A Premature Ode to Bolam post Montgomery

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Introduction

With the advent of the "materiality" test in Montgomery v Lanarkshire Health Board [2015] UKSC 11, it was presumed by many that Bolam was consigned to the long grass in informed consent cases. A Health care professional was now *"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 or variant treatments". The test of materiality " is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk ....".*

Was the assumption premature? Had the *Materiality* test indeed usurped *Bolam*? In an article that I wrote in April, 2021 entitled *"the Odyssey of informed consent post Montgomery – Have we reached Ithaca?" (Specialist Info Medico Legal Magazine Issue 16 1/04/2021)*, I suggested that any such assumption was indeed so, and that homage in part was still to be paid to Bolam.

Since *Montgomery*, the courts have been asked to address the test to be applied, and it has culminated recently in the Supreme Court decision in McCulloch and others v Forth valley Health Board (Scotland) [2023] UKSC 26. This was a case involving alternative treatment .The Supreme Court was asked in the words of Lord Hamblen and Lord Burrow to address " *in essence, the court is being asked to explain further what is meant by the italicised sentence"* namely that a health care professional was" *under a duty to take reasonable care to ensure that the patient is award of any material risks in any recommended treatment, and of any reasonable alternative or variant treatments"* ,and *that the two main issues that flowed for consideration were "what legal test should be applied to the assessment as to whether an alternative treatment is reasonable and requires to be discussed with the patient "and"* in particular whether that decision *"is determined by the application of the professional practice test found in Hunter v Hanley [the Scottish test [my italics] and Bolam"*. In doing so, the Supreme Court determined that Bolam, or as it termed it *"the professional practice test"*, does still have a role to play in informed consent. The genesis between what was said in *Montgomery* and McCulloch forms the subject matter of this article.

Montgomery and Post

Montgomery identified the difference between a role of the doctor in diagnosis and treatment , which rests entirely on professional skill and judgment , and the doctor's advisory role where the doctor must take into account the patient's right to decide on the risks to health that the patient is willing to run. It was identified at Paragraph 83 of the judgment that the risks of injury involved in an operation *"is a matter falling within the expertise of the medical profession. But it is a non sequitur to conclude that the question whether a risk of injury, or the availability of an alternative form of treatment, ought to be discussed with the patient is also a matter of purely professional judgment".*

In McCulloch the court set out at paragraph 50 of the judgment that *" the most important case on a doctor's duty of care to inform since Montgomery was the decision in Duce".* In Duce v Worcestershire Acute Hospitals NHS Trust [2018] EWCA Civ 1307, the Court of Appeal, in the judgment of Hamblen LJ (as then was) gave very practical guidance on the duty that was involved in informed consent. This was a case that turned upon the risks associated with an operation . At Paragraph 33 of the judgment, Hamblen LJ set out that the duty of care to inform required by *Montgomery* is characterised by a two-stage test. The test was:

> *"(1) what risks associated with the operation were or should have been known to the medical professional in question. This is a matter falling within the expertise of medical professionals ; and*
> *(2) whether the patient should have been told about such risks by reference to whether they were material. That is a matter for the court to determine. The issue is not therefore the subject of the Bolam test and not something that can be determined by reference to expert evidence alone".*

At Paragraph 42 of the judgment, Hamblen LJ stated that whether the doctor should have been aware of the relevant risks at issue *"is a matter for expert evidence"*. Clearly, as I promulgated in my earlier article, this first limb re-affirmed the faith and retained the homage to *Bolam*. Thereafter, whether those risks should have been communicated to the patient by reference to whether they were material is a question for the court to determine. In so doing, Hamblen LJ distinguished between first, knowledge of the risks which, applying the *Bolam* standard, is to be determined by reference to the expertise of the medical profession; and secondly, the duty to warn of material risks where the standard of care is set by the courts and the *Bolam* test does not apply. *Duce* dealt with the position re risks of an operation, but did not specifically address the approach to be had regarding alternative or variant treatments.

Post *Duce*, in Hazel Kennedy v Dr Jonathan Frankel [2019] EWHC 106 (QB), Yip J cited the two stage test and applied it to the facts of the case. It was a clear sequitur.

In a judgment dated 23rd March, 2023, only some 4 months prior to the judgment handed down by the Supreme Court in *McCulloch*, the Court of Appeal re-visited matters pertaining to informed consent in (1) Sidra Bilal (2) Hassan 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. This was a reasonable or variant treatment case. In the lead judgment of Nicola Davies LJ, it was set out at Paragraph 66 that Montgomery delineates between two aspects of a doctor's role *"namely an assessment of the treatment options (Bolam) and an assessment of what risks and treatment should be explained to the patient because they are material (Montgomery)."* She continued "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 or variant treatments".*

Nicola Davies LJ specified that she accepted 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 ie. Montgomery". She* concluded by stating that *"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".*

It would appear that the test to be applied was hybrid, and that in respect of the first limb Bolam applied in determining " any reasonable and variant treatment "

Confirmation in McCulloch

The Supreme Court set out that the correct test to be applied when determining the question of what constitutes a reasonable alternative treatment is the professional practice test found in *Hunter v Hanley and Bolam*. In setting out that the "*professional practice test*" as the correct legal test to be applied, the Supreme Court set out its reasoning , of which the following, are probably the most compelling:

i. Consistency with *Montgomery* - In line with the distinction drawn in *Montgomery* at Paragraph 83, as between the exercise of professional skill and judgment and the court imposed duty of care to inform, the determination of what are reasonable alternative treatments clearly falls within the former and should not be undermined by a legal test that overrides professional judgment, or in other words *"deciding what are the reasonable alternatives in an exercise of professional skill and judgment";*
ii. Consistency with Duce – It was identified that the two -stage test identified in *Duce* was based upon the distinction drawn in *Montgomery* between when the doctor's role is ,and is not, a matter of professional skill and judgment, and that in that context *"all matters of professional skill and judgment, to which the professional practice test should be applied, fall within the first stage of the Duce test"*. The then identification of what treatments are reasonable alternatives (that is what is clinically appropriate) is as much a matter of professional skill and judgment, as the risks associated with any treatment, and as such are governed by the legal practice test. The identification of reasonable alternative treatments is to be treated in the same way as the identification or risk in the first stage of *Duce*. It follows that it is only once the reasonable alternative treatment options have been identified that the second stage advisory role comes into play, whereby the doctor is required to inform of the reasonable alternative treatments and of the material risks of the alternative treatments.
iii. Consistency with professional expertise and guidance – The BMA and GMC, in their submissions as interveners in Mc*Culloch* strongly emphasised the importance of clinical judgment in determining reasonable alternative treatment options; and
iv. Avoiding an unfortunate conflict in the doctors' role – The court recognised that if it were to reject the professional practice test in determining reasonable alternative treatments, a consequence would be an unfortunate conflict in the exercise of a doctor's role.

Commentary

McCulloch has acknowledged that the identification of risks associated with any treatment and the identification of reasonable alternative treatments are both matters falling within medical expertise and professional judgment identified in Montgomery and are governed by the professional practice test.

It would follow from the decided caselaw that Bolam still has a role to play in informed consent cases. Its foreseen demise was much heralded but premature. McCulloch has re-iterated the position adopted in Montgomery and has not in any way backtracked towards medical paternalism. The court in McCulloch stated that it was applying " the law laid down in Montgomery " .Our faithful friend Bolam and its well known bedside manner therefore still has a role to play in informed consent cases.

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A positive professional identity: Maximising your legal career & well-being

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Globally the legal profession has become increasingly aware that significant numbers of lawyers are experiencing concerningly high levels of psychological distress. This is a serious issue relevant to the future sustainability of the profession. A profession in distress is ill-equipped to cope with the challenges of uncertainty and disruption that are now endemic in the contemporary world of work. It is also an issue that pertains to the efficacy of legal practice, as there is evidence linking stress, anxiety and depression with impaired professional judgement.

Since starting this conversation in 2014, Leaders of the Profession have begun to gather evidence from their members, inculcate learning in education and respond to the phenomenon of distress. Bar Associations around the world have created well-being related continuing professional development and portals of information, assistance and support.

Slowly data and research are emerging to reveal the causes of the causes. The complex myriad of personal and professional conflicts arising in humans and our working environments, suggest that it is not only our efficacy at risk but an existential threat to retention and progression. An evolving concept to promote and support lawyer well-being is the development of a positive professional identity across the legal profession, beginning at law school. This hypothesis is based on positive psychology and its meta-theory – Self Determination Theory *(the concept that all humans have 3 basic psychological needs. – autonomy, competence, and relatedness underpinning motivation and thriving).*

Ibarra[1] suggests that a professional identity includes a 'constellation of beliefs, values, motives and experiences' by which we define ourselves in our professional lives. A professional identity is how we understand what it means to be in and of a profession. The concept of a