

Medical negligence and diagnosis: further inroads into *Bolam*?

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Abstract

The Bolam test allows medical professionals to set the standard of care in medical negligence litigation. There is growing recognition that the medical professional's duty to the patient is complex and multifaceted and that Bolam may not be appropriate with respect to some aspects of the duty. Significantly, it has been rejected with respect to the duty to inform. Recent cases involving diagnosis and cancer screening raise questions about its application to these aspects of the medical professional's duty. It is timely to consider further inroads into Bolam by curtailing its application to diagnosis and rejecting its application to screenings tests.

Key words: *Bolam*; diagnosis; duty; negligence; screening; standard.

Introduction

The approach to the standard of care in medical negligence was set out by McNair J in *Bolam v Friern Hospital Management Committee*¹ when he directed the jury that, as long as a doctor acted in accordance with a practice accepted as proper by a responsible body of medical opinion, that doctor may not be found negligent even though there is another body of opinion expressing a contrary view.² Lord Scarman subsequently declared in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*, ‘the law imposes the duty of care: but the standard of care is a matter of medical judgment’.³ In the same case, Lord Diplock observed that the doctor’s duty is a comprehensive one that is ‘not subject to dissection into a number of component parts to which different criteria of what satisfy the duty of care apply, such as diagnosis, treatment, advice’.⁴

However, the dissection of the doctor’s duty had already begun in North America and soon swept across the common law world.⁵ The UK Supreme Court recognised this in *Montgomery v Lanarkshire Health Board*,⁶ when it rejected the application of *Bolam* to

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1 [1957] 1 WLR 583.

2 The House of Lords affirmed this in *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634.

3 *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] 1 AC 871, 881.

4 *Ibid* 893.

5 *Canterbury v Spence* 464 F 2d 772 (1972); *Reibl v Hughes* (1981) 114 DLR 1; *Rogers v Whitaker* (1992) 174 CLR 479; *Foo Fio Na v Dr Soo Fook Mun* [2007] 1 MLJ 593.

6 [2015] UK 11; [2015] AC 1430.