

Bilal: The Court of Appeal Considers the Application of Bolam in Montgomery Consent Case

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In the case of *Montgomery v Lanarkshire Health Board* [2015] AC 1430, the Supreme Court drew a distinction between a doctor's role when considering possible investigatory or treatment options and, their advisory role in discussing with a patient any risks of injury which may be involved in any recommended treatment and possible alternatives.

The former role was an exercise of professional skill and judgment to be assessed by reference to the *Bolam* test (i.e. whether it is in accordance with a practice accepted as proper by a responsible body of opinion skilled in that particular art).

In respect of the advisory role however, the court found that doctors were under a duty to take reasonable care to ensure that patients are made aware of any material risks involved in any recommended treatment and of any reasonable alternative or variant treatments.

Cases where issues arise concerning a doctor's advisory role are commonly referred to as "*Montgomery consent cases*".

Practitioners can be forgiven for initially thinking that the *Bolam* test has no application in *Montgomery* consent cases. It is becoming increasingly apparent from decisions following *Montgomery* however, that *Bolam* can still have a role to play.

An example of one such case is the Court of Appeal's decision in *Bilal v St George's University Hospital NHS Foundation Trust* [2023] EWCA Civ 605.

The Facts in *Bilal*

The Court in *Bilal* was concerned with an appeal following HHJ Blair KC's dismissal of the claim of Mr Malik, for personal injury following elective surgery performed by a Consultant Neurosurgeon, a Mr Minhas, at the respondent's hospital, which resulted in spinal cord injury. Mr Malik died from causes secondary to his spinal condition. The appeal was brought by his children as administrators of his estate.

Mr Malik had a history of spinal problems. Following a deterioration of his symptoms, he attended the respondent's A&E department. Mr Minhas performed emergency spinal surgery. There was no criticism of the execution of the surgery however, Mr Malik suffered neurological damage and experienced left leg numbness and weakness. Mr Malik underwent revision surgery, which was again performed by Mr Minhas. No criticism was made of the quality of surgery but it was unsuccessful. Mr Malik's previous symptoms did not improve and he suffered a paraparesis rendering him permanently wheelchair dependent.

The Decision at First Instance

At trial, the appellants argued *inter alia* that ([13(v)]):

“there were reasonable alternatives to surgery, which in light of their respective benefits and risks, no responsible and reasonably competent neurosurgeon would have omitted to offer to the claimant” [hereafter, the “Montgomery consent argument”].

In relation to that argument, the judge found as follows at [20]:

“Whilst the leading case of Montgomery identifies that there is a duty to take reasonable care to ensure a patient is aware of any reasonable alternative treatments...in the circumstances of this case I consider that a responsible, competent and respectable body of skilled spinal surgeons would have reasonably concluded that there were no reasonable alternative treatments available in the context of the parameters and discussion that the claimant had with Mr Minhas.”

The Decision on Appeal

The primary focus of the appeal related to an argument that Mr Minhas had failed to take a full history from Mr Malik before proceeding to offer revision surgery; a point which was not pleaded and which ultimately failed.

The appellants also advanced as ground 2 of their appeal, the Montgomery consent argument and, further argued in the alternative that ([33]):

“the Judge at ... [93] erroneously imported the Bolam test into what should have been a strictly Montgomery analysis. The respondent’s experts had agreed that alternatives to surgery should been discussed with Mr Malik even if they differed in their view as to the prospects of success.”

Nicola Davies LJ delivering the lead judgment (Coulson and King LJJ concurring), dismissed this argument in fairly short order. Her Ladyship rejected the appellants' contention that the judge's approach to the issue of alternative treatment represented a "gloss" upon the authority of *Montgomery* finding as follows at [66]:

"I accept the contention of the respondent that Montgomery draws a distinction between two aspects of a clinician's role, namely an assessment of treatment options (Bolam) and an assessment of what risk and treatment should be explained to the patient because they are material (Montgomery). The distinction between the two roles of the clinician is contained within the judgment of Montgomery at para 87 where it is stated that: "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 alternatives or variant treatments." I accept that "reasonable" in respect of the assessment of alternative or variant treatment encapsulates the Bolam approach. As to material risks, that is the element of materiality which is to be judged from the perspective of the patient i.e. Montgomery. In my judgment it is for the doctor to assess what the reasonable alternatives are; it is for the court to judge the materiality of the risk inherent in any proposed treatment, applying the test of whether a reasonable person in the patient's position would be likely to attach significance to the risk. Thus the Judge at [93] was correct to apply Bolam and to conclude that his assessment reflected the guidance set out in para 87 of Montgomery."

The appellants' third and final ground of appeal in relation to causation was also dismissed.

Conclusion

It is clear from *Bilal* that a doctor's duty to advise a patient of alternative or variant treatments is only triggered if that treatment is regarded as "reasonable". The question of whether any such treatment is in fact reasonable is to be assessed by reference to the *Bolam* test. Accordingly, it is evident from *Bilal* that the *Bolam* test still has an important role to play in *Montgomery* consent cases.

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