

Breach of Duty and Hospital Guidelines: Thorley v Sandwell & West Birmingham Hospitals NHS Trust [2021] EWHC 2604 (QB)

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This case considered the interplay between hospital guidelines and breach of duty in the clinical negligence setting. In summary, the Court found that:

1. The guideline relied upon by the Claimant did not apply to the procedure that he underwent.
2. In any event, even if it did apply:
 - (a) Derogation from the guideline was not negligent in the *Bolam/Bolitho* sense.
 - (b) Where there was a departure from a guideline, that did not deprive a Defendant of a *Bolam* defence.

Background

The Claimant suffered from Atrial Fibrillation (AF). AF is a condition which causes abnormal heart rate and rhythm, which gives rise to a recognised risk of stroke as a result of blood pooling in the atria. As a consequence of this, the Claimant was prescribed warfarin to reduce the risk of the formation of blood clots, and the accompanying risk of stroke.

In March 2005, the Claimant presented with chest pain. The Defendant concluded that the Claimant should undergo a coronary angiogram (the insertion of dye into the heart arteries by way of catheterisation to investigate heart blockages¹). Coronary angiogram is carried out as a day-procedure in clinic.

The Claimant's angiogram was booked for 27 April 2005. The Claimant was advised by the Defendant to stop taking his warfarin "*four days before the procedure*". He took his last dose of warfarin on 22 April 2005.

The Claimant underwent his angiogram as arranged. He was advised not to restart his warfarin until 29 April 2005 (two days later). He complied with this advice.

On 30 April 2005 the Claimant suffered an ischaemic stroke, as a consequence of which he now sadly suffers severe physical and cognitive disability.

The Parties' Cases on Breach of Duty

It was the Claimant's case that the Defendant was negligent in: (1) stopping warfarin for four days before the procedure instead of three days; and (2) failing to advise the Claimant to restart warfarin on the evening of the procedure (27 April 2005) as opposed to two days later.

The Claimant relied upon the Defendant's 2004 guidance document entitled "*Anticoagulation and Surgery (Sandwell)*".

The Defendant argued that the length of time that warfarin was stopped before surgery was reasonable. The Defendant disputed the application of the 2004 guidance to a coronary angiogram, which was not "*surgery*". The Trust admitted that warfarin should have been restarted by the day after the surgery (28 April) as opposed to 29 April, but denied that this was causative of the stroke. [Thomas Herbert](#) considers the causation elements in his blog [here](#).

The Court's Conclusions on the 2004 Guidance

Soole J heard expert evidence as to the application of the 2004 Guidance. He held that it did not apply to this procedure:

1. Coronary angiography was not a “surgery” within the meaning of the guidance.
2. There was no evidence that the Defendant trust treated coronary angiography as “*akin to surgery*”.
3. The content of the guidance, when analysed, showed that it did not accommodate coronary angiography.
4. There was ample cited material that supported the omission of warfarin for four or five days before an angiography.

The Court's Conclusions on the *Bolam/Bolitho* Test

In the alternative, the Judge considered the correct approach if the 2004 guidance did apply. The Court considered the comments of Mantell J in *Newell v Goldenberg* [1995] 6 Med LR 371 that, “*The Bolam principle provides a defence for those who lag behind the times. It cannot serve those who know better*” (p. 374, col. 1). As such, what was the situation to be applied by the Court where there was guidance from the Trust that was not complied with?

The Claimant argued that the Defendant was under a duty to comply with the guidance unless there were good clinical reasons not to, and that it was immaterial that a responsible body of clinicians would have done otherwise given the presence of the guidance.

The Defendant argued that this was to misinterpret the *Bolam/Bolitho* test, and that the defence was established regardless of the presence of the guidance document. If the clinician acts in accordance with a practice accepted as proper by a responsible body of practitioners in that field which has a logical basis, the defence is made out whether there is applicable guidance or not.

The Judge accepted the Defendant's arguments. Soole J found that the comments in *Newell* were “*better to be understood in the context of a 'warnings' case*” such as *Montgomery*. The Defendant was correct to distinguish a practice which is “*better*” from one that is simply “*different*”.

As such, the Judge found that there was a responsible body of practitioners who would have advised the Claimant to cease warfarin four days before the procedure and to have delayed restarting warfarin until the day after the procedure.

Accordingly, the contested allegations of breach of duty were dismissed.

Comment

The case gives rise to a number of interesting points for clinical negligence practitioners:

1. Care must be taken when considering the application or otherwise of guidance issued by a Trust to a particular procedure. In this case, much of the Claimant's argument was predicated upon the application of the 2004 guidance to a coronary angiogram, which the Court held did not apply.
2. In any event, even where there has been derogation from that guidance, that does not deprive the Defendant of a *Bolam/Bolitho* defence.

The comments of the High Court in *Newell* would appear to have been overtaken by *Montgomery*. The obiter consideration of *Newell* by Soole J is that it would not apply in a case such as the present. *Newell* was concerned with the application of *Bolam* to an issue of warnings, and following the Judgment in *Montgomery* it is established that *Bolam* does not apply in such cases. The worth of *Newell* must therefore be doubted.

¹ A video of the procedure with associated commentary can be found [here](#). (Source: The Mary Greeley Medical Centre, YouTube, accessed 7 October 2021).

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