

## Case Note

### The continuing demise of *Bolam*?

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#### Introduction

In *Montgomery v Lanarkshire Health Board*<sup>1</sup> it was held that the explaining of risks by a medical practitioner when advising a patient was not governed by the *Bolam*<sup>2</sup> test. Instead, the requirement was "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 be aware that the particular patient would be likely to attach significance to it". The doctor should engage in a dialogue with the patient, in a manner which is comprehensible, with the aim of ensuring that the patient understands the seriousness of the medical condition, the expected risks and benefits of the proposed treatment and any reasonable alternatives.

Subsequently, the courts have considered the applicability of this approach in the prospective liability of other professionals. In the context of solicitors' liability, in *Baird v Hastings*<sup>3</sup> the Northern Ireland Court of Appeal observed that the therapeutic duties owed by a doctor to a patient raised different questions from those arising between a solicitor and client, but that a solicitor must take reasonable care to ensure that the client understands the material legal risks involved in a transaction which the client has instructed the solicitor about. In common with the doctor/patient relationship, a solicitor should engage in dialogue with the client in a manner s/he can understand and materiality is the test - whether a reasonable client would be likely to attach significance to the risks arising which should be reasonably foreseeable to the competent solicitor.

In *O'Hare v Coutts*,<sup>4</sup> *Montgomery* was considered in relation to advice provided by an investment adviser employed by the defendant bank. *O'Hare* is the focus of this case note.

#### The facts

The O'Hares between 2007 and 2010 made five key investments, mainly on the advice of Coutts salesperson, Mr Shone. Mr Shone was a private banker at Coutts and was the main contact and relationship manager for the O'Hares from 2001 until he left Coutts in 2008. For the purposes of this case note the central element of the case was the contention that in contract and in negligence, these investments were unsuitable for the O'Hares' appetite for risk. Mr Shone had recorded in contemporaneous or near contemporaneous notes and reports to his credit committee that Mr O'Hare was "keen" and "very keen" to enter into the investments. The O'Hares' submission was that Mr Shone was a persuasive salesman who persuaded them to commit to higher risk products than they would otherwise have

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<sup>1</sup> [2015] A.C. 1430

<sup>2</sup> *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582

<sup>3</sup> [2015] NICA 22

<sup>4</sup> [2016] EWHC 2224

favoured. Coutts defended the claim on the basis that the O'Hares were sophisticated investors, Mr O'Hare was an experienced businessman and Mrs O'Hare had a background in business administration. The O'Hares overall wealth was estimated to be in a range of £25 million to £38 million which, Coutts argued, evidenced their business acumen and in this context the advice provided was appropriate to them. Coutts' contention was that the claimants were confusing poor performance of the investments, recognised only with the benefit of hindsight, with unsuitability of the original investment advice.

### Kerr J's analysis of the fact and the law

Kerr J categorised Mr O'Hare as an astute businessman who knew something about investing, but his expertise was no match to that of Coutts, hence his need for investment advice from them.<sup>5</sup> In terms of the nature of the advice given, Mr Shone's correspondence to Mr and Mrs O'Hare indicated "a linguistic practice" describing acceptance of a recommendation by the O'Hares "as the formation of a view, as if the view were not informed by the recommendation."<sup>6</sup> In that this and other evidence indicated that Mr Shone had utilised sales techniques, this in itself did not constitute a breach of duty by Coutts, even if the result was that the O'Hares had adopted more risk than might otherwise have been the case. The O'Hares' contract with Coutts provided, without charge, "advice about the investment services we offer and the kinds of investment that would in our view be most appropriate for you". There was no compulsion to accept the advice, so Coutts could only profit if the O'Hares contracted separately for recommended products. Kerr J's conclusion was that, as long as the products sold are suitable, selling and therefore the use of sales techniques are part of the "raison d'être" of a bank. Therefore, use by a private banker of persuasive sales techniques to induce a client to take risks which would not be taken but for that persuasion is not intrinsically wrong, as long as the client can afford to take the risks, demonstrates a willingness to take them and so long as the risks are not "so high as to be foolhardy".<sup>7</sup> In this latter respect, an investment adviser must not take advantage of a client's "reckless gambling streak" nor advise the risk of all of his or her wealth, but when appropriate, "advice from a private banker may condition the client's risk appetite, rather than the other way round."<sup>8</sup> Profit generation is not incompatible with such an approach. In the same way that a lawyer might be justified, even negligent in failing to give such advice, to warn a client that a settlement offer is unduly low and that the risk of going to trial is worth taking - even though the lawyer will generate additional fees from this approach - a provider of financial advice "might even be negligent" in failing to advise a client who is so risk averse that he might "lose out on a bonanza of high returns".<sup>9</sup>

It was not in dispute that tort and contract impose equivalent obligations - to use reasonable skill and care when recommending investments. When determining whether or not these standards have been met, the *Bolam* test provides the court with a tool to consider whether the defendants acted "in accordance with a practice of competent respected professional opinion [within the banking sector]".<sup>10</sup>

The court heard evidence from two expert witnesses, both with considerable experience in

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<sup>5</sup> Para [62]

<sup>6</sup> Para [82]

<sup>7</sup> Paras [56], [67] and [217]

<sup>8</sup> Para [218]

<sup>9</sup> Paras [219]-[220]

<sup>10</sup> Paras [199]-[201]

advising on banking and financial markets and investments. There was little agreement between them, such that Kerr J concluded:

“They did not reassure me that there is a clear consensus within the private banking and financial services industry about the boundaries that delimit the proper role of a financial adviser, and the extent to which use of persuasion to run risk, and thereby achieve sales, is acceptable practice.”<sup>11</sup>

In the absence consensus within the financial services industry about the approach to risk appetite and following the approach taken in *Montgomery v Lanarkshire Health Board* in the medical context, Kerr J concluded that, with regard to giving investment advice, the extent to which communications is needed between financial adviser and client to ensure the client understands the advice and associated risks is not determined using the *Bolam* test. Kerr J also noted that the Financial Conduct Authority's Conduct of Business Sourcebook (COBS) rules make no reference to a ‘responsible body’. Such industry or professional regulatory regime provisions constitute strong evidence of what the common law requires, given that “the skill and care to be expected of a financial adviser would ordinarily include compliance with the rules of the relevant regulator”.<sup>12</sup> In this latter regard, the COBS rules included provision regarding requisite explanations which included similarities to the *Montgomery* requirements and, as such, were “very difficult to square with the application of a conventional *Bolam* approach.”<sup>13</sup>

Applying these considerations to the facts of the case, the claim failed.

### Commentary

At its simplest, the decision in *O'Hare v Coutts* represents a rejection of the *Bolam* test in favour of the approach in *Montgomery v Lanarkshire Health Board* - when providing investment advice a bank should take reasonable care to ensure that the client is aware of any material risks involved in the recommended investment and be advised of any reasonable alternatives. However, the larger picture is perhaps more interesting. *Montgomery* may initially have been seen as reflecting a decision in a line of medical negligence case law which sits apart from the approaches taken in non-medical professional negligence cases and some other areas of negligence. [ref my book chapter]. This was the position following the House of Lords decision in the medical case, *Chester v Afshar*.<sup>14</sup> For a short time after *Chester* was decided, concerns arose within the professional negligence community that it might herald a change in approach, in that instance to causation, more widely than its factual medical negligence context. These concerns were alleviated by *White v Paul Davidson & Taylor*,<sup>15</sup> a solicitors' liability case, in which the Court of Appeal held that the *Chester* principle should be restricted to clinical negligence cases involving the failure to warn of risk. *Chester* did not establish a new general rule, but rather the decision was limited to the policy exception deemed necessary to address the special importance of informed consent to medical treatment. In the following year, this position was reinforced by the decision in

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<sup>11</sup> Paras [188]-[189] at [189]

<sup>12</sup> Paras [204] and [207], citing HHJ Jack QC in *Loosemore v. Financial Concepts (a firm)* [2001] Lloyds Rep PN 235

<sup>13</sup> Para [208]

<sup>14</sup> [2004] 4 All ER 587, HL

<sup>15</sup> [2004] EWCA Civ 1511, CA

*Beary v Pall Mall Investments*,<sup>16</sup> a case involving claims for negligent financial advice, where *Chester* was also distinguished.[for further discussion, see my sols neg book, ch2]

A little over a decade on from *Chester*, the position following *Montgomery v Lanarkshire Health Board* is looking different. We have a solicitors' liability case in *Baird v Hastings* and now a financial advice case in *O'Hare v Coutts* in which the *Montgomery* approach has been adopted. However, the concerns following *Chester* arose from the prospect that an especially claimant friendly approach might cause problems for professions where advice giving was a primary focus. Any similar concerns following the decision in *Montgomery* will not have been reinforced by the decision in *O'Hare v Coutts*. Not only were the claimants unsuccessful, but they were unsuccessful even though Mr Shone, potentially a key witness, did not give live evidence. Mr Shone had responded to calls to give evidence that he was "too preoccupied with other business responsibilities".<sup>17</sup> Admissible hearsay evidence, in the form of Mr Shone's contemporaneous notes were available. Mr O'Hare gave evidence in writing and at trial. It was argued on behalf of the O'Hares that Mr Shone's notes were misleading by omission - they omitted the elements which sought to influence Mr O'Hare's decision-making and exaggerated his appetite for risk. The O'Hares could have sought to compel Mr Shone's attendance to enable cross examination, but instead chose to rely on the fact that Mr O'Hare's account of the relevant discussions would, in most instances, remain uncontradicted by any other witness.<sup>18</sup> Kerr J found the latter approach reasonable, it was for Coutts to seek to rebut the O'Hares' account of events.<sup>19</sup> Kerr J described Mr O'Hare as an "honest and truthful witness",<sup>20</sup> subjected to "tough cross-examination" regarding the accuracy of Mr Shone's record, whereas Mr Shone was not present to vouch for the accuracy of his documents and to seek to defend this position.<sup>21</sup> Notwithstanding this potential evidentiary weakness on the part of the defendant, the application of the *Montgomery* approach saw them successful. In *Montgomery* itself the focus is on ensuring full disclosure, whereas *O'Hare* presents more pragmatic underpinnings in terms of acknowledging that an element of sale persuasion is acceptable, even expected, and with respect given to the industry's own rules.

More broadly, the decision in *O'Hare* represents a further step away from *Bolam*, but a step only in bringing under the *Montgomery* umbrella situations where clients (as was the position with patients in *Montgomery*) have discretion within their decision making.

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<sup>16</sup> [2005] EWCA Civ 415, [2005] All ER (D) 234 (Apr), CA

<sup>17</sup> Para [19]

<sup>18</sup> Para [30]

<sup>19</sup> Para [40]

<sup>20</sup> Para [52]

<sup>21</sup> Para [42]