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An informal academic forum for discussion

Claudia Carr on Montgomery: the new test for informed consent in medical law and the hidden paternalism

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What are the implications of *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 for medical practice?

[http://researchprofiles.herts.ac.uk/portal/en/persons/claudia-carr\(6843d4c7-c848-4827-9813-18eb474b3a64\).html](http://researchprofiles.herts.ac.uk/portal/en/persons/claudia-carr(6843d4c7-c848-4827-9813-18eb474b3a64).html)) from Hertfordshire Law School discussed her research in the latest seminar at HLS. The ambitious project will result in a PhD thesis and aims at understanding and possibly tracing guidelines for the professional practice of healthcare providers in the UK following the influential case in 2015. *Montgomery* sets the requirements for informed consent in medical practice, according to which, the practitioner (doctor, pharmacist, or anyone who delivers a treatment) must inform the patient of all risks involved with the treatment, and of whether alternative treatment is available, in order to be 'Montgomery compliant'.

The requirements aim at ensuring that a dialogue is established between patient and doctor, so that the patient is not treated paternalistically, and their autonomy is respected. The case determined a fundamental shift in the perception that practitioners should have of their role: that of engaging the patient in choosing the right treatment for them, and involving them in the decision process, aided by their expert and professional advice. Case law has since developed to include a series of exceptions (or privileges, in the preferred legal terminology) to the application of the *Montgomery* requirements. Ms Carr's project focuses on the therapeutic privilege, according to which the practitioner can lift the *Montgomery* requirements of informed consent if delivering some information regarding the risks of the therapy or alternative options will cause serious psychological or physical harm to the patient. The intuition that Ms Carr's project aims to investigate is whether a paternalistic approach, in practice, will lurk back in through the gaps left by a vague interpretation of serious harm.

The challenge that the application of *Montgomery* poses, and the risk for further space for paternalism in practice are exacerbated when the practitioner is addressing patients that lack the capacity to make autonomous choices. What kind of information will be withheld from intellectually disabled patients? How does the practitioners' behaviour change when they address mild or

moderate intellectual disability? How will the practitioner ensure respect for the patient's autonomous choice when the patient's capacity is compromised? These are some of the issues that the qualitative and quantitative empirical research aims at clarifying and addressing.

The project offers many conceptual and ethical challenges that will likely have to be clarified before the empirical research is conducted. Some of these challenges relate to the concept of autonomous choice. From the discussion it emerged that although capacity may be a necessary element of autonomy, a person could be capable of understanding her predicament, but still be unable to autonomously decide for herself – perhaps because her confidence has been shattered by the illness? If that's the case, perhaps the practitioner will have to act on the basis that their aim is to ensure the highest level of autonomy for their patient, given the patient's capacity. Or should the practitioner also be concerned with assessing whether the patient not only is capable of understanding rational thought, but also emotionally able to regard herself as the ultimate authority regarding her fate, before lifting the Montgomery requirements from their practice?

Another point of discussion landed on whether Montgomery and the therapeutic privilege should affect also those practitioners that merely deliver the diagnosis and not also the therapy. If the worry is that some information may affect negatively the health of the patient, would the diagnosis also not be an information that could potentially cause serious harm? At the moment Montgomery only applies to imparting some type of therapy. Should jurisprudence consider a wider application of the case to diagnosis, or perhaps a wider concept of therapy?

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