Clinical Negligence Cases: When the Bolam Test Does Not Apply

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The law requires medical practitioners to use diligence, care, knowledge, skill and caution in administering treatment to a patient. The question of whether a medical practitioner has met the requisite standard of care is often considered by reference to the test laid down in the case of *Bolam v Friern Hospital Management Committee* [1957] WLR 582. In *Bolam*, the Claimant sustained fractures of the acetabula during a course of electro-convulsive therapy administered to him at the Defendant's mental hospital. In considering whether the Defendant was negligent in the manner in which it carried out the treatment, McNair J confirmed that:

> "*the true test of establishing negligence in diagnosis or treatment on the part of a doctor was whether … he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art*" (p.587).

As case law has developed, so have the principles underpinning the issue of breach of duty in medical negligence cases. This has led to a recognition that the *Bolam* test is not appropriate to apply in every case.

Cases Concerning Issues of Advice and Consent

In Montgomery v Lanarkshire Health Board [2015] AC 1430, the issue before the Court was whether the Claimant ought to have been given advice about the risk of shoulder dystocia in the event that she proceeded with a vaginal delivery of her baby, and about the alternative possibility of delivery by elective caesarean section. The Claimant was diabetic and was having a larger than usual baby with an increased risk of shoulder dystocia. This risk manifested during labour and complications during the delivery resulted in her baby being born with severe disabilities.

Lord Kerr and Lord Reed delivered the lead judgment during the course of which their Lordships recognised [82]:

> "*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 possible alternatives, and the risks of injury which may be involved*."

Their Lordships recognised that the former role was an exercise of professional skill and judgment, falling within the expertise of the medical profession. In these circumstances, the *Bolam* test would apply. Their Lordships considered however that the doctor's advisory role could not be regarded as solely an exercise of medical skill. They considered that a patient's entitlement to decide on the risks to their health, which they are willing to run, must be accounted for and that responsibility for determining the nature and extent of a person's rights rested with the court not the medical professions.

Hence, the test in cases involving a doctor's duty to advise patients and obtain their consent was thus formulated as follows [88]:

> "*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 of variant treatments*".

The duty to advise as to risks is subject to the exception that such information could be withheld if the doctor reasonably considered that its disclosure would be seriously detrimental to the patient's health or, where the patient required treatment urgently but was unable to make a decision.

Cases Involving Pure Diagnosis

Where a medical practitioner makes a diagnosis based on the interpretation of data in the form of, for example, radiological scans or specimen on a slide, that interpretation and diagnosis is either right or wrong. If it is wrong, it is either negligently so or not. In Muller v King's College Hospital NHS Trust [2017] QB 987 these are recognised as 'pure diagnosis' cases. In *Muller*, the issue was whether a histologist had been negligent in failing to diagnose a malignant melanoma on examining slides containing specimen obtained from a punch biopsy performed on the Claimant. Kerr J observed that these pure diagnosis cases were far from what McNair J had in mind when laying down the test in Bolam, characterising *Bolam* as a "pure treatment" case.

Kerr J considered the approach taken by HHJ Peppit QC in Penney v East Kent Health Authority [2000] Lloyd's Rep Med 41, who observed that the abnormality on Claimant's slides in that case was there to be seen and should have been recorded. There was thus no issue as to whether a particular course of professional conduct was acceptable practice. The issue was rather whether the conduct though wrong, fell short of actionable negligence.

Kerr J expressed regret that he was constrained by the law to view the exercise of preferring one expert over another through the prism of the exception to *Bolam* laid down in Bolitho v City and Hackney Health Authority [1998] AC 232 namely, whether the view of the body of opinion relied upon is *"untenable in logic or otherwise flawed in some manner rendering its conclusion indefensible and impermissible"* ([79]). Kerr J considered that it would have been preferable to reject the very notion that the Bolam principle can apply where no "Bolam-*appropriate*" issue arose. As it was, Kerr J felt bound by the law as it currently stands and thus he considered that his approach to the case had to be by reference to a possible invocation of the *Bolitho* exception (which unsurprisingly was invoked).

Cases Where There Is No Dispute That the Alleged Conduct, if Proved, Would Be Negligent

There are many cases where there is no real dispute that the alleged conduct of a medical practitioner, if proved, would constitute negligence. The issue of breach of duty in these cases is resolved by a straightforward question of fact as to whether the practitioner acted in the manner alleged. In such cases, there is no need to apply the *Bolam* test.

For example, in FB v Princess Alexandra Hospital NHS Trust [2017] EWCA Civ 334, there was no dispute that there was a duty on a Senior House Officer ("SHO") to take an adequate history in relation to the Claimant when she was taken into A&E by her parents. The issue was therefore whether on the facts, the SHO failed to take an adequate history.

Conclusion

It is apparent that a strict application of Bolam is not appropriate in all medical negligence cases. It is likely that Bolam will be of no or limited application where the issues in the case concern advice and/or consent to treatment, pure diagnosis or, where it is agreed that the alleged conduct, if proved, would be negligent. Medical negligence practitioners therefore need to take care to ensure that they apply the correct test when considering the issue of breach of duty.