health Authority [1998]; Pearce v United Bristol Healthcare NHS Trust [1999] and Rogers v Whitaker [1992 Australia High Court]. The findings of the majority in Montgomery is in a great part re-enunciaion of Lord Scarmans' opinion in Sidway. Montgomery laid down the following principles:

- The discharge of a doctor's duty in providing information to and taking consent from patient's is not to be judged anymore by reference to the Bolam test;
- A doctor is 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 [Para 87];
- A risk is material if, in the circumstances of a 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 [Para 87];
- The assessment of whether or not a risk is material cannot be reduced to percentages: the significance of a risk will be affected by many patient-specific factors [Para 89];
- The doctor's advisory role involves dialogue; and
- A doctor can withhold from the patient information about a risk if he *reasonably considers* that its disclosure would be seriously detrimental to the patient's health. Further, this "therapeutic exception" must not be abused [Para 88].

Montgomery is based on the premise that today's patient is well informed as a result of technology (in the 21st century, it has become far easier and far more common for members of the public to obtain information about symptoms, investigations, treatment opinions, risk and side-effects). For a patient to make an informed decision, an informed consent should be taken which includes deliberating upon all risks and alternatives involved. Montgomery points towards a view that a patient is no more entirely dependent on information provided by the doctor. It points towards an approach which, instead of treating patients as placing themselves in the hands of their doctors, treats them so far as possible as adults who are capable of

understanding that medical treatment is uncertain of success and may involve risks, accepting responsibility for the taking of risk affecting their own lives, and living with the consequences of their choices.

Montgomery does seem to be a firm proponent of 'complete patient autonomy', but along with that, there remains certain questions unanswered. How, for instance, does one decide whether or not a doctor has taken "reasonable care" to ensure that the patient is aware of any material risks? Or whether a doctor should have been "reasonably aware" that a particular patient would be likely to attach significance to a particular risk? Or whether it was reasonable to consider that particular information fell within the therapeutic exception? Clearly, only Bolam in its original sense can answer these questions.

Montgomery also leaves us with the following questions, the answers to which are clearly not progressive:

Do we want to live in a world where doctors hesitate taking a decision for the patient? Where the patient himself decides the treatment/operation he should undergo? Where there is no longer a trusting relationship between a doctor and a patient? Are we moving towards an era where medical professionals are just an encyclopedia or a glorified 'google' and patients come to choose what to read? Are doctors not to be trusted any more for their experience? Is moving towards a patient centric society in the name of 'complete patient autonomy' the right way to go?

Assuming the patient would be willing to live with the consequences of their choice which would less likely encourage litigation (for a rational few) and yes, the patient would get his complete autonomy. But would such a patient be satisfied with the poor results at the end of his self-chosen treatment, in spite of it being perfectly performed by the concerned doctor? The future of doctor-patient relationship is doomed to worsen, and not to forget the inevitable resultant rise in litigation.

There is no doubt, the world is inevitably moving towards a patient centric society. In a quench to provide the best treatment, the medical fraternity is taking into account an individual patient's interest. It has become a norm in the healthcare sector to tailor the experience of a

patient to his/her needs. Every doctor is concerned about 'patient satisfaction' be it in terms of 'consumer satisfaction', and the fact remains, today a doctor does not take any decision independently of the patient's interests resulting in collective decision making.

Keeping the above in mind, was Bolam is its original form not sufficient?
The Bolam's test is based on the principle that a doctor who had acted in accordance with a *practice accepted at the time as proper* by a *responsible body of medical opinion* skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique.

As it is evident, patient satisfaction in the present time has very well become an accepted norm in the medical fraternity. It is now widely accepted that clinicians should negotiate rather than dictate what is in the best interests of patients. A reasonable body of medical opinion at the present time would gracefully accept a notion of a patient driven healthcare industry.

A patient does has the right to be informed of the treatment he is to undergo, to have an opportunity to understand the risks involved and alternatives if any. But to leave it all to a patient's judgement isn't the wise thing to do.

With the principle laid down in Bolam and current trends in medical practice, there doesn't seem a need for Montgomery to expressly lay down what is already impliedly prevalent. Rather than just doing that, Montgomery has opened the gates for distorting the doctor - patient relationship. Doctor-patient bond holds great significance and it is unlike any other professional bond. Its foundation lies on trust and mutual respect. Any attempt to regulate this relationship, even if remotely, should be critically analyzed and any unintended consequences that may arise in the near future must be taken into account.

Montgomery is a move away from the paternalism of the Hippocratic Corpus. However, do we really need to make a choice between a doctors' autonomous decision which includes elements of paternalism determined by their experience and expertise; and a patient's complete autonomy. While both the patient's and surgeon's autonomy are a dynamic interface influencing decision making, the main goal for the patient facing a palliative procedure should be that of making treatment decisions based on the concept of shared decision making, always

giving primary consideration to the patient's goals and values. Lastly, regardless of how the decision is made, it is the end responsibility of doctors to their patients to be a source of support throughout their treatment. Framing laws against the interest of the medical fraternity, would be a detrimental move jeopardizing the patient's interest.

Never to forget, each one of us would be a patient, if not today then tomorrow.