# Doctors Writing Judgements or Judges Writing Prescriptions? A Critical Approach to Pitch the Two Extremes Expounded in Bolam and Bolitho Tests

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***Abstract***— *The orthodox, yet preeminent tests of medical negligence have endangered the healthy balance of doctor - patient and doctor- judge relationships. While Bolam test being inordinately favourable towards medical practitioners, Bolitho remains shrouded in controversy due to its ambiguity. Due to the doctor-centric approach followed by Bolam, the application of the test has been regarded as inappropriate. Thus, reassertion of the role of the doctor in diagnosing and/or treating, and the judge, in determining the appropriate standard of care is of paramount importance. The author engaged in a qualitative research to highlight the imperativeness of pitching the two extremes expounded in the two tests and thereby, to prevent overshadowing each other, further victimizing the victim. Further, a comparative study was conducted taking Singapore, New Zealand, and Malyasia in to contemplation in proposing potential recommendations to augment the current medical negligence litigation process in Sri Lanka.*

***Keywords***— **Bolam test, Bolitho test, Medical negligence**

## I. INTRODUCTION

A crucial element of an action in negligence against a medical practitioner is to prove that the medical practitioner failed to provide the required standard of care under the circumstances. Traditionally, the standard of care as required in law has been determined according to the Bolam test which was introduced by Lord McNair in the landmark case, *Bolam vs Friern Hospital Management Committee*.[i] Since then, the test was approved in numerous jurisdictions as a universal test of professional negligence pertaining to doctors.[ii] Bolam test is based on the principle that a doctor acting in conformity of the accepted practice endorsed by his/her counterparts will be absolved from negligence.[iii] However, Bolam test has been perceived as a principle that overemphasizes the reliance upon medical testimony, further victimizing the victim. Furthermore, the standard of care under Bolam test is essentially 'set by medical profession and evidenced by expert testimony, with minimal court scrutiny'. (Samantha 2006, p. 321)[iv] Nevertheless, the judgement delivered by the House of Lords in *Bolitho vs City and Hackney Health Authority*[v] imposes a more plausible requirement that, the standard demonstrated must be justified on a rational basis taking the risks, benefits and competing interests of the parties into consideration. Whilst Bolitho test is prima facie logical in comparison with Bolam test, one could still question the competence of the court to enquire into medical evidence offered by both parties in reaching its own conclusions. Hence, understanding the two competing extremes expounded in Bolam and Bolitho, this paper will examine the practicality of both tests in the contemporary medical negligence litigation. It will further discuss the potential significance in striking a balance between the doctors and patients; the doctors should not be denounced for human errors while the patients should not be divested of fundamental rights and fair compensation.

## II. BOLAM TEST - THE ORTHODOX TEST FOR MEDICAL NEGLIGENCE

As Lord Atkin's judgement in *Donoghue v. Stevenson*[vi] underscoring negligence plays a decisive role in common negligence cases, Lord McNair's judgment in *Bolam v. Friern Hospital Management Committee* is correspondingly authoritative in medical negligence claims. In 1954, J.H. Bolam underwent the electroconvulsive therapy (ECT) for clinical depression, also known as Major Depressive Disorder. At the time of Mr. Bolam's case, medical opinion on how to minimize the risk of injuries caused by convulsions induced by ECT differed. The manual restraint technique generally used to limit or restrain the movement of a psychiatric inpatient was ineffective. As a result, Mr. Bolam fractured his pelvis. Subsequently, Mr. Bolam sued the doctor for breach of the standard of care in providing treatment and simultaneously the hospital for being negligent. As put by (Lord McNair 1957, P. 586) in his landmark judgement, 'it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art, (accordingly, 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'[vii]

In encapsulating the above, it is not expected from the medical professionals to possess the highest professional skills and work towards an idealistically perfect standard, as long as the medical professional is acting in conformity with the generally accepted practice approved by his/her counterparts. Even though from the point of view of the medical practitioners, this approach appears fundamentally fair, from the patients' point of view, it has the potential to be unduly favourable to the medical

practitioner since it solely relies on an opinion of a professional body, which sets the required standard of care in law. On the other hand, the test appears fair from the point of view of the judges in a court of law who are completely alien to the intricacies of medical science and clinical judgement. Hence, speaking frankly, the question of negligence which ideally should have been at judges' disposition will be passed on to the hands of a body of medical professionals which could result in possible indignation in the process of justice among the victims.

Ideally, the negligence or non-negligence of an action should be adjudged based on what ought to have been done. Similarly, an action done by many could still be regarded negligent, provided it falls below the standard of what ought to have been done. Nevertheless, the Bolam test fails to draw a clear cut distinction between "what is done" and "what ought to have been done" as it sets the standard of care exclusively dependent on "what is done", which is in contravention to the generally accepted legal principles. Consequently, it allows the medical practitioners to set the legal standard evoking the assistance of a responsible body of medical professionals. What is debatable in this stance is that, whether this practice should or should not be allowed, when the court plays the decisive role in determining the expected standard of the defendant in other areas concerning professional liability. Alternatively, 'critics have argued that the court should set the standard in cases concerning medical negligence, rather than a body of medical opinion, no matter how responsible or authoritative' (Teff 1998, p 473-84).[viii] Nevertheless, Bolam test applies as a cloak of protection around the medical practitioners placing an insurmountable discrepancy on victims, enunciating that no responsible body of opinion exists that would advocate the *modus operandi* beyond their purview.

## III. Bolitho Test - A Beacon of Hope for Victims?

Several decades after Bolam, *Bolitho vs City and Hackney Health Authority* marked an intriguing shift from the orthodox Bolam, due to its intended capability of heralding the dawn of a new era for victims. A two year old child named Patrik Bolitho suffered brain damage in consequence of cardiac arrest caused by respiratory failure. Ascribing that medical intervention would not make any difference to the child's hapless situation, the senior Paediatric refrained attending in assistance of the child. After much deliberation in analysing the case, the court denied the liability of the medical personnel on the ground that, had the medical personnel attended, still she would not have materially impacted on the outcome. Nevertheless, in the landmark judgement, Lord Browne - Wilkinson (Lord Wilkinson 1996, p. 241-2) held that, 'the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular, in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter'

He further added the possibility of overriding expert testimony, if the court perceives that the opinion is 'incapable of withstanding logical analysis' (Lord Wilkinson 1998 p. 233) or alternatively 'unreasonable or illogical' (Lord Wilkinson 1998, p.243) Hence, it fundamentally encourages a 'dilution of the Bolam Test'[ix] permitting the courts to adopt an interventionist stand whereby, the judges are allowed to scrutinize expert testimony. Additionally, if Bolitho is fully embraced by judges, it will envisage a fully fledged opportunity for courts to maintain a healthy check and balance of the susceptibilities of Bolam test. As a result, it will ensure the healthy balance of doctor-patient relationship as it avoids possible legitimization of antiquated, fallacious or shoddy practices supported by fellow practitioners.

Despite its coherence with the ordinary law of negligence, Bolitho test resulted in disappointing many legal luminaries. Initially, it was thought to be the dawn of a new era for medical negligence, as it depicted to fill the missing link in the standard of care in medical negligence cases. Nevertheless, Bolitho test remains enfolded with controversy due its propensity for ambiguousness. In fact, Bolitho fails to provide a profound guideline emphasizing the potential interpretations to "unreasonable and illogical". Given the intricacies of medical science, it is not plausible to consider that the mere illogicality and unreasonableness amounting to a wrongful medical practice. At the same time, it is highly contentious as to how the court would opine an extremely technical discipline to be illogical. Hence, one can argue that the unarticulated aspects of Bolitho mainly failed to fill the long standing lacuna in medical law jurisprudence as was initially expected.

## IV. A Way Forward – Significance in Pitching the Two Extremes

As has been pointed out earlier as to the intricate technicalities followed by the two tests, the author intends to highlight the possible pitching of the said extremes, to reassert the role of a doctor in treating a patient and a judge, in adjudicating legal complexities. In summation, doctors cannot be judges in their own cause, and simultaneously judges cannot decide on the flawless way of treating a certain patient, solely based on logic. While judges lack the expertise to make professional

judgment on the accepted practices of other professions, doctors lack the expertise in setting/constituting the common legal standard. Interestingly, the standard required by the law in medical negligence cases is neither perfection nor imperfection. It is simply, "reasonableness," thus, a doctor who fails to prevent an unforeseeable risk is less likely to be subjected to condemnation as 'negligent". Even though, the judge has the potential expertise in scrutinizing "reasonableness" as stipulated in legal compilations, there is an iota of doubt as to whether he possesses the professional expertise in scrutinizing medical evidence. This leads to an inexorable inference that, after all, medical evidence cannot be critically evaluated by a judge. Contrarily, in reality, it is scarcely possible that a judge would find a highly technical opinion to be illogical. Accordingly, it is anticipated that Bolitho would only have restrictive application in circumventing Bolam. Hence, it necessitates addressing the two ideologies within reasonable contemplation, to strike a balance between competing professions and the victimized victims.

## V. RECOMMENDATIONS

Within the given context, it poses a plausible question as to how could the two extremes be pitched? As I have already emphasized on the rampant effect of the two extremes of the tests, as an alternative measure to overcome the ramifications, the author propounds for possible clinical and medical education for judges specifically dealing with medical negligence litigation. It is noteworthy that forensic medicine as a combination of both legal medicine and medical jurisprudence have developed as a branch of both medical and legal disciplines. Simply, forensic medicine is the art of application of medical knowledge to solve questions of law concerning criminal liability. Obversely, medical negligence litigation concerning civil liability could be perceived as an indistinguishable branch of forensics, in terms of its application of medical knowledge to answer questions of law. If it is mandatory on the part of Judicial Medical Officers (JMO) to undergo a legal training pertaining to forensic medicine, the author emphasizes on the possibility of providing a medical training for judges, who will later be specifically assigned to deal with medical negligence litigation, in order to pitch the two extremes expounded in Bolam and Bolitho. This will further be advantageous to the litigants as the litigation process will be significantly expedited, given that there are specially trained judges to hear matters regarding medical negligence.

As pointed out in *Dr. Khoo James & Anor v Gunapathy d/o Muniandy*,[x] 'judicial wisdom has its limits thus a judge unschooled and unskilled in the art of medical science has a restricted role to play in adjudicating issues that even medical experts themselves cannot come into agreement'. (2002, p. 144) This is especially where, 'the medical dispute is complex and resolvable only by long-term research and empirical observation.'(2002, p. 144) Furthermore, the case also highlights the potential threat of 'the lawyer-judge in 'playing doctor' at the frontiers of medical science distorting its proper development'. (2002, p. 144) Hence, uncurbed judicial interference towards intricate medical procedures that often cannot even be resolved through expert medical involvement would certainly jeopardize the development of medical science as well as the competing interests of the parties involved in medical litigation.

Unfortunately, the literal application of Bolam and Bolitho will inevitably obstruct the intended purpose of both tests. While the author proposes for the application of Bolam test within the limits of diagnosis and treatment, its application in determining the reasonable standard should remain within the judges' domain. Simultaneously, judges as arbiters of 'what constitutes reasonable care', ought to have undergone an accepted medical education to have scrutinized the medical evidence placed before the courts by Medical Professionals. The author surmises that, the above examined approach would balance the competing interests of medical practitioners, judges and predominantly, patients while fulfilling the ultimate purpose of the two inherently ideological approaches expounded in Bolam and Bolitho.

By virtue of fault based liability being embedded in the legal system governing medical negligence litigation in Sri Lanka, victims' success fundamentally depends on the possibility of attributing the fault on the medical practitioner. As a consequence, many victims remain uncompensated subjecting to further victimization. Thus, for years, strong proponents of wiping out the conventional adversarial system of justice, which corresponds with the fault based liability system in medical negligence litigation, has been a concern of many countries. As a result of such inherently vexed legal practices, especially pertaining to medical negligence litigation, implementation of a non-fault compensation system, that would permit compensation to be granted without having to prove the fault on the part of the medical personnel, developed as an alternative method to medical negligence litigation. The author suggests that, as an alternative solution to pitching the two extremes expounded in Bolam and Bolitho, a potential implementation of a non-fault compensation system scheme with a maximum financial limit would inevitably benefit both doctors and patients as opposed to the orthodox adversarial system of justice. This mechanism will further expedite the compensation process as well as

reduce the exorbitant costs incurred by the current adversarial system.

## VI. CONCLUSION

Despite the inherent drawbacks of Bolam and Bolitho, the two tests still remain preeminent in medical negligence litigation. Nevertheless, if the two tests are fully embraced by courts to be applied in its literal sense, it would inevitably result in overshadowing each other. Consequently, it would either be unduly favourable to the medical practitioners or medical practitioners will be disparaged for human errors. Regrettably, both consequences will inexorably tarnish the doctor-patient relationship, doctor - judge relationship as well as the judge-litigant relationship, causing grave repercussions. Nevertheless, the author proposes a more pragmatic approach to the application of the two tests within the framework of normative values of the society. With balancing the two extremes enunciated in the two tests, the author believes that it would inevitably result in shifting the orthodox "accepted practice" as expounded in Bolam, to "expected practice" and providing the judges who are specifically dealing with medical negligence litigation a medical training will facilitate the said transitioning process.

Further, as an alternative to the above, the author proposes a non-fault compensation system as opposed to the prevailing adversarial system, that would indeed fulfil the ultimate purpose of serving justice to the victims of medical negligence without victimizing them even further.

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[i] (1957) 1 WLR 582

[ii] Priyani Zoysa vs Rienzie Arsekularatne (2001) 2 SLR 293 (Sri Lanka), Chiu Keow vs Government of Malaysia (1967) 2 MLJ 45 (Malaysia), Dr. Khoo James and another vs Gunapathy d/o Muniandy (2002) 2 SLR 414 (Singapore)

[iii] R. Mulheron, Trumping Bolam: A Critical Legal Analysis of Bolitho's "gloss", (2010) CLJ 609, at p. 611

[iv] A. Samantha, M.M. Micehelle, C. Foster, J. Tingle and J. Samantha, The Role of Clinical Guidelines in Medical Negligence Litigation: A shift from the Bolam Standard, (2006) Med L Rev 321, at p. 321

[v] (1996) 4 ALL ER 771

[vi] (1932) AC 562

[vii] (1957) 1 WLR 582 at 586

[viii] H. Teff, The standard of care in medical negligence – moving on from Bolam? Oxford J Legal Studies 1998;18:473–84

[ix] K. Amirthalingam, Case Comment -A new Dawn for Patient's Rights?, 2001 117 LQR 532, at p. 534

[x] (2002) 2 SLR 414 at 64 -65