Case Note

Bolam v Montgomery: Alternative Approaches to Alternative Treatment?

In two current cases, the appellate courts have considered whether a duty to identify and discuss treatment as an alternative to treatment recommended should be considered by a Bolam approach or a Montgomery approach. The first case is Bilal v St George's University Hospital NHS Foundation Trust where the Court of Appeal handed down judgment on 13 June. The second case is McCulloch v Forth Valley Health Board. The Supreme Court heard argument in this case in May and reserved Judgment. The argument before the Supreme Court can be gleaned by accessing the Supreme Court's excellent streaming service.

In both cases, there was significant dispute as to whether the clinician's approach in terms of identifying and discussing reasonable alternative treatment should be assessed on a Bolam basis or following the principles in Montgomery. In Bilal, the surgeon on the Judge's findings had reasonably considered that conservative treatment as an alternative to surgery had no reasonable prospect of alleviating the Claimant's pain. Accordingly, the surgeon had not discussed this possibility with the patient. The Judge His Honour Judge Blair KC concluded at paragraph 93,

"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 (because an adult is entitled to decide for themselves which, if any, of the available forms of treatment to undergo and thereby give their informed consent to an interference with their bodily integrity), 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 was no reasonable alternative treatments available in the context of parameters and a discussion that the Claimant had with Mr Minhas".

The Court of Appeal rejected any criticism of the Judge's approach, Lady Justice Nicola Davies stating at paragraph 66,

"In my judgement 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 a proposed treatment applying the test of whether a reasonable person in the patient's position would be likely to attach significance to the risk".

Insofar as the discussion in this case and the arguments in McCulloch are implying that there is a binary issue as to whether Bolam or Montgomery should apply to assessment of alternative treatment , this is arguably an over-simplification at least in more complex cases.

The Appeal in Bilal essentially failed because of the Appellant's inability to persuade the Court that the Judge ought to have made a factual finding that at the date of discussion of surgery the Claimant's pain was short lived. If as the Court of Appeal accepted the Judge was entitled to approach on the basis that there was established pain the relevant experts agreed that conservative management would be very unlikely to resolve the pain , therefore not a reasonable alternative treatment. If it is accepted that the treating clinician could reasonably conclude that an alternative treatment had no real prospect of success , it would if advice had been given it would have been to this effect . In practical terms there is unlikely to be any significant difference in outcome whether Bolam or Montgomery is applied.

However in a more complex factual matrix the Court might have to take an approach which would reflect both elements of Bolam and Montgomery. The issues that could arise could relate to assessment of suitability for surgery. A surgeon in particular in the context of major surgery will inevitably have to consider the patient's suitability. This will entail some consideration of the patient's psychological profile, for example the Claimant's likelihood of being able to comply with rigorous rehabilitation necessary to make the operation successful. In this context a surgeon might reasonably conclude that a patient was not suitable for surgery and a reasonable number of other surgeons would equally so conclude thereby passing the Bolam test. However, it is difficult to see applying Montgomery that the patient should not be informed of these issues and the patient's views taken into account. The patient in particular may have different view as to the patient's ability to undertake rigorous rehabilitation. I have undertaken clinical negligence long enough now to know that prior to Montgomery surgeons would form these assessments without reference to the patient. Following Montgomery it is hard to see that they could justify this In these circumstances Bolam and Montgomery in effect ellide because a reasonably competent clinician should have regard to the requirements of the Montgomery decision.

The basic premise of the Montgomery approach that patients should give informed consent is wholly uncontroversial. However, the scope and implications of the decision are still developing. There are clearly issues for clinicians in having to discuss treatments not recommended by them, in terms of the clinician's workload and the prospect that patients may come to harm as a result of choosing ill-advised treatments.

We will be discussing these and other issues at our streamed webinar on .

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