

NEW CONSULTANTS' CONFERENCE



20 September 2019

Operating within the Law

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Cardiac Surgeon (recently retired)

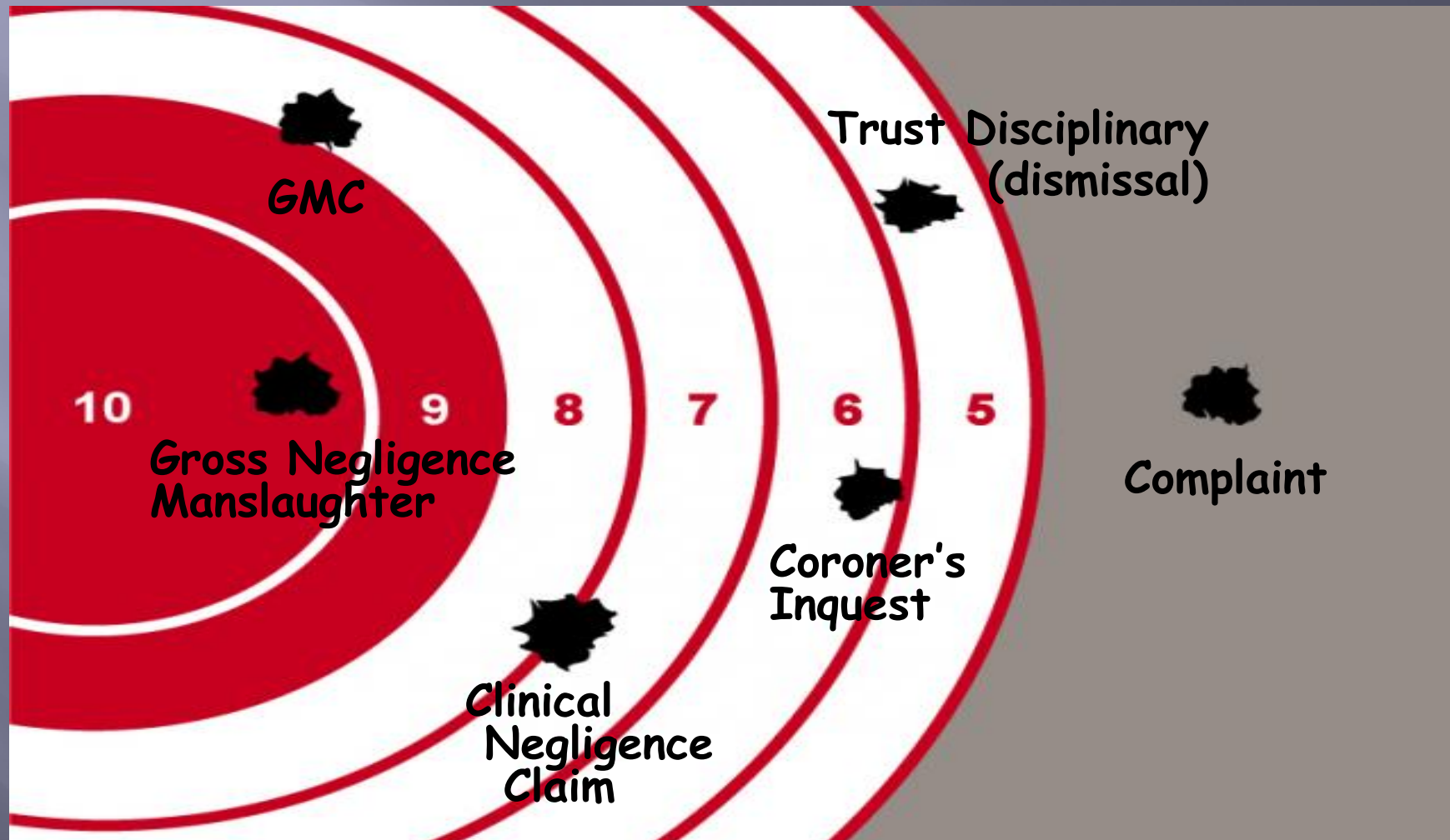
Assistant Coroner, Durham

Royal College of Surgeons of England

Regional Director (NE) + Council member (2015 – 19)

Independent Review GNM: Chair

Multiple Jeopardy (MPS)





Good medical practice

2013

General
Medical
Council
Regulating doctors
Ensuring good medical practice



Good Surgical Practice

The Royal College of Surgeons of England



2014

 **RCS**
ADVANCING MEDICAL STANDARDS

"Operating Within the Law"

- ▣ Medical Act 1983: GMC / MPTS
- ▣ Coroners and Justice Act 2009 (implemented July 2013)
- ▣ Clinical Negligence: Civil Court - case law
 - Bolam, Sidaway, Bolitho, Chester v Afshar, Montgomery (consent)
- ▣ Criminal Negligence (GNM: gross negligence manslaughter)
- ▣ Mental Capacity Act 2005 (? in Trust induction)
- ▣ Duty of Candour (Trust legal responsibility): moderate harm (RCSE guidance)
- ▣ Human Rights Act 1998 (ECHR - Art 2: right to life; 8: privacy; 9: religion)
- ▣ Human Tissue Act 2004: retention of tissue, transplantation
- ▣ Data Protection Act 1998 (GDPR): computers, memory sticks ⇒ encryption
- ▣ Confidentiality: see GMC guidance 2017



April 2017

Confidentiality:

good practice in handling
patient information

Working with doctors Working for patients

General
Medical
Council

GMC reviewed for advice on Confidentiality

- ▣ •The Abortion Regulations 1991 5
- ▣ •The Access to Health Records Act 1990 5
- ▣ •The Access to Medical Records Act 1988
- ▣ •Blood Safety and Quality Legislation 8
- ▣ •The Census (Confidentiality) Act 1991 10
- ▣ •The Children Act 2004 10
- ▣ •The Civil Contingencies Act 2004 11
- ▣ •The Civil Evidence Act 1995 12
- ▣ •Commission Directive 2003/63/EC (brought into UK law by inclusion in the Medicines for Human Use (Fees and Miscellaneous Amendments) Regulations 2003) 12
- ▣ •The Computer Misuse Act 1990 13
- ▣ •The Congenital Disabilities (Civil Liability) Act 1976 14
- ▣ •The Consumer Protection Act (CPA) 1987 15
- ▣ •The Control of Substances Hazardous to Health (COSHH) Regulations 2002 16
- ▣ •The Copyright, Designs and Patents Act 1990 16
- ▣ •The Crime and Disorder Act 1998 17
- ▣ •The Criminal Appeal Act 1995 18
- ▣ •The Data Protection Act (DPA) 1998 18
- ▣ •The Data Protection (Processing of Sensitive Personal Data) Order 2000 25
- ▣ •The Disclosure of Adoption Information (Post-Commencement Adoptions) Regs 2005 26
- ▣ •The Electronic Commerce (EC Directive) Regulations 2002 26
- ▣ •The Electronic Communications Act 2000 27
- ▣ •The Environmental Information Regulations (EIR) 2004
- ▣ •The Freedom of Information (FOI) Act 2000 29
- ▣ •The Gender Recognition Act 2004 32
- ▣ •The Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No. 2) Order 2005 33
- ▣ •The Health and Safety at Work etc Act 1974 33
- ▣ •The Human Fertilisation and Embryology Act 1990, as amended by the Human Fertilisation and Embryology (Disclosure of Information) Act 1992 34
- ▣ •The Human Rights Act 1998 35
- ▣ •The Limitation Act 1980 38
- ▣ •The Medicines for Human Use (Clinical Trials) Amendment Regulations 2006 39
- ▣ •The National Health Service Act 2006 39
- ▣ •The NHS Trusts and Primary Care Trusts (Sexually Transmitted Diseases) Directions 2000 40
- ▣ •The Police and Criminal Evidence (PACE) Act 1984 41
- ▣ •The Privacy and Electronic Communications (EC Directive) Regulations 2003 42
- ▣ •The Public Health (Control of Diseases) Act 1984 and the Public Health (Infectious Diseases) Regulations 1988 42
- ▣ •The Public Interest Disclosure Act 1998 43
- ▣ •The Public Records Act 1958 45
- ▣ •The Radioactive Substances Act 1993 45
- ▣ •The Regulation of Investigatory Powers Act 2000 46
- ▣ •The Re-use of Public Sector Information Regulations 2005 47
- ▣ •The Road Traffic Acts 49
- ▣ •The Sexual Offences (Amendment) Act 1976, sub-section 4(1), as amended by the Criminal Justice Act 1988 49

The Coroner

- ▣ Inquest is “inquisitorial”
- ▣ RCSE Bulletin: “The Coroner’s Court – all you need to know but forgot to ask” 2016; 98(5):198
 - facts → “who, when, where and how the deceased came by their death”
 - report asap (£1000 fine)
 - Coroner’s “target”: inquest completed by 6 months
 - full disclosure
 - consistency (David Sellu ? perjury),
 - the better your report, the less likely you are to be called
 - lay language – family will read

Civil Court: Clinical Negligence (how you get sued)

- ▣ Duty of Care (civil law of Tort)

- easy in medical practice

- ▣ Breach of Duty of Care

- standard: **"Bolam"**
- "Experts" needed to decide

- ▣ Harm

- Foreseeable

- ▣ Causation

- "but for" test
- "Experts" needed

NB: standard of proof = "balance of probabilities" (51% vs 49%)

Mr Bolam (1957)

- ▣ **Mr Justice McNair** (direction to the Jury - one of last)

"The test is the standard of the **ordinary** skilled man exercising and professing to have that special skill. A man need not possess the highest skill

A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a **responsible body** of medical men skilled in that particular art.

... a standard of practice recognised as proper by a **reasonable body of opinion**

... not negligent ... merely because there is a body of opinion that takes a contrary view. "





Montgomery ?

... and then came "Montgomery"



- ▣ Supreme Court 2015 (Scottish case)
 - *Montgomery v Lanarkshire Health Board* [2105] UKSC 11
- ▣ 1999: diabetic Mum – risk (10%) of shoulder dystocia: ? C section
- ▣ following Bolam test : lost her case
 - Note: Hunter and Hanley in Scotland

Supreme Court, London



Judges: 2015



Montgomery case: 7 Judges → unanimous

Montgomery

"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 likely to attach significance to it.

Lord Kerr and Lord Reed [2015] UKSC 11 (para 87)

Montgomery: impossible ?

- ▣ impossible to discuss the risks within the time typically available for a healthcare consultation
- ▣ but ... guidance similar to that from GMC in GMP (Consent guide in 2008)
- ▣ nevertheless necessary to impose **legal obligations**

"... so that even those doctors who have less skill or inclination for communication, or are more hurried, are obliged to pause and engage in the discussion **which the law requires.**"



Consent: Supported Decision-Making

A GUIDE TO GOOD PRACTICE



Supports Good Surgical Practice

Domain 3: Communication, partnership and teamwork



October 2016

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The end of doctor knows best as medics are told to let patients make their own decision about treatment



→ Opportunity to care and treat patients as individuals

Clinical Negligence: Standards

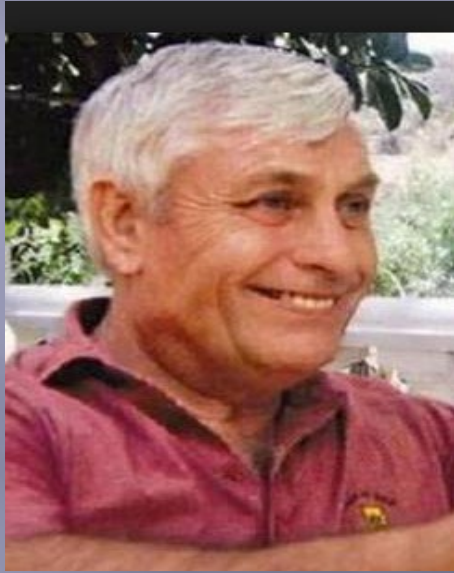
- ▣ **Bolam**

- all areas of clinical practice except

- ▣ **Montgomery**

- consent





Gross
Negligence
Manslaughter



Gross Negligence Manslaughter

- ▣ Jury decision
- ▣ doctor's conduct was "truly exceptionally bad" and death was foreseeable
- ▣ Dr Bawa-Garba: GMC successful appeal 25 January 2018 (erasure)
- ▣ Jeremy Hunt: Williams Review
 - *"GNM in Healthcare: rapid policy review"* (June 2018)
- ▣ GMC: Clare Marx / Independent Review of GNM / CH
 - published 6 June 2019

Registration and licensing Ethical guidance Education Concerns **About**

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Independent review of gross negligence manslaughter and culpable homicide

[f](#) | [t](#) | [in](#)

Leslie Hamilton and his working group have published their independent review into how the law on gross negligence manslaughter and culpable homicide are applied to medical practice.

The review has been chaired by Leslie Hamilton, a former consultant cardiac surgeon.

Since we commissioned this independent review in 2018, Leslie and his working group have [carried out extensive research and engagement](#) across the UK. Their final report, and our response, has now been published.

1. Summary
2. Why did we commission this review?
3. What was the review?
4. Read the review and our response
5. Who has shaped the review?

Next >

Why did we commission this review?

- 77 pages
- whole system
- 29 recommendations

Mental Capacity Act 2005

- ▣ “vitally important piece of legislation” (? Trust induction)
 - capacity = ability to make a decision
- ▣ 5 principles: 1st .. assumed to have capacity ...
- ▣ capacity: time and decision specific
 - 2 stage test ⇨ 2 questions: (on balance of probabilities)
 - ▣ is there impairment / disturbance of mind or brain?
 - ▣ unable to make that decision at the time it has to be made?
- ▣ who decides? – **you do**
- ▣ Advance Decision (“living will”) to refuse – legally binding
- ▣ Lasting Power of Attorney (LPA) ⇨ consent for medical treatment
- ▣ IMCAs: access to notes

DNACPR form (? AND)

- ▣ June 2014 Court of Appeal: Tracey v Cambridge UH NHSFT
- ▣ Lung cancer ⇒ prognosis 9 months
- ▣ RTA ⇒ fracture cervical spine ⇒ ventilated (COPD)
- ▣ DNACPR form (?) without consultation with patient / family
 - CPR: "institutionalised torture and electrocution of the dying"
- ▣ Article 8 ECHR: Right to respect for private and family life
- ▣ Lord Dyson MR:
 - "no uncertain terms .. decision as to how to pass the closing days and moments of one's life and how one manages one's death touches in the most immediate and obvious way a patient's personal autonomy, integrity, dignity and quality of life".
- ▣ "should be a presumption in favour of patient involvement"

And Finally ... Operating within the Law

- "Good Medical Practice" (GMC)
- "Good Surgical Practice" (guidance series – consent post Montgomery)
- RCSE: LASP (Legal Aspects of Surgical Practice course) – do LLM in Medical LAW
- know your limitations, ask for help (lack of insight; ego)
- keep good records (never alter ..)
- apologise if things go wrong (Duty of Candour)
- if involved in any investigation ⇒ be open and honest (probity)
- communication: 71% claims (MPS) – TIME
- "work – life" balance: yourself, partner / family

Clipper "Round the World" Race 15 / 16: leg 8

- 8 legs (approx 6 weeks each)
- 12 boats
- 20 crew
 - total 700
 - age: 18 - 73
 - 40% never sailed before

