3PB BARRISTERS

Bilal and Malik v St George's University Hospital NHS Trust [2023] EWCA Civ 605

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Introduction

1. *Sidra Bilal, Hassaan Aziz Malik (Administrators on behalf of the estate of Mukhtar Malik, deceased) v St George's University Hospital NHS Foundation Trust,* [2023] EWCA Civ 605 provides an interesting insight into the post-*Montgomery* landscape. It provides further clarification on informed consent as well as reminding practitioners of the importance of tightly crafted pleadings in clinical negligence claims.

Factual background

2. The Claim was brought by the personal representatives of a deceased Claimant, Mr Malik.

3. Mr Malik, aged 48 at the date of trial, had a history of spinal problems commencing in 2012 consisting of pain, leg weakness and altered sensation. On 14 July 2014, Mr Malik attended the Defendant's A&E department, where an MRI revealed spinal cord and cauda equina compression. Mr Minhas, a consultant neurosurgeon at the Defendant's Trust, performed successful emergency spinal surgery.

4. Following surgery, Mr Malik attended an outpatient appointment with Mr Minhas on 13 July 2015 for a review. Mr Malik continued to experience pain on the left side of his back with left side intercostalgia as well as ongoing left-sided sciatic pain down the length of his leg and foot.

5. Following recommendation from Mr Minhas, Mr Malik underwent surgery on 13 August 2015. No criticism was made of the quality of the surgery itself, however the operation rendered Mr Malik's condition significantly worse. He suffered paraparesis and was to be wheelchair dependent for the remainder of his life. Mr Malik died on 14 July 2021 from causes secondary to his spinal condition.

First instance decision

6. At first instance, HHJ Blair KC dismissed Mr Malik's claim. At paragraph 16 of the first-instance judgment, HHJ Blair KC set out Mr Malik's allegations of breach of duty focusing specifically on the 13 July 2015 review consultation. In summary, it was alleged Mr Minhas failed to recognise that the pain was neuropathic rather than radicular, failed to obtain informed consent, and failed to advise Mr Malik of all the risks of the surgery.

7. In essence, Mr Malik's argument was that his adverse outcome was the result of not being informed of alternative treatments. If properly advised on the risks of the surgery and the scale of its potential benefits, Mr Malik's case was that he would have opted for alternative treatment altogether.

8. HHJ Blaire KC recognised that the evidence of Mr Malik and Mr Minhas fundamentally conflicted in many respects. The judge did not have confidence in the reliability and accuracy of Mr Malik as a witness. HHJ Blair KC arrived at the 'firm' conclusion that a responsible body of competent and reasonable neurosurgeons would have agreed that a significant proportion of Mr Malik's intercostal pain was radicular in nature and caused by compression to the left sided T10 nerve root, and that a responsible body of competent and reasonable neurosurgeons would have offered Mr Malik revision surgery.

9. HHJ Blair KC accepted Mr Minhas' evidence that he had given appropriate advice to Mr Malik as to the potential risks of the surgery and that the consent form he completed was adequate. Moreover, HHJ Blaire KC was satisfied that it was not negligent for Mr Minhas not to have discussed alternative surgery with Mr Malik. In paragraph 93, HHJ Blair KC provided: *"whilst the leading case of Montgomery identified 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 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 were no reasonable alternative treatments available in the context of the parameters and discussion that the claimant had with Mr Minhas."*

10. Not only did the judge find that breach of duty had not been made out, but also concluded that any negligence would not have been causative of the Claimant's injuries. In other words, the judge was not satisfied that Mr Malik would have declined the offer of having

surgery in August 2015, nor would he have sought another opinion/delayed making his decision.

Grounds of appeal

11. It was the Appellants' contention that the judge was wrong in law:
    i) Ground 1: To hold that a responsible body of competent neurosurgeons would have offered Mr Malik revision surgery of his thoracic vertebrae in July 2015 in the absence of any enquiry or knowledge about the duration of his back pain.
    ii) Ground 2: To hold that Mr Malik had been made aware of reasonable alternative treatments and had given informed consent.
    iii) Ground 3: To hold that causation had not been proved.
12. The Appellants conceded that grounds 2 and 3 were parasitic upon ground 1.

Court of Appeal Decision

13. Ground 1 was at the crux of the Appellants' appeal. Although the Appellants attempted to argue that Mr Minhas should have explored Mr Malik's pain in further detail, the Court of Appeal noted that the difficulty for the Appellants was that the failure of Mr Minhas to ask about the duration of Mr Malik's back pain simply was not a pleaded Particular of Negligence. In addition, it was not an issue raised with the neurosurgical experts prior to trial and was not put to Mr Minhas in cross-examination. Mr Minhas therefore had no opportunity to address the issue which the Appellants *'elevated to the core of their appeal.'*

14. The Court of Appeal cited Rimer LJ's judgment in *Lombard North Central PLC v Automobile World* (UK) Ltd [2010] EWCA Civ 20, where it was stated: *"it remains a basic principle of our system of civil procedure that the factual case the parties wish to assert at trial must ordinarily be set out in their statements of case…it is essential to the conduct of a fair trial that each side should know in advance what case the other is making, and thus what case it has to meet and prepare for."*

15. The Court of Appeal further stated that pleadings form *particular* weight in clinical negligence claims, as the pleaded allegations of negligence form the core of experts' instructions who proceed to draft a report. A Claimant, therefore, should refrain from ambushing a Defendant at trial in relation to points not previously pleaded, nor should they use re-examination as an attempt to remedy the mistake.

16. The Appellants also attempted to rely upon the *Wisniewski*[1] principle. As a reminder, Wisniewski provides that *"in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action."*[2] In effect, the Appellants attempted to construct the argument that as Mr Minhas had failed to take full history of Mr Malik's pain, adverse inferences should be drawn. However, this argument was firmly rejected on the basis that some evidence supporting the parties' point must exist before this principle can be triggered. As no evidence had been provided in relation to this point, this point was firmly rejected.

17. Ground 2: although the Court recognised that grounds 2 and 3 were parasitic on ground 1, the Court still briefly explored such issues. Importantly, Davies LJ concluded that clinicians' conduct should still be construed through the lens of Bolam when assessing patients' reasonable alternatives for treatment.

18. The extent to which Montgomery and Bolam overlap, however, is a live point currently being considered by the Supreme Court in *McCulloch v Forth Valley HB*. Although perhaps axiomatic to state, Montgomery provided 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 reasonably alternative or variant treatments."*

19. Davies LJ, giving the lead Judgment, agreed with HHJ Blair's previous analysis, in that the test flowing from *Montgomery* in relation to reasonable alternatives or material risks, is only triggered if the clinician decides there are 'reasonable alternatives' as per *Bolam*.

20. The Court of Appeal therefore found that HHJ Blair was correct to apply Bolam before then considering whether Mr Malik had been made aware of the material risks involved in the recommended treatment and reasonable alternatives. In other words, as Mr Minhas came to the (non-negligent) conclusion that no other treatment was reasonably available, it was therefore not necessary to advise on additional treatments he did not consider necessary or prudent.

21. As set out by Davies LJ in paragraph 66 *"..I accept that 'reasonable' in respect of the assessment of alternative or variant treatments 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*

[1] *Wisniewski v Central Manchester* [1998] PIQR P324
[2] [2023] UKSC 26, which was heard in May 2023.

reasonable alternatives are; it is for the court to judge the materiality of the risk inherent in any proposed treatment…"

22. Ground 3: in relation to the final ground, although the Appellant attempted to rely upon the *Chester v Afshar* gateway, Davies LJ concluded that Mr Malik did not provide evidence that he would have elected to defer or reject surgery if told something different about the prospects of success due to the duration of the pain. As Mr Malik's argument was not borne out in any evidence, this point was additionally dismissed.

Takeaway points

23. The authors consider that the two key takeaway points from the case are firstly, that allegations of negligence must be pleaded with precision and that secondly, and as confirmed by the Supreme Court's decision in McCulloch (handed down today 12/07/2023), whether treatment is a reasonable alternative is to be determined by application of the professional practice test (i.e. Bolam, as qualified by Bolitho). Therefore, a doctor is not obliged to tell a patient about treatments that the doctor does not consider reasonable (applying the professional practice test), even where the doctor is aware of an alternative body of opinion which considers the treatment to be reasonable. Thus the clinicians' conduct should only be construed through the Montgomery lens if other forms of treatment are 'reasonable alternatives.'

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