Physical Medicine & Rehabilitation Research & Reports

Bernardino S. Physi Medi Rehabi Res Rep: 105

Original Article Open Access

Bolam vs. Bolitho: A Medico-Legal Inquiry for a Test in Medical Negligence

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Received Date: 29th October, 2022; **Accepted Date:** 06th November, 2022; **Published Date:** 12th November, 2022.

Abstract

Lately, the debate centering on medical negligence has been a deeply invigorated one. On the one hand, some argue for the Bolam Test as the right standard for medical malpractice. On the other hand, some vouch for the Bolitho Test to the effect that Bolam has lived past its shelf life. Entangled are the courts which have to decide on the rightful test to apply. The paper offers a medico-legal analysis of the conflict between the Bolam and Bolitho tests. It clarifies that the court in Bolitho did not overrule Bolam but only modified the general rule in Bolam as circumstances may require. Neither has the Bolam Test lived past its shelf life as it is alive, well, and kicking.

Introduction

In modern law and development discourse, the wealth of a nation is not only measured through the Gross Domestic Product but also through the liberties that citizens enjoy. It, therefore, means that for there to be meaningful development the law must play a fundamental role. Consequently, the law is seen as a tool for social, economic, and political development. A productive nation must be healthy for an unproductive nation can never be productive.[1]

The right to health care services is not a constitutional rope of sand but a justiciable constitutional guarantee. For that reason, the Constitution of Kenya guarantees every person the right to the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare[2] for him to have a dignified life. In addition, no person should be denied emergency medical treatment.[3]

On the other hand, the Public Health Act[4] establishes health authorities[5] whose duties are to take all lawful, necessary, and reasonably practicable measures for preventing the occurrence or dealing with any outbreak or prevalence of any infectious, communicable or preventable disease, to safeguard and promote public health and to exercise the powers and perform the duties in respect of public health conferred or imposed on them by the Act or by any other law.[6]

Since the provision of health would be crippled without medical practitioners, Parliament enacted the Medical Practitioners and Dentists Act[7] which, among others, makes provision for the registration of medical practitioners and dentists. The Medical Practitioners and Dentists Act establishes the Kenya Medical Practitioners and Dentists Council[8] as a body corporate.[9]

The functions of the Council include but are not limited to establishing and maintaining uniform norms and standards on the learning of medicine and dentistry in Kenya, prescribing the minimum educational entry requirements for persons wishing to be trained as medical and dental practitioners, licensing eligible medical and dental interns, determining and setting a framework for the professional practice of medical and dental practitioners and registering and licensing health institutions.[10]

Medical Malpractice

In medical practice, the Hippocratic Oath acts as the ethical guideline for doctors. Accordingly, from the maxim primum non-nocere, doctors make oaths and state that they shall not harm their patients. From the Hippocratic Oath is also drawn the principle of beneficence which requires doctors to do good to their patients. This implies an undertaking on the part of doctors 'to exercise reasonable care and skill in diagnosing, advising, and treating their patients.[11] As imperfect beings, doctors might unknowingly harm their patients. However, situations may arise where doctors intentionally harm their patients. The former action may be

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[1] S Ouma, H Mbori & C Amutete, Engendering rule of law in health care delivery in Kenya. Wisconsin International Law Journal, Vol. 35, No.1, 82.

[2] Article 43(1) (a), Constitution of Kenya.

[3] Article 43(2), Constitution of Kenya.

[4] Cap. 242. Laws of Kenya.

[5] Public Health Act, section 2.

[6] Ibid, section 13.

[7] Cap. 253. Laws of Kenya.

[8] Medical Practitioners and Dentists Act, section 3.

[9] Ibid, section 3(2).

[10] Ibid, section 4.

[11] A Grubb, J Lang, and J Mc Hale, Principles of Medical Law, 3rd edn, Oxford, 3.30. See also Jones v Manchester Corporation (1952) QB 852.

justified whereas the latter is unjustified and may fetch criminal and/or civil liability.[12]

Medical malpractice, also known as medical negligence, has received much academic scrutiny. Marc and Kay define it as 'any unjustified act upon the part of a doctor or other health care worker which results in harm to the patient'.[13] For Claudia Carr, medical negligence 'is concerned with the legal consequences of a medical professional negligently treating a patient.'[14] Alderson B in Blyth v Birmingham Waterworks Company,[15] stated that 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do'.

The Kenyan Medical Practitioners and Dentists Act does not define medical malpractice but alludes to professional misconduct which is 'a serious digression from established or recognized standards or rules of the profession, that includes a breach of such codes of ethics or conduct as may be prescribed by the profession from time to time.'[16] Medical malpractice can therefore be defined as a deviation from an established standard of the medical profession which results in harm to a patient.

Where a patient suffers an injury as a result of negligent harm by a medical practitioner he or she should be able to be compensated. For that to be so, the patient needs to prove three ingredients i.e. that there existed a duty of care between him and the doctor, that the doctor breached the duty of care and as a result of the breach of duty he has suffered an injury.[17]

The leading authority on the duty of care is Donoghue v Stevenson,[18]where the neighbor principle was enunciated by Brett Master of the Rolls. The principle propounds that a duty of care exists where injury to another person is reasonably foreseeable. However, the duty principle existed well before the case of Donoghue v Stevenson as seen in the case of R v Bateman.[19] In Bateman Lord Hewart CJ expressed himself as follows: 'if a doctor holds himself out as possessing such skill and knowledge, by or on behalf of the patient, he owes a duty to the patient to use caution in the undertaking the treatment'.

The other limb of negligence that needs to be proved is the breach of duty. What then is the standard of care in breach of duty? It is trite law that where there is no established standard of care, for instance in cases where no special skills are involved, then the test would be that of the man on top of the Clapham Omnibus. The question to be asked is; what would the reasonable person do in the same circumstances as the defendant?

For professionals, practice is always established which is regarded as proper for the profession. The standard is that of a peer in the same profession and not the man on the Clapham omnibus because the ordinary person has no special skill.[20] It follows that any act which falls below the practice amounts to professional negligence.[21] Nonetheless, they may be a divergence of opinion as to what constitutes proper practice within a particular profession as seen in the cases of Bolam v Friern Barnet Hospital Management Committee[22] and Bolitho v City & Hackney Health Authority.[23]

Bolam v Friern Barnet Hospital Management Committee

In the case, the plaintiff underwent ECT to help treat his mild depression. In the operation, there was the risk of convulsions but was not informed of the risk. He was neither given a muscle relaxant drug nor restrained. The plaintiff, therefore, suffered a fractured hip in the circumstances. The plaintiff contended that he was not informed of the risk involved thus the hospital was vicariously liable for the doctor's negligent actions.

Nonetheless, expert witnesses could not agree on the proper practice at the time. One school of thought posited that restraining a patient reduced the risk of fractures whereas the other took the view that restraining a patient increased the risk.[24] In his direction to the jury, which became the ratio in negligent claims, McNair J stated that the test for negligence was that of the man on the street where no special skills were involved however, for professionals the test was that of the skilled person 'exercising and professing' such skill in the profession.

In sum, McNair J expressed himself that a doctor is not negligent if he 'acts following a practice accepted as proper by a responsible body of medical men skilled in that particular act notwithstanding the existence of a body of opinion that takes a contrary view'.[25]

It is of utmost importance to mention that the dictum of McNair J is two-pronged, to wit, a doctor is not negligent if his actions match those of other doctors in the same position as his and the doctor is not negligent because other doctors hold the opinion that his actions are not per a practice accepted as proper by the medical profession.[26]

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[12]See R v Cox (1992) 12 BMLR 38.

[13] Marc Stauch & Kay Wheat, Text, Cases and Materials on Medical Law and Ethics. 4th edn, 243.

[14] Claudia Carr, Course Notes Medical Law and Ethics. Routledge, 1.

[15] (1856) Exch 781, 784.

[16] Medical Practitioners and Dentists Act, section 2.

[17] Claudia Carr, Course Notes Medical Law and Ethics. Routledge, 1.

[18](1932) AC 562.

[19](1925) 19 Cr App Rep 8.

[20] See McNair J in Bolam v Friern Barnet Hospital Management Committee (1957) 2 All ER 118, 121.

[21]Wilsher v Essex Area Health Authority.

[22] (1957)

[23] (1997)

[24] Ifeoluwayimika Bamidele, The Bolam Test and Negligence of Medical Practitioners: Balancing Patient's Demands and the Liberty of Doctors. Akungba Law Journal, Vol. 2, No.1, 2013, 235.

[25] Supra (n 19).

[26]Claudia Carr, Course Notes Medical Law and Ethics. Routledge, 8.

The Bolam test,[27] as it came to be known, was applied with its rigidity in the case of Maynard v West Midlands Regional Health Authority.[28] In the case, there were two competing bodies of expert opinion favoring the plaintiff's and the defendant's sides. It was held that as soon as there was evidence that the doctor's actions were approved by a professional opinion that was enough to disprove any allegation of negligence hence there was no room for the judge to decide between the two schools of thought.

As far as informed consent is concerned, it was held in Sidaway v Bethlehem Hospital[29]that a doctor would not be negligent if he did not inform a patient about a particular risk where a respectable body of professional opinion would also not inform him/her of the risk. In Lord Scarman's words 'the Bolam principle may be formulated as a rule that a doctor is not negligent if he acts under a practice accepted at that time as proper by a responsible body of medical opinion even though other doctors adopt a different approach. In short, the law imposes the duty of care, but the standard of care is a matter of medical judgment.'[30]

Criticism of the Bolam Test

In as much as the Bolam Test ruled for over four decades, it was not without its criticisms. One of them is that the test is very rigid. This is because as per the guidelines of McNair J a judge has no discretion but to accept as true line, hook, and sinker the opinion of a respected body of professionals in support of the actions of a doctor notwithstanding glaring evidence to the contrary. This makes it very difficult for a plaintiff to succeed in an action of negligence as seen in the Maynard and Sidaway cases.[31]

Bolam test is further criticized because it puts much emphasis on what is done rather than what ought to be done in the medical profession.[32] Put differently, it focuses on the staticity of medical practice rather than its dynamism. Miola and Brazier call it the 'Bolamisation' of medical negligence.[33] Stone argues that 'instead of upholding a standard of care that is good, Bolam defaults to a standard of care that can be supported, even if it falls below what is objectively acceptable'.[34]

Andrew Grubb et al argue that the Bolam test makes doctors judge in their own cause contrary to the maxim Nemo judex in causa sua.[35] To Jerameel, Bolam 'is a clumsy tool, born out of medical nepotism and implemented through a system of peer review, where doctors set the standards required of them and give testimony in each other's defense'.[36]

From Protectionism to Isolationism: Here Comes Bolitho

The case of Bolitho v City and Hackney Health Authority[37] concerned a boy who suffered brain damage owing to cardiac arrest which was caused by a partial blockage of the bronchial air passages. The defendants appreciated that there had been negligence in that a doctor who had been called for assistance on several occasions failed to attend.

It was not in contention that had the claimant been attended by a doctor he would not have suffered brain damage. There were two schools of thought, however, as to whether in the circumstances it was appropriate to intubate. The doctor who failed to attend to the patient contended that even if she attended to the claimant she would not have intubated. Besides, the cardiac arrest and ensuing brain damage would still have occurred.

For the claimant, expert evidence was adduced to the effect that the proper action that should have been taken in the circumstances was intubation which would have prevented the brain damage. It was the claimant's position in the House of Lords that he would not accept as true, the opinion of a responsible body of medical men where such opinion had no logical consistency and that it was for the courts and not medical men to decide what the standard of care was.

In his judgment for the House of Lords, Lord Browne-Wilkinson agreed with the claimant's position that it was not enough for a doctor to lead evidence from several medical experts who believe that the doctor's actions were proper to escape liability in negligence but such an opinion must have some logical basis. In his words: '… in my view, the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from several medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice.'

In short, what Lord Browne-Wilkinson proposed was that for a doctor not to be held negligent the expert evidence that he puts forward had to pass the test of logical consistency which involves the 'weighing of risks against benefits' to reach a defensible conclusion. If the expert evidence has not passed the logical consistency test then the judge, on the rarest of occasions, has no option but to reject it altogether.

The logical consistency test became a darling for claimants and was adopted in the case of Marriott v West Midlands Health Authority.[38] In this case, the claimant suffered an

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[27] C Stone, 'From Bolam to Bolitho: unraveling medical protectionism', 2011, 3.

[28] (1984) 1 WLR 634.

[29] (1985) AC 871.

[30] Sidaway v Bethlehem Royal Hospital Governors (1985) 1 All ER 643, 649.

[31]E Cave and C Milo, Informing Patients: The Bolam legacy, Medical Law International 2020, Vol. 20(20 103-130, 106. See also Odhiambo Jerameel Kevins Owuor, of entente betwixt medical negligence and John Bolam; is time ripe to decamp from Bolam test? An examen. (Retrieved from The Platform, Number 77, June 2022, page 69).

[32]Odhiambo Jerameel Kevins Owuor, of entente betwixt medical negligence and John Bolam; is time ripe to decamp from Bolam test? An examen. (Retrieved from The Platform, Number 77, June 2022, page 69).

[33] M Brazier and J Miola, Bye Bye Bolam: A Medical Litigation Revolution? Medical Law Review 8(1) 2000, 85.

[34]C Stone, 'From Bolam to Bolitho: unravelling medical protectionism', 2011, 5.

[35] A Grubb, J Lang, and J Mc Hale, Principles of Medical Law, 3rd edn, Oxford, 4.08, 198.

[36] Odhiambo Jerameel Kevins Owuor, of entente betwixt medical negligence and John Bolam; is time ripe to decamp from Bolam test? An examen. (Retrieved from The Platform, Number 77, June 2022, page 69).

[37] (1997) 4 All ER 771.

[38] (1999) Lloyd's Rep. Med 23.

injury to the head, was taken to the hospital, and was discharged the next day. The claimant however continued to complain of headaches but his wife was assured by the hospital that his husband would be well. The same position was taken by the claimant's general practitioners who prescribed to him, pain killers. Nevertheless, the claimant suffered cardiac arrest. The court held that the reasonable course of action that should have been taken by the doctors was to order extensive tests due to the serious nature of the matter hence the evidence of the defendant's expert was illogical.

a. Criticism of the Bolitho Test

It is generally accepted that opinion evidence is not admissible in courts of law. However, when a court has to form an opinion upon a point of science, opinions upon that point are admissible if made by persons specially skilled in such science.[39] In R v Turner[40] it was held that 'an expert opinion is admissible to furnish the court with specific knowledge which is likely to be outside the experience of a judge or jury.

Could it be said therefore that the opinion of an expert upon a point of medicine could be irrational as alleged by Lord Browne-Wilkinson in Bolitho? To me, the answer is negative. That is so since such medical opinion is held by specially skilled men having special knowledge of that point of medicine.

The answer would be different if such medical opinion were held by a man on the Clapham omnibus because the man has no such special skills and knowledge upon the point of medicine. If anything, the opinions of a man on the Clapham omnibus are inadmissible.

Conclusion

It is imperative thus far to conclude that Bolam remains the substantive test in determining medical negligence.[41] Bolitho did not in any way overrule Bolam but only modified it to the extent of propounding what McNair J felt short of saying in Bolam i.e. that the expert opinion relied on by a defendant doctor must have some logical basis.

A body of medical opinion only becomes 'respectable' when its opinion is logical therefore it cannot be said that an opinion held by a body of medical men or women is illogical and I must hasten to add that it is an insult to the medical profession to purport that on the opinion held by one of their bodies is illogical.

The only point where a court could prefer one body of medical opinion over another is where one opinion has been overtaken by events. For instance, in cases of informed consent, the accepted practice is that doctors must inform their patients of the risks of a medical procedure before undertaking that procedure such that where a patient is not informed the doctors become negligent.

Indeed, it was Lord Denning's holding in Roe v Minister of Health that 'one cannot look at the 1947 accident with 1954 spectacles'.[42] I nevertheless concur that Bolam has lived beyond its shelf life only to the extent of informed consent.

[39] *Section 48, Evidence Act Cap. 80, Laws of Kenya.*
[40] *(1975) 1 All ER 70.*
[41] *See for instance Monicah Wairimu Maina & another v AIC Kijabe Hospital & another [2020] eKLR; John Mutora Njuguna t/a Topkins Maternity & Clinic v Z W G [2017] eKLR.*
[42] *(1954) 2 QB 66.*