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## SUPREME COURT RULING ON CONSENT: McCulloch v Forth Valley Health Board [2023]

The Supreme Court's unanimous ruling that a doctor is not obliged to tell a patient about treatment options that they do not consider reasonable, has provided important clarification on the law on informed consent.

### Facts

Mr McCulloch was admitted to hospital with central pleuritic chest pain. He was diagnosed with acute viral myo/pericarditis, but his presentation was complex and atypical. During a subsequent discussion with experienced consultant cardiologist, Dr Labinjoh, Mr McCulloch denied any chest pain, palpitations, or breathlessness and appeared generally well. Because he was not in pain and because the diagnosis was not clear, Dr Labinjoh did not discuss the possibility of giving him a non-steroidal anti-inflammatory drug ("NSAID") as she did not think this was reasonable.

Mr McCulloch's condition improved, and he was discharged a few days later. Sadly, he died the following day having suffered a cardiac arrest. A claim was brought by Mr McCulloch's family who alleged, amongst other things, that it was negligent to fail to offer him NSAIDs and that his death was caused by this negligence.

### Question for the Supreme Court

In the leading case on consent, *Montgomery*, the Court ruled that doctors have a duty to ensure that a patient is aware of any **material risks** involved in any recommended treatment, and of any **reasonable alternative** treatments. The question for the Supreme Court in this case was whether it was mandatory for Dr Labinjoh to discuss the option of NSAIDs, even though she did not think that such treatment was reasonable.

### Supreme Court's Decision

The Supreme Court determined that the correct test for assessing the reasonableness of an alternative treatment is the "professional practice test", or the "Bolam" test. This states that a doctor is not negligent when they have "*acted in accordance with a practice accepted as proper by a responsible body*" of medical opinion. The expert evidence in this case indicated that, while some doctors would have prescribed NSAIDs to Mr McCulloch, there was also a responsible body of medical opinion that supported Dr Labinjoh's approach.

The Supreme Court held that a doctor will not be negligent in failing to inform the patient of a treatment option if the doctor's opinion that the treatment option is not appropriate is supported by a reasonable body of medical opinion. It would not be in a patient's best interests to provide information about possible alternative treatments and their risks, which the doctor did not themselves consider suitable. Dr Labinjoh was, therefore, not negligent in failing to inform Mr McCulloch about possible treatment by NSAIDs.

The Supreme Court did, however, reinforce that a doctor not only has a duty to inform the patient of the risks of the treatment option that they are recommending but also of the other alternative treatment options they consider reasonable, together with the advantages and disadvantages and the material risks involved in each option.

### Hypothetical Example

A doctor identifies that there are ten possible treatment options for a patient but in their judgement only four of these options are reasonable. Their decision to rule out the six other options is supported by a responsible body of medical opinion.

The doctor is not negligent in failing to offer the six alternative options as their decision not to do so is supported by a reasonable body of medical opinion. The doctor still, however, not only has a duty to inform the patient of the risks and benefits of the treatment option they are recommending, but also of the other three options that they consider reasonable, indicating the respective advantages and disadvantages and the material risks of each option, to allow the patient to make an informed decision.

### Analysis

The Supreme Court's decision not to extend the scope of Montgomery has provided welcome clarification on the law on consent. Provided the decision that the treatment is not reasonable satisfies the professional practice test, a doctor has no duty to inform the patient of all alternative treatment options.