Shared Decision Making
(Just how complicated is it?)

Michael Mylonas KC

SERJEANTS' INN

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In the Beginning there was

Bolam V Friern Hospital Management Committee [1957]

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Bolam - Background

- John Hector Bolam - Salesman
- April 29th 1954 : self admitted to Friern Hospital (post suicide attempt)
- July 30th : discharged
- August 16th: re-admitted
- August 18th: consented for ECT by Dr de Bastarrechea
- August 19th: first treatment
- August 23rd: second treatment

Bolam - Treatment

- No restraint
- No muscle relaxants
- No warning of the risk of fracture

Bolam - Treatment

- HB on a table, pillow under his back and a gag
- 3 male nurses around him
- Dr Allfrey administered 1 shock for a second
- Then 4 further momentary shocks to dampen the amplitude of the jerking movement of Mr Bolitho's body

Bolam - Outcome

- Bilateral fractures of the pelvis on each side
- Head of the femur driven through the acetabulum, shattering it
- Catastrophic and life altering orthopaedic injuries

Bolam - Claim

- Claim brought alleging negligence in administering ECT :
  - without a muscle relaxant
  - without restraint
  - without advising of the risks of fracture

Bolam – The Expert Evidence

- Claimant's evidence from experienced consultant psychiatrist:
- "foolhardy" not to provide manual restraint or use relaxant
- This expert always warned of the hazards of ECT including fractures

Bolam – The Expert Evidence

- Defendant's evidence :
- Unnecessary to inform Mr B of the risks of fracture
- Reasonable not to restrain or use relaxants
- Could be dangerous or even fatal

Bolam Judgment – McNair J

"A doctor 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"

"A doctor is not negligent if he is acting in accordance with such a practice merely because there is a body of opinion that takes a contrary view"

Bolam

Bolam v Friern

Judgment for Defendant

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Then came ….

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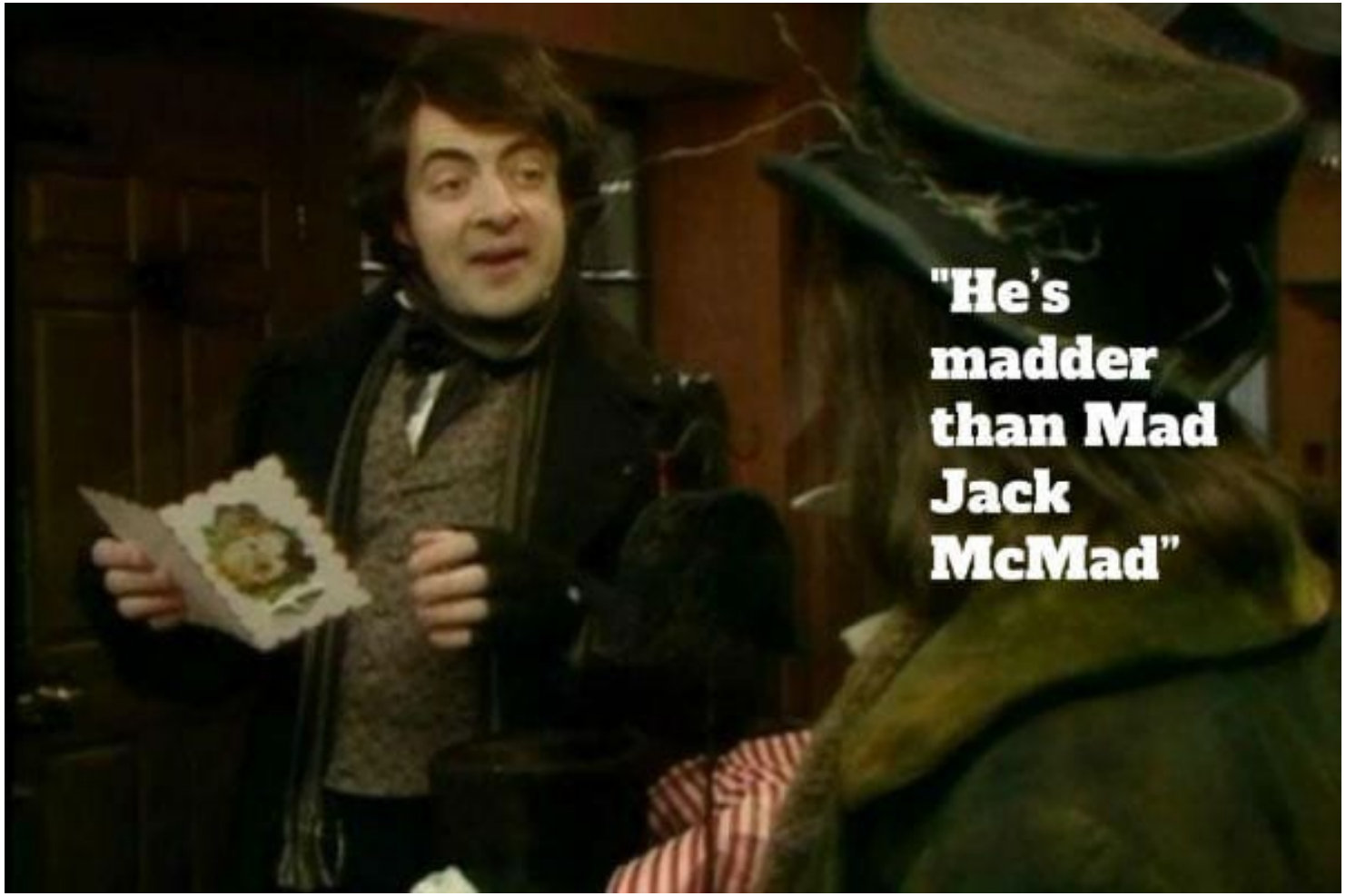
Then came ….



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Then came Bolitho (HL)….

- Jan 11th 1984: Patrick Bolitho (2) admitted to Barts with croup under Dr Janet Horn (senior paeds reg) & paeds SHO
- Jan 15th: Discharged
- Jan 16th: re-admitted and examined by the SHO. 1:1 Obs overnight
- Jan 17th: in morning, reduced air entry – monitored
- 1240: deteriorated. Nurse asked Dr Horn to review. Didn't attend
- Patrick Recovered
- 1400: deteriorated. Called Dr Horn. Recovered during call. Did not attend
- 1430: deteriorated and arrested. Severe hypoxic ischaemic brain injury

Intermission
Primer in Clinical Negligence Litigation

To succeed a Claimant must show both:

(a)Breach of Duty; and

(b)Causation

SERJEANTS' INN

Back to Bolitho (HL) ….

Breach/Negligence

- D admitted Dr Horn was negligent in not attending/arranging attendance

Causation

- Dr Horn said she would not have intubated even if she had attended

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Bolitho – The Expert Evidence

- 8 experts!
- 5 for Patrick, 3 for the Trust
- All 5 for P:

*After second episode, **any** competent doctor would have intubated….*

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Bolitho – The Expert Evidence

- Defendant's expert (Dr Dinwiddie)

"displayed a profound knowledge of paed resp medicine, coupled with impartiality and there is no doubt of the genuiness of his opinion that intubation was not indicated"

SERJEANTS' INN

Bolitho – Claimant's Case

If the views of D's expert are not logical or sensible then, no matter how genuinely held, those views do not allow D to avoid liability.

Bolam – McNair J

"A doctor 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"

"A doctor is not negligent if he is acting in accordance with such a practice merely because there is a body of opinion that takes a contrary view"

Bolitho – The Expert Evidence

- Defendant's expert (Dr Dinwiddie)

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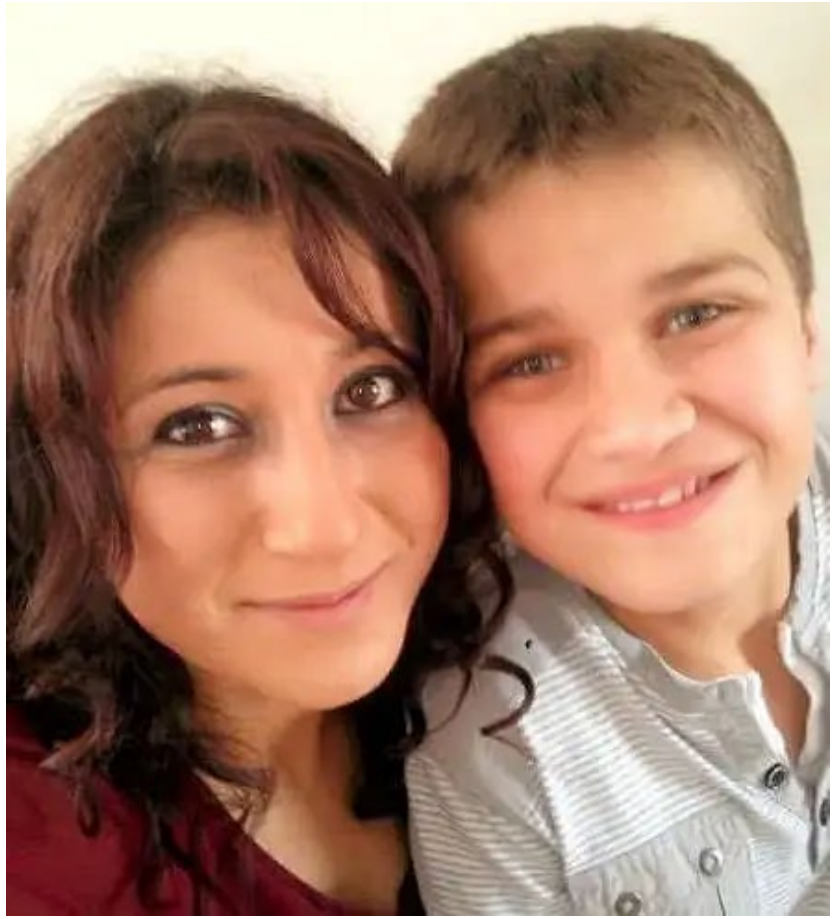
Judgment for Defendant

SERJEANTS' INN

Nadine Montgomery



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Consent & Montgomery v Lanarkshire (2015)

- 1st October 1999, Sam born
- Complications resulted in injuries to mother and child
- Claim brought alleging
  - Failure to discuss risks of shoulder dystocia and
  - Failure to discuss and offer her a C-section
  - Mismanagement of her labour

SERJEANTS' INN

Consent & Montgomery (2015) HL

- Nadine Montgomery's first pregnancy (under Dr McLellan)
- 5' tall
- Insulin dependent diabetes
- Risk of macrosomia
- In particular a risk of concentration of weight around the baby's shoulders and risk of shoulder dystocia
- Shoulder dystocia associated with:-
  - 11% risk of pp haem
  - 3.8% risk of 4th degree perineal tear

SERJEANTS' INN

Consent & Montgomery (2015) HL

- Labour induced with hormones
- After several hours, labour obstructed
- Further hormones administered over number of hours
- Then Dr McLellan applied forceps
- Baby's shoulder impacted when half of his head was outside the perineum

Consent & Montgomery (2015) HL

- Zavanelli - unsuccessful
- Dr McLellan applied “significant traction”
- Attempted to perform symphysiotomy (partially successful – no fixed blade scalpels available)
- With “just a huge adrenalin surge” Dr M delivered the baby
- 12 minute delay between delivery of head and body
- Hypoxic →CP
- Brachial plexus injury (Erb’s palsy)

Consent & Montgomery (2015) HL

- 36 week scan, est'd birth weight 3.9 kg @38 w
- Dr McLellan said if she thought 4 kg, would offer CS
- At 36 w, NM expressed concern about size of baby and ability to deliver vaginally
- Those concerns had been expressed *"more than once"*
- Dr McLellan Did not arrange a 38 w scan (anxiety)
- Then arranged induction at 38+5
- (>4kg…)

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Consent & Montgomery (2015) HL

- No mention of the risk of shoulder dystocia
- No offer of CS

"Since I felt the risk of .. SD was low, I didn't raise it with her and had I raised it with her, then yes, she would have no doubt requested a CS…".

Dr McLellan

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Consent & Montgomery (2015)

"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. 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, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it"

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Consent & Montgomery (2015)

- Can't simply be reduced to percentages (include nature of the risk if it eventuates etc)
- Dr's role involves a **dialogue**

"not fulfilled by bombarding pt with technical information which she cannot reasonably be expected to grasp"

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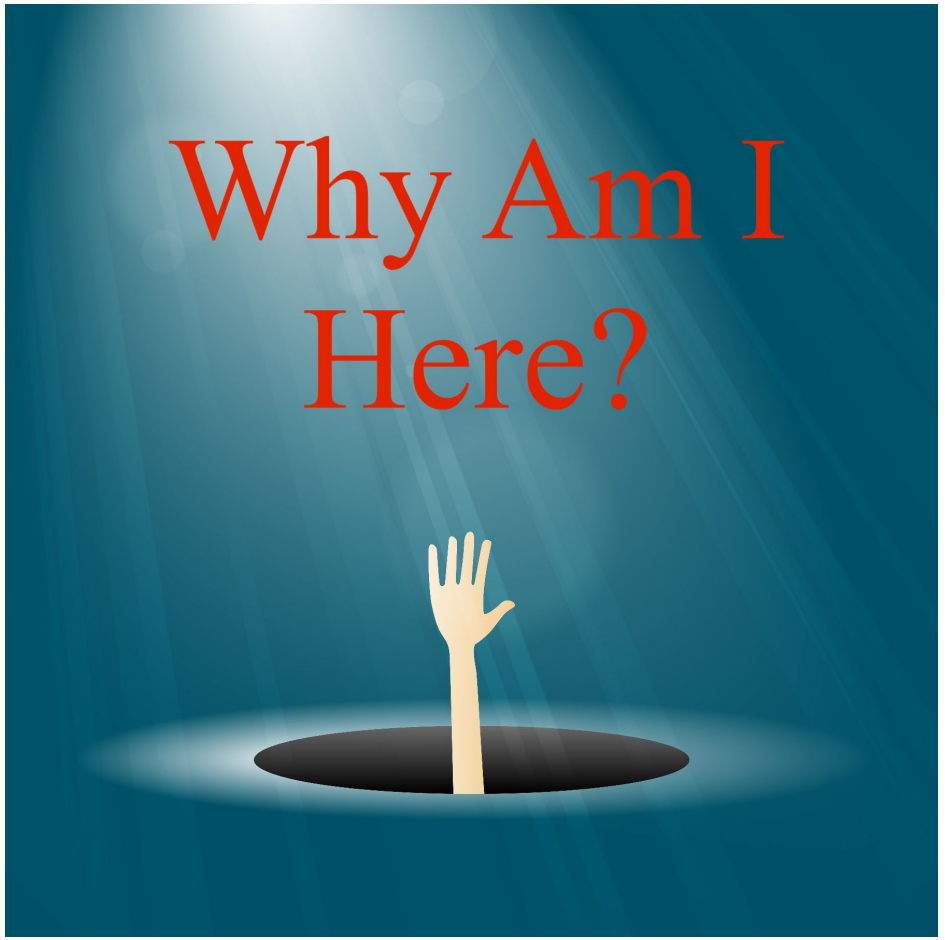
Consent & Montgomery?



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Consent & Montgomery – *WHY AM I HERE*?

- How far do we have to go in consenting
- Do we have to explain every option?
- Even ones we don't think are reasonable?
- If we don't mention every option am I vulnerable?
- How relevant are pt's views?

SERJEANTS' INN

Consent after Montgomery – Bilal (2023 CA)

- Spinal surgery
- Issues re discussion of alternatives
- D’s expert said all reasonable treatment options excluded

Consent after Montgomery – Bilal (2023 CA)

*"In my judgment **it is for the doctor** to assess what the reasonable alternatives are….. Thus the Judge at was correct to apply Bolam and to conclude that his assessment reflected the guidance set out in para 87 of Montgomery."* ***Nicola Davies LJ***

SERJEANTS' INN

Montgomery, Bilal now **McCulloch** (2023 **SC**)

- March 2012, admitted with chest pain, nausea and vomiting
- ECG. Dr Labinjoh reviewed. Not standard pericarditis. No further chest pain
- Didn't rx NSAIDs
- April 6th d/c
- April 7th arrested and died (idiopathic pericarditis)

SERJEANTS' INN

Montgomery, Bilal now **McCulloch** (2023 **SC**)

C's case

- Negligent failure to advise about possible treatment with NSAIDs
- Had NSAIDs been offered, they would have been accepted and arrest would have been avoided

SERJEANTS' INN

Montgomery, Bilal now **McCulloch** (2023 **SC**)

Judgment:

The correct test to decide what is a reasonable alternative treatment is what can be referred to as the ‘professional practice test’ (*Bolam*). A doctor who has taken the view that a treatment is not a reasonable alternative treatment for a particular patient will not be negligent in failing to inform the patient of that alternative treatment if the doctor's view is supported by a responsible of body of medical opinion.

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SERJEANTS' INN

Montgomery, Bilal now **McCulloch** (2023 **SC**)

To Be Clear:

If there are **ten** possible treatment options; the doctor, exercising his or her clinical judgment, decides that only four of them are reasonable and that decision to rule out six is supported by a responsible body of medical opinion. The doctor is not negligent by failing to inform the patient about the other six even though they are possible alternative treatments

SERJEANTS' INN

Montgomery, Bilal now **McCulloch** (2023 **SC**)

To Be Clear:

The duty of reasonable care would then require the doctor to inform the patient **not only** of the treatment option that the doctor is recommending **but also of the other three reasonable alternative treatment options** (plus no treatment if that is a reasonable alternative option) indicating their respective advantages and disadvantages and the material risks involved in each treatment option

Shared Decision Making
(Just how complicated is it?)

Michael Mylonas KC

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Shared Decision Making
(Hopefully less complicated than you thought)

Michael Mylonas KC

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Bonus Slides !

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NICE?

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CG 132/p101 [2011]

"The GDG also believed it was important for an individual obstetrician to be able to exercise their own beliefs about what is the best course of action in any given situation. Thus, if an obstetrician feels a woman's request for CS is not appropriate after the woman has received appropriate counselling and support, then the obstetrician should be able to decline to support the woman's request."

SERJEANTS' INN

CG 132/p101 [2011]

"….. However, this does not overrule the woman's rights to express a preference for a CS, and in this instance the obstetrician should transfer care of the woman to an obstetrician who is happy to support the woman's choice."

SERJEANTS' INN

CG 192/p47 [Jan 2024 rev]

"The committee discussed the potential rare situations where there was a clinical reason behind a reluctance to perform a maternal request caesarean birth, but agreed that in this situation a full multidisciplinary team discussion would be needed during the pregnancy to agree a plan for the woman or pregnant person…"

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