Medicine, Court and Logical Sense

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Of Medicine, Court, and Logic

In teaching the rudiments of the 1957 Bolam test as 'reined' in by the Bolitho principle, it is invariable for at least one student to ask "is it not obvious that explanations must make logical sense to the Court?" Which invariably raises the point in my mind, "The question should be: The Bolitho principle demands that Bolam oriented statements makes logical sense to whom? Is it to the Court? Is it to any independent observer?"

In *Bolitho v City & Hackney Health Authority [1]* the House of Lords ruled on the death of a 2-year old child suffering from breathing difficulties where a doctor failed to attend due to a malfunctioning bleep. Applying Bolam's Law, the Court accepted the peer opinion review favouring the doctor who stated that even if she had attended the child, she still would not have intubated as it was not indicated in this case. At Appeal, the House of Lords accepted the majority opinion favouring this explanation, re-confirming Bolam's Law and also stating that this explanation made *logical sense* to the Court and was thus defensible. This was the birth of Bolithos' law or principle. The question raised here is "To *whom* should the proferred explanation make logical sense?"

To those stating that logical sense is the logical sense, I reply that a bottle maybe both half empty and half full, with discernment being most subjective. And here, we are referring to a major medico-legal principle reigning in Bolam's principle which, however bleak its likely future [2], still guides UK Courts' decisions involving diagnosis and treatment. So, I ask again and now with reference to the major landmark UK Supreme Court Case *Montgomery v. Lanarkshire Health Board* [3].

It would be salutary to remind that in this Appeals case, £5.25 million was awarded to the plaintiff who had suffered shoulder dystocia at birth, with subsequent fetal injuries including spastic quadriplegic dyskinetic cerebral palsy consistent with underlying hypoxic-ischaemic encephalopathy from peri-partum hypoxia. The claim centered, among other allegations, on the lack of disclosure of information pertinent to a

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situation fraught with high risks related to maternal diabetes and short stature in the presence of a large baby. The plaintiff claimed that a cesarean section rather than a vaginal route for delivery would have been chosen had the defendant disclosed the risks. In the original case in the Scottish Courts in 2010, the same obstetrician had been cleared when she invoked Bolam's law. In other words, the Court had accepted the plea that since the obstetrician's peers agreed that the doctor knew best what should be disclosed to the patient, all was well with the world. The obstetrician walked free. And even in the 2015 Appeals case, the Bolam argument still held some degree of sway, as the final decision was not unanimous.

I quote from the official transcript of the 2015 Appeal case:

Mrs. Montgomery was told that she was having a larger than usual baby. But s not told about the risks of her experiencing mechanical problems during labor. In particular, she was not told about the risk of shoulder dystocia...(of) 9-10% in the case of diabetic mothers. Unsurprisingly, Dr ... accepted that this was a high risk. But, ...said that her practice was not to spend a lot of time, or indeed any time at all, discussing potential risks of shoulder dystocia.....because, in her estimation, the risk of a grave problem for the baby resulting from shoulder dystocia was very small. She considered, therefore, that if the condition was mentioned, "most women will actually say, 'I'd rather have a cesarean section'.

At this point, I pause and ponder and wonder if all my life. Well, to most obstetricians' logic the proferred explanation by the defendant would have failed Bolam's test badly. It is NOT logical to disclose high risks to the patient so that she would not prefer a cesarean section. Who wants to risk a child's life and invite disaster by purposefully manipulating a patient in avoiding a c-section. And yet, the Scottish Court in 2010 and part of the UK Supreme Court in 2015 felt that Bolam made logical sense in this case. It seems logical sense is multi-faceted.

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Conflict of Interest

All authors have read and approved the final version of the manuscript. The authors have no conflicts of interest to declare.

References

[1] Bolitho v City and Hackney Health Authority [1997] UKHL 46; [1998] AC 232; [1997] 4 All ER 771; [1997] 3 WLR 1151.

[2] Badenoch J. A doctor's duty of disclosure and the decline of 'The Bolam Test': A dramatic change in the law on patient consent. Med Leg J. 2016 Mar;84(1):5-17. [**PMID**: 26683408]

[3] Heywood R. RIP Sidaway: patient-oriented disclosure—a standard worth waiting for? Montgomery v Lanarkshire Health Board [2015] UKSC 11. Medical Law Review. 2015 Sep 1;23(3):455-66.