

ENGLAND AND WALES / JUDGMENT

Simon Butler v David Anthony Ward

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[2025] EWHC 877 (KB) IN THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION Case No:
QB-2022-002250 Royal Courts of Justice Strand, London, WC2A 2LL Date: 10/04/2025
Before : MR CHRISTOPHER KENNEDY KC (sitting as a Deputy Judge of the High Court)

- ----- Between : MR SIMON BUTLER Claimant
- and - MR DAVID ANTHONY WARD -and- Defendant Applicant SPENCER WEST LLP
Respondent
- -----
- ----- The Claimant appeared in person Ms Francesca O'Neill (instructed
by Messrs DWF LLP) for the Defendant Mr Jonathan McNae (instructed by Messrs Spencer
West LLP) for the Respondent Hearing date: 17 March 2025
- ----- Approved Judgment CHRISTOPHER KENNEDY KC (DHCJ)
Christopher Kennedy KC:

Introduction

1. 2. 3. By an application dated 4 February 2025 the Defendant to this claim has sought three remedies. As against the Claimant, he seeks summary judgment pursuant to CPR Part 24 on the ground that the claim has no reasonable prospect of succeeding. His secondary application, pursuant to CPR 3.4(2)(b), is that I strike out the Claimant's Schedule of Loss on the basis that it is likely to obstruct the just disposal of the proceedings. Finally, the Defendant has made a separate application for Wasted Costs against the Respondent, who are the Claimant's former solicitors. I am asked to consider stage 1 of that application whether the Respondent should be required to show cause why an order should not be made. On 24 July 2019 the Claimant underwent a hip resurfacing procedure. The Defendant was the consultant orthopaedic surgeon who conducted the operation. He performed that surgery to a reasonable standard but unfortunately the repair to the Claimant's abductor muscle failed post-operatively. Despite further interventions, the Claimant has been left with persistent weakness and restricted movement. He was an accomplished skier and has not been able to return to anything like that level. Skiing was not simply a cherished activity for the Claimant, he made a living out of it. The basis of the Claimant's claim for damages from the Defendant is set out at paragraph 54 of his Particulars of Claim. It is that he was not

properly advised by the Defendant about the risk that the operation could leave him with difficulties in the activities of daily living and that it could render him unable to work as a ski coach or instructor. He also maintains that he was not advised specifically as to the risk of avulsion injury leading to long term weakness in the hip. In the agreed case summary prepared for the trial of the action, his case on breach of duty was crystallised, into the following proposition which the court was invited to address, "Breach of duty: Did the Claimant give informed consent to the procedure." That issue was one of four, the others concerning factual causation, medical causation and quantum. Although factual causation was raised as potential ground in the Defendant's statement in support of his summary judgment application, it was not taken forward in the skeleton argument and not pursued with any vigour in oral submissions. I agree with that approach. The issue of what the Claimant would in fact have done had he been given different information is a matter for a trial judge after having heard the Claimant give evidence. Thus, neither the issue of factual causation nor those of medical causation or quantum are relevant to this application for summary judgment. Of course, the Defendant's case is that the Claimant's inability to succeed on breach of duty makes a determination on the other issues and thus a trial unnecessary. The application for summary judgment: background 4. A number of relevant matters are common ground but there are also material differences in the recollections of the Claimant and Defendant. The Claimant ran ski schools in the Alps where he provided accommodation and tuition. He had had CHRISTOPHER KENNEDY KC (DHCJ) 5. 6. 7. 8. 9. 10. 11. symptoms in his right hip which had eventually led him to consult the Defendant, whom he knew. The Defendant is described by the Claimant as 'a personal friend' as well as a client. The Defendant by contrast has stated that he considered the Claimant a 'distant acquaintance' whom, prior to being consulted he had not seen since 2014. The Claimant recalls that his symptoms were most noticeable after skiing and that he had had to stop skiing competitively or sprinting. He was however able to run and was not a regular user of painkillers. The Defendant's recollection was that the Claimant's history was that his symptoms were significantly more intrusive, causing him pain on a daily basis. The Claimant recalls what he describes as an informal discussion in which the Defendant recommended hip resurfacing as the option which would permit his return to the levels of fitness he had previously enjoyed. The Defendant does not mention an informal discussion in his evidence. On 12 March 2019 the Claimant had a consultation with the Defendant. Afterwards he wrote a long letter to the Claimant's general practitioner setting out what had been discussed and what was proposed. It was copied to the Claimant himself. This is an important contemporaneous document to which both parties have referred. The Defendant recalls that he not only had a discussion with the Claimant on 12 March 2019 but he also examined him and considered x-rays which had been undertaken in November 2018. The examination and his analysis of the x-rays confirmed his opinion that the Claimant had a classic severely osteoarthritic hip. In relation to the level of pain which the Claimant was suffering, the contents of the letter are more closely aligned to the recollection of the Defendant than that of the Claimant. The Claimant has taken issue with that part of the letter which he says does not reflect the discussion. The Claimant describes the

‘overwhelming impression’ he got from the Defendant was that a hip resurfacing procedure would return him to full fitness. He accepts that he was aware the operation had risks but his understanding was that it was routine. At the heart of his case is the proposition articulated at paragraph 12 of his witness statement, “Had it been made clear to me that there was a chance I could end up in a worse position, then I would have soldiered on. I wasn’t making anywhere near the maximum use of painkillers. I might have continued an appreciable period before surgery became an absolute necessity.” 12. Although the Defendant considered the Claimant a suitable candidate for a hip re- surfacing procedure, he recalls that a significant part of their discussion involved him counselling the Defendant about the possibility of an adverse outcome and the need to proceed carefully and in a measured way with rehabilitation. CHRISTOPHER KENNEDY KC (DHCJ) 13. It can be seen that the parties’ recollection about the role which risk played in their discussions differs materially. The following passages of the 12 March 2019 letter are the most relevant to risk, ‘We discussed the fact that a modern hip arthroplasty (either hip resurfacing or hip replacement) should certainly free him from pain and allow him to get back to a good level of activity; what is of course less predictable is whether the or not he achieves a final full recovery that allows him to return to a competitive demanding physical sport. He realises that there must be an element of doubt over this but currently he cannot do any sport and therefore it seems a reasonable and measured risk to take. ‘I discussed with Simon the higher failure rate over time with resurfacing compared to conventional THR and also the other risks associated with a metal on metal bearing including adverse reaction to metal debris and the rare risk of femoral fracture.’ ‘I explained to him that I would use the Adept resurfacing implant which... [has] an acceptable failure rate at ten years. Simon understands the possibility that he may require future hip surgery to salvage a failed hip.’ ‘There will always be an element of the unknown in a situation like this but overall I am confident that a correct decision has been reached.’ 14. 15. I do not regard those passages as sufficiently clear to allow a judge, without hearing oral testimony, to come to a conclusion as to whose evidence is most accurate on the issue of how and in what terms risk was discussed. Some risks are referred to but not all the risks that the Claimant says he was concerned about. In particular there is no reference to the Claimant’s work as an instructor. It is not possible to gauge the depth and tone of the discussion itself from the contents of the letter alone. Finally, the Defendant accepts and deals specifically in his evidence with the question of warning about an avulsion injury. He agrees that he did not give this warning but maintains that he did not do so because that was not his practice and it was not the general practice at the clinic where he worked, the South West London Elective Orthopaedic Centre. The Claimant signed a consent form immediately prior to his surgery which made reference to certain risks (not including avulsion) but for the purposes of this application at any rate, the discussion of 12 March 2019 is central. The Defendant does not put his application for summary judgment on the basis that events after 12 March 2019 made good deficiencies in the consent process which was gone through on that day. I note however the agreement of the experts (para 10 of the joint report) that the materialisation of several of the risks on the consent form for the operation could have had similar consequences to those which in fact occurred because of the avulsion injury. 16. The

parties each instructed experts to report to the court on breach of duty. The Claimant relies on Mr Nicholas Gilham, consultant trauma and orthopaedic surgeon, and the Defendant relies on Mr Paul Partington, consultant orthopaedic surgeon. Both are experienced experts. It is common ground between the parties that Mr Partington CHRISTOPHER KENNEDY KC (DHCJ) (and the Defendant) are hip replacement specialists and Mr Gilham is not. His expertise lies in surgery at the ankle and wrist and in hand and wrist arthroplasty. He does not perform total hip replacement surgery although he has some experience of hip hemi-arthroplasty and is familiar with the available approaches. Their respective experience is set out in some detail in the answers to the first three questions in the joint report. This is a matter to which I return later in this judgment. 17. In his first report dated 9 April 2023, a liability and condition and prognosis report, Mr Gilham offer two opinions potentially relevant to consent. At page 9 of his report in his answer to the question ‘Was a hip replacement indicated at the time of his surgery?’ Mr Gilham, on the basis of the history provided to him by the Claimant, advised that the full range of options had not been explored, that continuing with analgesics should have been advised. At page of the same report Mr Gilham stated, “The appropriate questions to ask are whether Mr Butler adequately consented to the risks and benefits of the alternative procedures? Only Mr Butler can give a view as to the information he was given.”

18. Mr Gilham was asked Part 35 questions by the Defendant in July 2024. In his answers (5 August 2024 p.7) he referred on the Claimant’s evidence that he completed a 3 mile run in a good time on the morning of his surgery as an indicator of that his disability was not as serious as the Defendant recalled and he noted that appearances on x-rays do not always correlate with symptoms. He was asked about the consent procedure and responded as follows: “The consent for any procedure is far more than the written documentation. This includes the discussion with the patient as to the benefits and inconvenience of the procedure as well as the risks. It is also important that it is clarified with the patient that they understand these risks and benefits. This is often by confirming consent on the day of surgery. After discussion with Mr Butler it was clear that he has not appreciated that there were any implications in having a metal on metal resurfacing replacement, including the more extensive soft tissue approach and the long-term surveillance for metal ions and the development of a pseudo-tumour. For full Montgomery consent the full range of reasonable alternative treatment options should be discussed. In this case this would include the full range of non- operative treatment and the alternative surgical approaches and implants and the implications of these different approaches and implants. After discussion with Mr Butler it was clear that he did not understand the implications should the abductor repair fail or the potential benefits of alternative surgical approaches. CHRISTOPHER KENNEDY KC (DHCJ) If the court were to accept the view of Mr Butler that he had not been fully informed of the risks and benefits of the surgical procedures that were available then the conclusion would be that he had not been adequately consented for this procedure.” Mr Gilham has therefore provided indications as to what the court might look for in relation to informed consent but directed the court to the necessity of considering the evidence of the Claimant

and Defendant themselves. 19. At page 16 of his breach of duty and causation report Mr Partington clearly identified the relevant issue concerning consent, “This claim is related to inappropriate consenting and it alleges that if the Claimant had fully understood the risks of surgery he would not have proceeded at that time and would have continued for an unspecified prolonged period before undergoing some form of surgery.” In defining the issue, Mr Partington does not suggest that the Claimant had to undergo surgery at that time or that hip re-surfacing was the only form of surgery he could have undergone. He had options. Mr Partington made observations on what appeared to him to be a discrepancy between what the Claimant was saying and what could be gleaned from the correspondence. He was however clear that this was a matter for the court to determine. He advised that if the court preferred the evidence of the Defendant then the consent process was appropriate and reasonable and, again deferring to the court, he raised some doubts as to whether the Claimant would have soldiered on as he claimed.

20. Mr Partington specifically recognised that the issue of what the Claimant would have done had he been given more information about risks was one for the court. 21. I do not detect a difference between the approach of Mr Gilham and Mr Partington to how the issue of consent should be determined. Both seek to assist the court whilst recognising that the determination requires findings of fact.
22. Mr Partington supported the Defendant’s position that the risk of avulsion was not a material risk which required specific discussion. Mr Gilham did not agree. In his view the Claimant’s individual circumstances made the discussion of an avulsion necessary because of its implications for his physical activity. 23. 24. Save for their agreement that there is not always correlation between symptoms and radiographic changes and that symptoms and clinical signs are more important in the decision-making process, the joint report did not add greatly to the opinions of the experts as set out in their respective reports and in Mr Gilham’s answers to the questions he was asked. As the Defendant acknowledges, the timing of the application for summary judgment is unusual. The claim was issued in late 2022 and a Defence was served in June 2023. Witness evidence and evidence as to breach of duty was exchanged in the summer of
2024. The joint report is dated 17 December 2024 and the case was listed for a three day trial in a window commencing on 13 January 2025. It was vacated on the first CHRISTOPHER KENNEDY KC (DHCJ) day of the trial window and is now due to be heard on 23 June 2025. The application was not made until 4 February 2025, after the trial should have taken place. 25. The Defendant was ready for trial on 13 January 2025 and had produced a skeleton argument. Paragraphs 7 to 15 rehearse parts of the parties’ competing recollections on the issue of consent. Paragraph 15 reads, “D will make further submissions following the evidence at trial.” The Defendant’s position in his skeleton thus appeared to be that the court needed to hear evidence from the Claimant and the Defendant before a decision on informed consent could be reached. That is different to the position urged on me in this application. Argument 26. I had the benefit of a witness statement from Ms Rachel

Thompson the Defendant's instructing solicitor, and a helpful skeleton argument from Ms Francesca O'Neill of counsel. The Claimant neither provided a skeleton argument nor a statement in response to the application but he did make oral submissions and was able to refer to his trial witness statement and, more generally, to other parts of the evidence.

27. Ms O'Neill included in her skeleton argument reference to the principles relating to an application for summary judgment as first set out by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC (Ch) at para 15, subsequently approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098, "[15] As Ms Anderson QC right reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows: The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91; A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]; In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*; This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]; CHRISTOPHER KENNEDY KC (DHCJ) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63; On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a

fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.”

28. Ms O'Neill's main point is that Mr Gilham cannot assist the court in deciding whether the consenting process was adequate. She also relies on the severity of the osteoarthritic changes on examination and the fact that the Claimant was warned about other risks which might have caused the same damage. She cites the South- West London Elective Orthopaedic Centre as showing that there is a reasonable body of medical opinion which does not warn of the risk of avulsion injury. 29. The centrality of the issue of Mr Gilham's lack of relevant expertise to the success of the Defendant's summary judgment application is reflected in the evidence of Ms Thompson. Expanding on this matter to me, Ms O'Neill described it as a 'knockout blow'. Her submission was that for an expert to give a view on the adequacy of consent to a procedure and to add a gloss as to what might or might not constitute a CHRISTOPHER KENNEDY KC (DHCJ) non-standard patient, it was essential that that expert had experience of taking that consent in the context of that procedure. Mr Gilham's upper limb expertise was she submitted quite different. Ms O'Neill did however accept that Mr Gilham might have been able to offer some assistance if he had a related expertise to hip replacement, such as knee surgery. She drew attention to the fact that Mr Gilham clearly had his own concerns about his suitability because he had sought to source an alternative expert for the Claimant but had been unsuccessful. She submitted that any judge hearing the case would prefer the evidence of Mr Partington because of his greater expertise.
30. Ms O'Neill submitted that I needed to consider how the principles as to consent set out by the Supreme Court in *Montgomery v Lanarkshire Health Board* [2015] UKSC 26 have been added to by its further decision in *McCulloch v Forth Valley Health Board* [2023] UKSC 26. She submitted that the latter decision made it clear that the test set out in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 applied to the adequacy of the consent process, in particular to whether there should have been any discussion of an alternative procedure or any particular risk. If the absence of that discussion would have been supported by a reasonable body of medical opinion, then that the consent process was adequate without it. Mr Gilham, the Defendant argues, cannot say whether the absence would have been supported because of his lack of relevant expertise.
31. Mr Butler was an articulate Claimant. He was understandably however, not as familiar with what was and was not relevant to the issues before me in the context of a summary judgment application. The relevant evidence was however before the court in the form of the witness statements and the evidence of the experts. He confirmed that Mr Gilham was reserved to attend court for the trial. Discussion of the application for summary judgment 32. The relevant issue for the purposes of this application is whether the Claimant has no real prospect of showing that his consent to the hip resurfacing procedure was uninformed. The principles by which a court assesses the issue of informed consent are those set out in

Montgomery. Lord Kerr and Lord Reed JJSC delivered the leading judgment which included the following paragraphs, “[82] In the law of negligence, this approach entails a duty on the part of doctors to take reasonable care to ensure that a patient is aware of material risks of injury that are inherent in treatment. This can be understood, within the traditional framework of negligence, as a duty of care to avoid exposing a person to a risk of injury which she would otherwise have avoided, but it is also the counterpart of the patient’s entitlement to decide whether or not to incur that risk. The existence of that entitlement, and the fact that its exercise does not depend exclusively on medical considerations, are important. They point to a fundamental distinction between, on the one hand, the doctor’s role when considering possible investigatory or treatment options and, on the other, her role in discussing with the patient any recommended treatment and CHRISTOPHER KENNEDY KC (DHCJ) possible alternatives, and the risks of injury which may be involved.

- [83] The former role is an exercise of professional skill and judgment: what risks of injury are involved in an operation, for example, is a matter falling within the expertise of medical members of the medical profession. But it is a non sequitur to conclude that the question whether a risk of injury, or the availability of an alternative form of treatment, ought to be discussed with the patient is also a matter of purely professional judgment. The doctor’s advisory role cannot be regarded as solely an exercise of medical skill without leaving out of account the patient’s entitlement to decide on the risks to her health which she is willing to run (a decision which may be influenced by non-medical considerations). Responsibility for determining the nature and extent of a person’s rights rests with the courts, not with the medical professions.
- [84] Furthermore, because the extent to which a doctor may be inclined to discuss risks with a patient is not determined by medical learning or experience, the application of the Bolam test to this question is liable to result in the sanctioning of differences in practice which are attributable not to divergent schools of thought in medical science but merely to divergent attitudes among doctors to the degree of respect owed to their patients.
- [87] The correct position, in relation to the risks of injury involved in treatment, can now be seen to be substantially that adopted in Sidaway by Lord Scarman, and by Lord Woolf MR in Pearce [1999] PIQR P53... 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.

- [89] Three further points should be made. First it follows from this approach that the assessment of whether a risk is material cannot be reduced to percentages. The significance of a given risk is likely to reflect a variety of factors besides its magnitude: for example, the nature of the risk, the effect which its occurrence would have on the life of the patient, the importance to the patient of the benefits sought to be achieved CHRISTOPHER KENNEDY KC (DHCJ) by the treatment, the alternatives available, and the risks involved in those alternatives. The assessment is therefore fact- sensitive, and sensitive also to the characteristics of the patient.” 33. 34. The parts of the judgment which I have cited above make it clear that there is a distinction to be drawn between the choice of treatment options on the one hand and the discussion of those options and the risks that come with them on the other. The Bolam test is central to the first but not the second. With regard to the second, it is for the patient to decide what risks he is willing to run. The doctor’s duty is to take reasonable care to ensure that he is aware of any material risks in treatment and of any reasonable alternative or variant treatments so that he can make his informed decision. The test of materiality is patient centred, what the reasonable person in the patient’s position would attach significance to. On the face of it, the application of the principles set out in Montgomery to the issue of whether the Claimant in this case gave informed consent is one that requires findings of fact as to what he was told about the balance of risks and rewards of the hip re-surfacing procedure. Its risks and rewards had to be placed in the context of the other options and their risks and rewards. Mr Partington, in the passage which I quoted at paragraph 19 above referred to the alternative of not proceeding (‘soldiering on’) and, by implication, to other forms of surgery, most obviously a hip replacement. The degree of the Claimant’s restriction at the material time and the implications of the risks in the procedure for his earning capacity may be important matters of context to the discussion. I have already found, (paragraph 13 of this judgment), that it is not possible to adjudicate between the parties’ respective positions on these issues without hearing their evidence.
35. Ms O’Neill submits that the decision in McCulloch should change my analysis. That case which concerned the decision by a consultant cardiologist not to discuss the risks and benefits of the prescription of non-steroidal anti-inflammatory drugs with a patient because she did not consider it appropriate to do so for clinical reasons. Lord Hamblen and Lord Burrows JJSC gave the judgment of the court. The section concerning Montgomery and consent starts at para 46. Having rehearsed the factual background of Montgomery and cited the key paragraphs (see paragraph 32 above), they then proceeded to consider the decision of the Court of Appeal in Duce v Worcestershire Acute Hospitals NHS Trust [2018] PIQR P18. CHRISTOPHER KENNEDY KC (DHCJ) 36. Duce concerned a female patient who developed Chronic Post Surgical Pain after an operation. The Court of Appeal held that there was insufficient understanding of the existence of the risk of this to justify imposing a duty to warn, as a clinician could not be required to warn of a risk of which he or she could not reasonably be taken to be aware. Hamblen LJ considered the judgment in Montgomery and identified a two stage test (para 33 of his judgment) which was included in the judgment in McCulloch itself at paras 53-54, along with Hamblen LJ’s observations as to ‘materiality’ at

para 35: “[53]...(1) What risks associated with an operation were or should have been known to the medical professional in question. That is a matter falling within the expertise of medical professionals . . .

- (2) Whether the patient should have been told about such risks by reference to whether they were material. That is a matter for the court to determine . . . This issue is not therefore the subject of the Bolam test and not something that can be determined by reference to expert evidence alone . . .”

[54] He went on in para 34 to cite the test of materiality set out in Montgomery at para 87...and then continued in para 35: “Factors of relevance to determining materiality may include: the odds of the risk materialising; the nature of the risk; the effect its occurrence would have on the life of the patient; the importance to the patient of the benefits sought to be achieved by the treatment; the alternatives available and the risks associated with them.” 37. 38. The analysis in Duce makes clear that the Bolam test does not apply to the discussion of risk with a patient. Expert evidence may have a role to play in assisting the court but the test of what is material remains the patient centred test articulated at para 89 of Montgomery. As the judgment in McCulloch noted, Duce concerned the discussion of the risks involved in an operation, as opposed to the issue of what alternative treatments should be raised with a patient. The Claimant in this case also underwent an operation. However the part of the judgment in McCulloch to which Ms O’Neill particularly draws my attention in support of her application is that under the heading, “What is the correct test to be applied to the assessment as to whether an alternative treatment is reasonable and requires to be discussed with the patient? And did the lower courts err in deciding that the correct legal test is the professional practice test found in Hunter v Hanley and Bolam.” CHRISTOPHER KENNEDY KC (DHCJ) 39. The discussion of that issue is at paras 56 to 58 of the judgment which I have reproduced below, (My underlining)

[56] In our view, in respect of issues (1) and (2) (see para 43 above), the correct legal test to be applied to the question of what constitutes a reasonable alternative treatment is the professional practice test found in Hunter v Hanley 1955 SC 200 and Bolam [1957] 1 WLR 582. On the facts of this case, therefore, as Dr Labinjoh took the view that prescribing NSAIDs was not a reasonable alternative treatment because Mr McCulloch had no relevant pain and there was no clear diagnosis of pericarditis and, because that view was supported by a responsible body of medical opinion (as established by the evidence of Dr Bloomfield), there was no breach of the duty of care to inform required by Montgomery. There was therefore no error of law made by the lower courts and there is no basis for going behind their decision reached on the evidence that Dr Labinjoh was not negligent.

[57] A hypothetical example may help to explain, in more detail, how we regard the law as working. A doctor will first seek to provide a diagnosis (which may initially be a provisional diagnosis) having, for example, examined the patient, conducted tests, and having had discussions with the patient. Let us then say that, in respect of that diagnosis, there are ten possible treatment options and that there is a responsible body of medical opinion that

would regard each of the ten as possible treatment options. Let us then say that the doctor, exercising his or her clinical judgment, and supported by a responsible body of medical opinion, decides that only four of them are reasonable. The doctor is not negligent by failing to inform the patient about the other six even though they are possible alternative treatments. The narrowing down from possible alternative treatments to reasonable alternative treatments is an exercise of clinical judgment to which the professional practice test should be applied. The duty of reasonable care would then require the doctor to inform the patient not only of the treatment option that the doctor is recommending but also of the other three reasonable alternative treatment options (plus no treatment if that is a reasonable alternative option) indicating their respective advantages and disadvantages and the material risks involved in such treatment options.

- [58] It is important to stress that it is not being suggested that the doctor can simply inform the patient about the treatment option or options that the doctor himself or herself prefers. Rather the doctor's duty of care, in line with Montgomery, is to inform the patient of all reasonable treatment options applying the professional practice test.
40. Ms O'Neill relies on this part of McCulloch as authority for the proposition that the correct legal test to be applied to the assessment of whether an alternative treatment or risk (my underlining) is reasonable engages the Bolam principles. I disagree. The issue which this part of the judgment addresses is that of what alternative treatments are (i) reasonable and (ii) thus need to be discussed with a patient. A doctor is not under a duty to CHRISTOPHER KENNEDY KC (DHCJ) discuss a potential alternative treatment that he or she does not consider reasonable, providing that assessment is supported by a responsible body of medical opinion. As the judgment makes clear at para 58, all reasonable treatment, even if it is not preferred, must be discussed. The issue of whether a known risk should have been discussed cannot be decided by expert opinion alone. That requires an assessment of the materiality of the risk, a patient centred question as the authorities cited make clear. This is illustrated by the conclusion part of para 57 of the judgment in McCulloch where, in the context of their hypothetical example, the Supreme Court determined that the duty on a doctor requires a discussion of the advantages, disadvantages and material risks of all treatment options and none, if that is a reasonable option. 41. In my judgment the experts have appropriately sought to assist the court in adjudicating on the issue of informed consent but equally appropriately recognised that it is a matter in relation to which factual findings are of primary importance. The decision in McCulloch does change the approach to informed consent in relation to risks. Mr Partington's superior expertise may mean that his opinion on some matters carries more weight. It does not follow from that that the opinion of Mr Gilham carries no weight and it does not follow that Mr Partington's superior expertise will count in relation to the issues where the experts can assist the court on informed consent. Although she did not accept it, I find that Mr Gilham's position is similar to that of the knee surgeon whom Ms O'Neill accepted could assist the court. 42. It follows from the discussion above that, by reference to the Easyair approach: i) ii) iii) iv) v) I consider that that the Claimant has a realistic prospect of success. His case on the factual issues on which

the decision on informed consent will turn cannot be dismissed as fanciful or lacking any degree of conviction. It will depend on his evidence and that of the Defendant. See (i) I could not adjudicate on the issues as that would require evidence. The contemporaneous documents, in particular the 12 March 2019 letter, are of some assistance and, in one respect at least, favour the Defendant. They do not however establish that what the Claimant says in his statement is without substance. The evidence before me is the evidence which would have been available at trial. It is not reasonable to anticipate further evidence on the issue; CHRISTOPHER KENNEDY KC (DHCJ) vi) This is an archetypal case where a judge should hesitate before granting summary judgment. The Defendant did not make his application until after the trial date and his skeleton argument for trial was predicated on the proposition that evidence would be required before a decision could be reached. vii) This case will turn on evidence not a point of law. 43. For the reason set out above the Defendant's application for summary judgment is refused. The application to Strike out the Schedule of Loss 44. The Claimant's schedule of loss is dated 15 May 2024. It contains his valuation of general damages £70,000, a lump sum claim for past care, £15,000, a claim for future care (in fact for remedial surgery) for £10,000 and a claim for past and future loss of earnings which comes to £2.5 million. There is also a claim for interest. 45. I will deal with the claims apart from loss of earnings first. 46. 47. 48. 49. The Claimant's witness statement dated 11 April 2024 does not deal with the issue of past care. It includes a claim for medical fees and rehabilitation costs of £20,000 which is not part of the schedule and the statement uses a different figure for the cost of future surgery - £10,000 as opposed to £15,000. The Defendant raised Part 18 requests of the Claimant. Question 2, which was broken down into several parts, directed the Claimant towards the issues relevant to a claim for care. The Claimant's answer did not engage with the individual questions but rather referred the reader to Mr Gilham's report, as he had done in his updated schedule. Mr Gilham's report gives some limited relevant information – the Claimant is restricted in domestic lifting and gardening and needs more help with certain work activities. The answer is however thin and fails to engage at all with the issue of how the sum claimed was calculated. Question 5 of the schedule related to the claim for future surgery. The Claimant responded to that more fully. The cost claimed was the cost of a further hip replacement to be undertaken by Professor Griffin. The sum advanced was an estimate but I note one that is somewhat below the figures for Hip Replacements in the latest edition of Facts and Figures. The Defendant invites me to use my case management powers under CPR 3.4(2)(b) on the basis that the statement of case is likely to obstruct the just disposal of the proceedings. I remind myself that the strike out CHRISTOPHER KENNEDY KC (DHCJ) of a claim or part of a claim should be a last resort and that there is nothing to stop a judge at trial from adjudicating on a claim and making a finding that it has not been established.

50. When the schedule and part 18 replies are taken together, the claim for future remedial surgery is adequately (if sparsely) pleaded, notwithstanding its somewhat misleading title. 51. 52. 53. 54. 55. The claim for past care is inadequately pleaded but I find that the inadequacy will not obstruct the just disposal of the proceedings. The judge at trial will take

a view on whether the evidence justifies any award and, if so, how much. The Defendant has experienced representation and will be able to make submissions on this. The Claimant's claim for past and future earnings is of a different order to his other claims for special damage and future loss. He seeks £700,000 for past loss and £1.8 million for future loss. In his witness statement dated 11 April 2024 the Claimant deals with his loss of earnings in a single paragraph, paragraph 22. In that he says that the damage, by which I assume he means his disability following his surgery, has destroyed his business as a ski instructor. He has attached a set of accounts to which I shall turn shortly. He deposes to earning £200,000 per annum and says that he would have carried on earning at that level until age 70. The accounts attached to his statement are for the 13 month period 1 June 2017 to 30 June 2018. There would therefore have been accounts for at least some of the period between 1 July 2018 and 24 July 2019, the date of his surgery. These are not exhibited, neither are any accounts for earlier years. The 2017/2018 accounts state that the Claimant had an average of 8 employees and his business incurred staff costs, including directors' salary costs, of just under £93,000. The business made a profit of just under £21,500. It is not clear what proportion of either figure was paid to the Claimant. On any view the sum supported by the accounts is nowhere near the claimed £200,000 per annum. Beyond the assertion that the Claimant would have received £700,000 during the period from the operation to 15 May 2024, the schedule provides no detail. There is nothing to help with how that figure was calculated. The schedule adopts the multiplicand of £200,000 per annum for future loss without further explanation. The multiplier is also, and obviously, incorrect but that is a technical matter capable of being rectified. CHRISTOPHER KENNEDY KC (DHCJ) 56. 57. 58. The Defendant raised Part 18 questions as to both past and future loss. The first question about past loss was what income the Claimant earned in the 5 years before his surgery. It was a reasonable question which went unanswered. Instead the Claimant answered a different question, where he earned his income. He was asked what income he had in fact earned. The figure of approximately £36,000 was provided by way of answer with no further particulars and there has been no supporting disclosure. None of the remaining answers permit the Defendant or the court to understand how the Claimant's claim was calculated. I therefore asked the Claimant if he could help. He gave me further background to his claim but did not explain on how the numbers in the schedule were arrived at. He referred to some French accounts which were not complete and which had not been disclosed. I suggested to him that his claim did not make any sense. He agreed. I indicated that I was minded to strike out the claim for loss of earnings. He did not seek to dissuade me. He told me that he might come back with a re-formulated claim for loss of earnings support by evidence as yet undisclosed. I said that I anticipated the Defendant would object and that the decision as to whether or not to admit such a revised claim would be a matter for another judge but it might not be straightforward. I remain of the view I indicated to the Claimant. To allow the pleaded claim for loss of earnings to proceed would obstruct the just disposal of the claim. The Claimant has not adduced evidence in support of his calculation, did not provide an explanation for it in his schedule, did not take the opportunity afforded to him by Part 18 questions, could not explain the arithmetic behind it in court and agreed with me

that it did not make sense. Its continued presence serves no purpose and obstructs the just disposal of the proceedings. The Defendant is entitled to know that this is not a claim that he has to face and he does not have to devote resources to anticipating how it might be put and how he might meet it. 59. Separately, I find that the criteria under CPR 3.4(2)(a) are also satisfied in relation to the claim for past and future earnings. There are no reasonable grounds for bringing the loss of earnings claim pleaded. It is incoherent. The Defendant's application to strike out the Claimant's schedule of loss therefore succeeds in part. The application for wasted costs 60. The Defendant's case that the Respondent should show cause is set out at paragraphs 101 to 108 of the statement of Ms Thompson and, in CHRISTOPHER KENNEDY KC (DHCJ) shorter form, in a helpful 'charge sheet' prepared by Ms O'Neill at my request. 61. The charge sheet sets out six acts of conduct in relation to which the Defendant invites me to order that the Respondent show cause. There are three acts of 'negligent' conduct two acts of 'unreasonable' conduct and one of 'improper' conduct.

62. My task was succinctly described by Ritchie J at para 11 of *Williams-Henry v Associated British Ports* [2024] EWHC 2415, "The first stage is a triage in which the Applicant must prove a prima facie case which gets over the threshold of the balance of probabilities, that one or more of the 3 IUN grounds arises; that the IUN caused specified wasted costs and that it would be just to make the Respondent pay and that it is proportionate in costs to pursue the WCO. This stage is generally accusatory, not defence focussed. If the Court is satisfied that, if unanswered, the Applicant's evidence is "likely" to lead to a WCO, then notice is given to the Respondent franchising it to put in evidence and answer the allegations." 63. There are therefore four things of which I must be satisfied as to a prima facie case. First the existence of a ground which would justify an order, improper conduct, unreasonable conduct or negligent conduct. Second a causal link between the ground and wasted expenditure. Third that it would be just to make the Respondent pay. The fourth thing of which I must be satisfied is that the exercise is proportionate. 64. The authorities have consistently emphasised the summary nature of the procedure.
65. Ms O'Neill's submissions had at their centre that the Claimant's case was hopeless and that this was one of those cases where that should be reflected in an order for wasted costs. For the reasons I have set out in relation to the issue of summary judgment, I have not formed the view on the evidence before me that the Claimant's case is hopeless. That allegation therefore falls away. 66. Had I been satisfied that the Claimant's case was hopeless, it would not necessarily have followed that a wasted costs order should be made. It is settled that running a hopeless case does not of itself provide a ground for a wasted costs order. To quote from the judgment of Lord Bingham MR in *Ridehalgh v Horsfield* [1994] CH 205,234C-F, "Pursuing a hopeless case CHRISTOPHER KENNEDY KC (DHCJ) the public policy underlying ...As is also well known, solicitors are not subject to an equivalent cab-rank rule, but many solicitors would and do respect it by affording representation to the unpopular and the unmeritorious. Legal course, whether barristers or representatives will, of solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a Court to assume

that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it. It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the Court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it.” 67. In my judgment the Respondent could not be said to be assisting in an abuse of the process of the court. The Claimant has suffered injury as a result of an operation the outcome of which was not as all had hoped. He is entitled to explore the issue of whether he gave informed consent and whatever the criticisms of his evidence (lay and expert) it is not an abuse of process to put it before the court.

68. Ms O'Neill accepted that, if she was not successful on her global submission then it was unlikely that it would be found proportionate to take her subsidiary grounds to stage 2 because of their limited value. I agree. It would not be proportionate. However I will deal briefly with each in the order that they appear on her 'charge sheet'. 69. The first item on Ms O'Neill's charge sheet is the signing of a statement of truth schedule of loss by Mr Mercer containing a claim for loss of earnings which, as I have found above, was incoherent and which I have struck out. I agree with her that an explanation would be needed as to why that was not negligent. It appears to denote failure to act with the CHRISTOPHER KENNEDY KC (DHCJ) 70. 71. 72. competence reasonably to be expected of members of the profession. It is not clear that this would have resulted in material wasted expenditure, capable of being specified and it would not I find be just or proportionate to explore it further. The second item on Ms O'Neill's charge sheet concerns failures to deal promptly or properly with required procedural steps. The reader of Ms Thompson's witness statement will have no difficulty in understanding and, in part at least, sympathising with her frustration. She found herself undertaking a number of preparatory tasks which are generally accepted to fall to the Claimant's solicitors and which she did not expect to have to do. There are however differences of recollection in relation to some of those matters and some misunderstandings. For instance, Ms Thompson requested a trial timetable from the Respondent on 6 January
2025. She was provided with one on 7 January 2025 but told it had been filed before Christmas. The properties of the document suggested to her that it may have been created on 7 January 2025 and that she was being misled. Ms O'Neill and Mr McNae were content for me to look at the CE- file record and take judicial notice of what was there. The CE-file records

that the timetable was filed on 16 December 2024 and, whatever the explanation for the date of the trial timetable, it was not that it had been created for the first time on 7 January. One had been filed before Christmas. It would not be proportionate or just to consider these matters further. The third matter on the charge sheet concerns the costs wasted by the adjournment of the trial. I cannot identify any negligence on the part of the Respondent in relation to this. At the time they applied to come off record, they were assured by the Claimant that he intended to proceed with the trial without legal representation. It was his subsequent decision to apply for an adjournment that led to that happening. The Defendant also makes allegations of unreasonable conduct, that is conduct which is vexatious or designed to harass. The allegations are the pursuit of a hopeless case, persisting in the instruction of Mr Gilham and the failure to provide Mr Gilham with relevant records and statements. For the reasons set out in relation to my decision on summary judgment I do not consider the case hopeless and I do consider that Mr Gilham can assist the court. There may have been failings in relation to the documents he was provided but the causal relationship with wasted costs has not been established and it would not be proportionate to proceed with them. CHRISTOPHER KENNEDY KC (DHCJ) 73. I turn finally to the suggestion of improper conduct. This is raised in the last paragraph of Ms Thompson's statement. Ms Thompson is sceptical of an explanation she was given that a document had not been delivered to her because it had erroneously been left in an outbox. The basis of her suspicion was her own, non-specialist, interpretation of metadata. The need for caution in that regard is well illustrated by the trial timetable example, set out at paragraph 70 above. As I indicated to the parties at the hearing, an allegation of improper conduct is a serious matter. It is incumbent on a party alleging improper conduct to examine their reasons for doing so critically. If, as here, the basis for the allegation is technical then some further inquiry may be required before the allegation is raised with the court and the Respondent. What will reasonably need to be done will depend on the circumstances of the case. In this case I would have expected that someone with a level of specialist knowledge, not necessarily an expert in the Part 35 sense, would have been asked if there could be an 'innocent' explanation and the allegation would have been supported with reasons why that was unlikely to be the case. 74. The other issue in relation to probity referred to by Ms Thompson concerned what she was told about the instruction of counsel. It appears convoluted, did not feature in the charge sheet and I agree with the submission of Mr McNae that it is difficult to anticipate that a material amount of costs could be attributed to it. It would be neither just nor proportionate to take it further. 75. It follows that the Defendant's application for a wasted costs order against the Respondent is dismissed.

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