BOLAM IS DEAD. LONG LIVE BOLAM!

written by Imogen Hildred | 9 July 2019

In this article Simon Fox QC reviews the Bolam test for breach of duty in clinical negligence in the light of recent case law and asks – is it still the test for breach?

Since I transferred from medicine to law 25 years ago, I have always thought that the *Bolam* test cannot logically apply to many scenarios of alleged clinical negligence. The scenario which has always struck me is the iatrogenic surgical bowel injury; a surgeon inadvertently and unknowingly perforates the bowel with a surgical instrument during a routine and otherwise uncomplicated laparoscopy. Can we logically apply *Bolam* as the test of negligence to that?

I have never thought so.

After a long wait I find some judicial support for my concern from Kerr J in *Muller v Kings College* [2017] EWHC 128 QB.

Before we go any further in a discussion about *Bolam*, it is important to be very clear exactly what we mean by the use of the term "the *Bolam* test".

McNair J actually described a number of tests for a doctor's negligence in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

The one which has become known as "the *Bolam* test" is this one –

> *"He is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art"*

– i.e. a body of doctors test.

However, McNair J also approved the Scottish case of *Hunter v Hanley* [1955] SLT 213 which described the test as – *"such failure as no ordinary doctor of skill would be guilty of, if acting with ordinary care"*– i.e. a skill and care test.

The body of doctors *Bolam* test was subsequently lifted and adopted by the Court of Appeal and High Court in cases like *Maynard v West Midlands RHA* [1984] 1 WLR 634 and *Sidaway v Bethlem and Maudsley Hospitals* [1985] AC 871 to become "the *Bolam* test".

The case of *Bolitho v City and Hackney HA* [1999] 4 Med LR 381 added to the body of doctors the requirement for that body to be reasonable, responsible and for their position to withstand a logical analysis of risks and benefits. This in effect means that a claim must fail unless the defence expert can be shown to fail this requirement and therefore fall into the so-called "*Bolitho* Exception" – a tough job for most claimants at trial.

The recent case of Muller concerned an allegation of negligence in interpretation of histology slide which was reported as normal when it in fact contained malignant melanoma. The parties disagreed over whether the *Bolam* test applied to breach. Kerr J adopted the test used in the earlier Court of

Appeal cervical smear histology case of *Penney v East Kent* [2000] Lloyd's Rep Med 41 –

1. What as a matter of fact is present on the slide?
2. In missing it, did the doctor exercise reasonable skill and care?

There is further support for Kerr J for his approach in that the same test was used in the two negligent interpretation of fetal ultrasound cases of *XXX v Kings* [2018] EWHC 646 QB and the earlier Court of Appeal case of *Lillywhite v UCL* [2005] EWCA Civ 1466.

Two things are of note about this test.

Firstly – it does in fact reflect the *Hunter v Hanley* skill and care test, the other test referred to by McNair J in *Bolam* – so it can at least be described as a test which is consistent with, or derives from, the *Bolam* decision. This was expressly referred to in the cases of both *Penney* and *Lillywhite*.

Secondly it is a less onerous test for a Claimant because, from the judgments, there does not appear to be the same requirement to prove that the defence expert falls into the *Bolitho* Exception of being unreasonable, irresponsible or failing to withstand a logical analysis of risks and benefits. It does not play such a central role. It is either considered rather reluctantly at the end of the process, or not at all.

This might be because, logically, use of the *Bolitho* Exception only makes sense if you are applying it to a body of doctors test, which they were not.

Kerr J was obviously concerned about the latter because he adopted a belt and braces approach of finding that the defence expert did fall into the *Bolitho* Exception by adopting too low a standard – just in case. This isn't the high hurdle claimants are used to in the *Bolam* test.

A similar "just in case" approach was taken by the first instance Judge in *Penney* and the Court of Appeal didn't disagree with it.

The judgment in *XXX* does not refer to *Bolam* or *Bolitho* at all.

Kerr J contrasted interpretation cases such as the one he was trying, which he called "pure diagnosis" cases, with "pure treatment" cases where the *Bolam* test does logically apply. He gave as an example the case of *C v North Cumbria* [2014] EWHC 61 QB.

There the allegation was of negligence in managing an induction of labour in a specific manner (timings and dosage of Prostin). In such a case there is a choice of approach by the doctors and it is absolutely logical to assess negligence by reference to whether the approach adopted by the defendant would be accepted as proper by a reasonable and responsible body of obstetricians. The test is suited to the circumstances.

So there will still be cases where *Bolam* does apply.

In my view the key feature for a scenario where the *Bolam* test does still correctly apply is one where the clinician is selecting one form of management from a number of different options – where there is a **choice**. It seems to me that this could apply to management in choosing how to investigate (and diagnose) as well as how to treat, so that *Bolam* can apply to some diagnosis as well as treatment cases.

I should add that, in *C v North Cumbria* at paras 20-25, Green J gives a fantastic guide (often quoted in subsequent judgments) on how to address the *Bolam* test and in particular whether the defence

expert evidence falls into the *Bolitho* Exception when you do still have a *Bolam* case.

In my view, if the reasonable skill and care test applies to interpretation of histology and ultrasound, then logically it must also apply to interpretation of all radiology and other test interpretation such as ECG and, crucially, CTG for that matter.

So 60 years after the *Bolam* test was first described, there is now authority that it does not apply to interpretation cases. Where else does it not apply?

Well this is of course consistent with the decision in *Montgomery v Lanarkshire* [2015] UKSC 11 which made it clear that, while the *Bolam* test had been applied to consent for 60 years too, it was expressly described by the Supreme Court as not appropriate for consent.

They replaced it with what was helpfully set out by the subsequent Court of Appeal decision of *Duce v Worcestershire NHS Trust* [2018] EWCA Civ 1307 as a two stage test –

1. What risks associated with an operation were or should have been known to the medical profession – a matter falling within expertise of medical professionals.
2. Whether the patient should have been told about such risks – were they material – not a matter to be determined by expert evidence alone.

Montgomery concerned an allegation of negligence in obtaining consent for an approach to management of pregnancy in an antenatal clinic (advising of the risk of shoulder dystocia and the option of elective Caesarean), not for surgery, as did the later case of *Webster v Burton Hospitals* [2017] EWCA Civ 62. So it is important to remember to apply *Montgomery* in similar "advice" type cases as well as surgical cases.

There is the further case of *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50. In holding that the hospital did owe a duty of care on the part of it's receptionists (and medical staff) not to provide misinformation to patients and was in breach, the Supreme Court described the duty simply as one to to take reasonable care. There was no reference to the *Bolam* test or associated analysis of how the defence expert evidence fell into the *Bolitho* Exception.

I set out a summary of my view of the different clinical scenarios and tests supported by the above cases –

- Advice and consent on treatment options – *Montgomery*
- Misinformation – reasonable care (*Darnley*)
- Interpretation of investigations like histology, radiology (and ECG, CTG) – reasonable skill and care (*Muller*)
- Selection of management where there is a choice – whether management means investigation, diagnosis or more commonly treatment – *Bolam* (*C v North Cumbria*)
- Consent to surgery – *Montgomery*
- Surgical injury – reasonable skill and care (logically, but no authority on this yet).

Finally, there has been some passing suggestion (for example Yip J in *Kennedy v Frankel* [2019] EWHC 106 QB) that the *Bolam* test is still relevant to the first stage in the *Duce* test in applying the *Montgomery* test to consent.

This might arise from para 115 of *Montgomery* where Lady Hale states – *"once the argument departs from purely medical considerations … the* Bolam *test becomes quite inapposite"*- i.e. *Bolam* does not apply to the second stage. This might be used to infer that it does however still apply to the first stage in *Duce/Montgomery*.

Is that correct?

It goes against the rest of the judgments – not just in the cases of *Montgomery*, *Duce* and *Webster* but other more recent cases like *Ollosson v Dr Lee* [2019] EWHC 784 QB – all of which describe *Montgomery* replacing *Bolam* without qualification. If *Bolam* did retain a specific role in the test for consent, you might expect these (often lengthy) judgments to say so.

If the *Bolam* test is still relevant to consent (used as it is normally – to mean the body of doctors test), then *Bolitho* is still relevant and the judgments would contain an analysis of why the defence expert did or did not fail that test and fall into the *Bolitho* Exception. None of them do.

Is it logically appropriate to apply the *Bolam* test to *Duce* stage 1 in considering an alleged failure by a clinician to know of risks associated with a procedure? Would being ignorant of such a risk be a practice accepted as proper by a reasonable and responsible body of doctors? It seems illogical to ask the experts to address the test in that way as no body of doctors would describe being ignorant as being an acceptable practice but that doesn't mean it's negligent.

The test seems logically better described as whether, in being ignorant of the risk, they were still exercising reasonable skill and care – in keeping up to date by attending meetings and reading journals for example. I.e. the same reasonable skill and care test as that in *Muller*, *Penney*, *XXX* and *Lillywhite* – and also referred to in *Bolam* itself. The *Bolam* test, as detailed by the House of Lords in *Bolitho*, is all about logic. There is a wonderful irony in trying to use it illogically in circumstances to which it is fundamentally not suited.

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