

The Impact of Bolitho on the Duty of Care in Cases Concerning Medical Negligence

Introduction

This essay will outline and examine the way in which the courts apply the duty of care to cases concerning medical negligence. Key cases will be considered, and the way in which the duty of care has been developed over the years will be examined. A prominent issue pertains to the extent to which professional medical opinion is relied upon by the courts. It will be argued that the courts have recently shown some degree of increased willingness to subject medical professionals to a higher standard of care, but that such professionals are generally protected from liability.

A historical Account of the Standard of Care in Medical Negligence Cases

The standard of care that was imposed upon medical professionals is based on the traditional test established in *Bolam v Friern Hospital Management Committee*, in which it was stated that the test should be based on an assessment of whether the medical professional fell below the necessary standard of care in his treatment of the patient. Justice McNair in this decision stated that liability will not be imposed upon a medical professional 'if he has acted in accordance with the practice accepted as proper by a reasonable body of medical men skilled in that particular art'. This means that the test for medical negligence was originally favourable towards medical professionals, as they were able to exert considerable discretion over how they could treat their patients. This decision, therefore, gave birth to the trend under which a lower standard of care would be imposed upon medical professionals than other negligence cases. Two main components arise from *Bolam*. Firstly, it requires that medical professionals be examined by reference to the standards that have been confirmed by their peers. This principle is 'proclaimed' rather than 'adhered to', meaning that it restricts the degree to which the courts could interfere in the decisions of medical professionals. The second component pertains to policy reasons founded upon the notion that medical professionals should not be held liable for negligence if there is a body of professional opinion that accepts their conduct. The existence of 'a body of opinion taking a contrary view' was held to have no impact on the validity of professional opinion.

It is clearly the second stage of the *Bolam* test that grants considerable protection to medical professionals. This fuelled criticisms that *Bolam* was unjust because it did not hold medical professionals accountable. The decision has also been criticised on the grounds that it laid the faulty foundations for later decisions that continued the trend of immunity from liability for medical negligence.

The *Bolam* test was widely applied, meaning that it became extremely difficult for claimants to successfully sue for medical negligence. It was, for example, applied in the case of *O'Malley*, in which it was held that doctors should not be expected to inform patients of all risks involved in a

proposed treatment. Thus, the threshold for the standard of care was further lowered, as it further entrenched the principle that medical professionals are 'much better qualified to weigh up the advantages and the desirability of the proposed operation as against the risks'. This further continued the trend under which medical professionals were able to enjoy considerable immunity from liability in all but the most exceptional of cases. This was based on the assumption that medical professionals always act in the best interests of their patients. The Bolam test received continued judicial support. In the case of *Maynard*, Lord Scarman expressly stated that 'in the realm of diagnosis and treatment, negligence is not established by preferring one respectable body of professional opinion to another'. The courts' approach was, therefore, justified by reference to the claim that the standard of care that should be imposed upon medical professionals was a matter of medical judgement and should not be too easily subject to judicial interference.

The Bolitho Decision: A New Direction for Medical Negligence?

As criticisms of the Bolam test gained pace, the House of Lords was presented with the opportunity to re-examine the scope and application of the test for medical negligence in *Bolitho v City & Hackney Health Authority*. In this case, Lord Browne-Wilkinson recognised that the Bolam test had been misinterpreted, and that the courts should determine the standard of care and whether it has been satisfied. The House of Lords responded to criticisms that Bolam had been used as a tool to prevent the development of a doctrine of informed consent. Bolitho may therefore be defined as the courts' first positive step towards increasing the standard of care expected of medical professionals, and judicial intervention in setting this standard. This is due to the fact that it established that professional opinion supporting the conduct of medical professionals should be tested for its reasonableness. A body of opinion could, therefore, be dismissed by the courts as unreasonable, if it could not withstand logical analysis.

At first glance, Bolitho appears to symbolise a new judicial approach towards medical negligence which enables the courts to impose their own opinions regarding the reliability of expert medical opinion. This had restricted the degree to which the medical profession may exercise discretion in setting the standard of care in medical negligence cases. It also recognises the need to adopt an approach based on logic rather than abstract medical opinion. It is for these reasons that Bolitho may be described as a decision that strengthened the rights of patients, and the fairness of medical negligence claims.

Upon closer inspection, the impact of Bolitho appears to be limited in practice. This is because it could be defined as a limited and extremely narrow exception to the Bolam test, particularly considering the qualifying criteria of reasonableness set by the House of Lords. Bolitho merely necessitates that the judge consider medical evidence in a similar manner to other forms of expert evidence in cases concerning medical negligence. While this could strengthen the position of patients, it could on the other hand be argued, that judges do not possess the medical knowledge and experience required to effectively scrutinise medical opinion. According to this view, Bolitho has not increased the standard of care expected of medical professionals. In order

to determine whether this argument is accurate, it is necessary to examine how the courts have approached medical negligence cases following Bolitho.

The Standard of Care Post-Bolitho

The courts appear to have struggled to exercise their newfound discretion following Bolitho. However, despite such difficulty, they have developed the concept of 'best interests' in order to strike a balance between the need to respect medical professionals and the need to promote the best interests of patients. Cases following Bolitho indicate that the courts have proven generally willing to tip the balance in favour of medical professionals. For example, in *Whitehouse v Jordan*, Lord Denning stressed that medical errors should not automatically be equated to negligence. He stated that, if medical professionals were held to be negligent simply because an unexpected occurrence arose, or because they failed to cure a patient, negative consequences would result. Lord Denning, therefore, addresses fears that medical professionals would resort to defensive medicine, and treat patients too cautiously, as even minor risks would not be taken in their treatment of patients. Patients would not be granted access to risky treatments. It is generally for this reason that the courts have adopted a non-interventionist approach towards medical negligence cases. The courts therefore grant medical professionals considerable discretion when treating patients, so that they may take some risks without fear of liability. The best interests' principle therefore appears to be applied not only to individual patients, but also to the public in general.

However, the application of the best interests' concept to the general public has evidently resulted in perhaps too much discretion being granted to medical professionals. The courts have fiercely maintained their non-interventionist approach, both prior to and following Bolitho. For example, in *Re J (A Minor)*, Lord Donaldson held that medical professionals should be able to exercise sufficient discretion in practicing good medical ethics, although he did add that the question of patients' best interests should be a joint decision made by both the courts and the medical profession. Several cases decided after Bolitho evidence that the courts have maintained a 'reinforcement' rather than 'interventionist' approach towards medical negligence. This approach has not been impacted by the Human Rights Act 1998. In *NHS Trust A v M*, the court declined to create a specific test for determining whether or not it would be lawful for medical practitioners to cease treatment that would not be in the best interests of their patients. Instead, the Bolam test was applied, which it was stated was compatible with the right to life contained in Article 2 of the European Convention on Human Rights 1950. Bolam therefore appears to have become concretised, and Bolitho has not had any major impact on the scope and force of this decision.

While the House of Lords in Bolitho could have increased the standard of care expected of medical professionals, and the degree to which the courts could intervene in medical negligence cases, it failed to. There are no cases following Bolitho in which a medical professional was held liable for negligence in any but the most extreme of circumstances. It is, however, important to address the fact that the courts have not completely ignored the potential for Bolitho to be applied in a manner that imposes a higher standard of care upon medical professionals. Bolitho

at the very least promoted a more legalistic approach towards medical negligence cases, in that it has enabled the courts to scrutinise the reasonableness of professional medical opinion. Bolam the full force of Bolam therefore appears to have at the very least been reduced. This may be observed in cases such as *R (Smeaton) v Secretary of State for Health*, in which the court conducted an in-depth examination of the law on abortion. The court scrutinised both academic and medical opinion, which indicates the increase willingness of the courts to become familiar with medical issues in order to judge the fairness of the law in such areas. However, such cases are few and far between.

Conclusions

It may be concluded that Bolitho in theory appears to have a considerable impact on the law on medical negligence, in that it enables the courts to judge the reasonableness of medical opinion. In theory, however, the courts have proven keen to maintain their non-interventionist approach towards medical professionals. The decision has at least enabled the courts to judge and dismiss unreasonable or illogical medical opinion. This means that medical professionals are subject to a slightly higher standard of care, as not any body of medical opinion will be accepted by the courts. This marks a remarkable shift from the broad ambit of discretion granted to medical professionals under Bolam. Bolitho has shifted the focus of the courts from paternalism towards legal certainty. The courts are now able to question medical opinion, and judge it according to the standard of reasonableness. It is also important to point out that the adoption of an overly strict approach towards medical professionals would indeed have negative consequences as a result of defensive medicine. The policy reasons underlying the courts' approach towards medical negligence cases should not therefore be overlooked.

The most positive impact that Bolitho has had is that it has restored 'the Bolam test to its proper limits and appropriate context'. Medical professionals can no longer be deemed completely immune from liability, indicating that Bolitho has impacted upon the law. The courts following Bolitho have become more aware of the requirements that medical opinion must satisfy in order to be relied upon. This has rendered them more willing to query and scrutinise medical opinion, meaning that the medical profession no longer controls the standard of care expected of medical professionals. Overall, then, Bolitho has had an important impact on the Bolam test, in that it has placed it within suitable boundaries, thereby reinforcing the rights of patients in medical negligence cases.