Bilal and Malik v St George's: pleadings, *Wisniewski* and useful comments on *Montgomery*

The Court of Appeal gave judgment on 13 June 2023 in *Bilal and Malik v St George's University Hospital NHS Trust* [2023] EWCA Civ 605.

This was an appeal by the children and administrators of an unsuccessful Claimant against an adverse judgment at trial dismissing his claim that the Defendant, by its surgeon Mr Minhas, had been negligent in failing to obtain informed consent to spinal surgery which, although performed properly, had led to serious neurological injury. The Claimant's case had been that Mr Malik should have been informed of alternative treatments, and that, if this had occurred, he would have chosen these in preference to surgery.

The primary issue at trial was one of fact, namely whether Mr Malik had been suffering severe intercostal pain, which Mr Minhas concluded was caused by compression of the left sided T10 nerve root. Mr Malik denied that he was suffering this pain, and his Particulars of Claim contended that the back pain he was suffering was neuropathic, not caused by nerve root compression. HH Judge Blair KC held that Mr Malik was complaining of severe intercostal pain and that a reasonable body of neurosurgeons would have concluded that the cause of that pain was nerve root compression. He therefore accepted that Mr Minhas had acted reasonably in advising Mr Malik to undergo surgery, and in not discussing any alternative treatments. As to causation he held that the Claimant had not satisfied him that, even if Mr Minhas had discussed alternative treatments, he would have declined surgery.

On appeal the Appellants contended that the Judge was wrong:

(1) to hold that a responsible body of neurosurgeons would have offered surgery without knowledge of the duration of the pain;

(2) to hold that Mr Malik had given informed consent; and

(3) to hold that causation had not been proved.

Ground 1 was the core of the appeal. The Appellants accepted that grounds 2 and 3 were parasitic upon ground 1.

As to ground 1 it was accepted that Mr Minhas had not asked how long the intercostal pain had been present; the medical records and his witness statement recorded no such enquiry. The core of the Appellant's case in the Court of Appeal was that it was mandatory to enquire as to the duration of symptoms and that, absent knowledge of the duration of the pain, Mr Malik could not have been properly advised as the merits of the proposed surgery or of any alternative treatments.

The Respondent contended that this case was not pleaded and was not put to Mr Minhas in cross-examination, meaning that he had no opportunity to explain his views as to the significance or otherwise of the duration of the pain. The Respondent further said that in any event the totality of the factual and expert evidence established that the pain had been present for a significant time by the date of surgery. It contended that it would be unfair to the Defendant, to Mr Minhas and indeed to the judge for an appeal on that basis to be allowed.

The Court of Appeal rejected the appeal on all grounds, and helpfully dealt with all three grounds notwithstanding the concession by the Appellants that grounds 2 and 3 were parasitic. The lead judgment was given by Nicola Davies LJ; King LJ and Coulson LJ agreed. There are three points in the judgment that are worthy of note as being of general significance.

Pleadings. Nicola Davies LJ stressed the importance of pleading the specifics of a case, citing *Lombard North Central v Automobile World* [2010] EWCA Civ 20, and commented at [45-46]:

> *The importance of pleadings carries particular weight in clinical negligence claims which can be complex and are dependent on expert evidence….. if Mr Malik, and his legal advisers, intended to rely upon an allegation that there was a negligent failure by Mr Minhas to ask Mr Malik about the duration of the intercostal pain, it was necessary to plead that allegation in the Particulars of Claim and this was not done.*

***Wisniewski* and inferences.** The Appellant argued that in the absence of a history of the duration of the pain an adverse inference should have been drawn, in accordance with *Wisniewski v Central Manchester* [1998] PIQR P324, on the grounds that the Defendant was at fault in failing to take such a history. The Court of Appeal rejected that argument, pointing out that before any inference can arise for the purposes of the principle there must be at least some evidence on the point from the party seeking to rely on the principle. There was none here and the judge had been right to reject the argument.

Arguments based on Wisniewski are increasingly prevalent. This judgment helpfully demonstrates the limits of the principle.

Montgomery. The issue of the interplay between the Bolam principle and Montgomery is current; it is before the Supreme Court in the case of *McCulloch v Forth Valley HB* for which judgment is awaited. HH Judge Blair KC had rejected the Claimant's case that Mr Minhas had been wrong not to discuss alternative treatments, holding that Mr Minhas' conclusion that there was no other treatment that was reasonably available to address the Claimant's pain had not been negligent, and that in those circumstances he was under no obligation to advise as to treatments he did not consider viable. The Appellant in Malik argued that this approach amounted to a gloss on Montgomery. The Court of Appeal rejected that argument at [66] per Nicola Davies LJ:

> *I accept the contention of the respondent that Montgomery draws a distinction between two aspects of a clinician's role, namely an assessment of treatment options (Bolam) and an assessment of what risks and treatment should be explained to the patient because they are material (Montgomery). 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 alternative or variant treatments." 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 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.*

We will have to await the decision of the Supreme Court before we have a definitive interpretation, but this is, I would suggest, a logical and persuasive analysis of the way that Montgomery should be applied.

Andrew Post KC
Leading Counsel for the Respondent
Hailsham Chambers
13 June 2023