A CRITICAL ASSESSMENT OF THE TORT COMPENSATION SYSTEM REGARDING NEGLIGENT HEALTH CARE TREATMENT IN ENGLAND AND WALES*

Abstract
Medical practice today is not devoid of negligent malpractices. Upon its occurrence, the affected patient reserves the right to sue in negligence for professional misconduct/negligence. Negligence here means failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. In England and Wales today, the tort compensation system model is adopted in relation to negligent health care treatment. However, the standard of care required in the doctor-patient relationship is not without concerns. Hence, the research aimed at assessing critically, the tort compensation system regarding negligent health care treatment in England and Wales. In gathering and analyzing data, the writer used doctrinal method of data collection relying on local statutes, cases laws, textbooks, journal articles, international treaties, conventions and covenants. The writer found that a more vigorous implementation of the existing laws will better optimise the gains of the current tort compensation system.

Keywords: *Tort, Negligence, Compensation, Treatment, Health care.*

1. Introduction

The quest to evolve an efficient and sustainable system of justice has been a continuous one among humans. The extent a society is able to assure unhindered and satisfying access to justice to her members has become a key variable in evaluating the extent of civilisation attained by that society. Inevitably, therefore, every human society is set in a seemingly endless struggle to strengthen her capacity to deliver justice as emerging realities of the time continuously challenge this capacity. It is against this backdrop that one may view efforts by a society like UK to engage medical negligence as one phenomenon that continuously brings to scrutiny her capacity to protect the rights of her individual citizens as would be expected of any clime laying claim to democratic ideals. Every year, a good number of individuals approach the courts to make one form of clinical claim or the other; and the bottom line would be how much the existing system of tort compensation in the country would ensure that justice is done in regard to these recurring claims. While no one would deny that many of these claimants have got justice within the existing system, the truth remains that the system is yet to become perfect. Little wonder there have been successive efforts to study and improve the system over the years. In England and Wales (which is the focus of this study), notable among these interventions include the Woolf Reform (with its famous Pre-Action Protocol) and Lord Justice Jackson's Civil Litigation Costs Report of January 2010.[1]

2. Assessing the Tort Compensation System in England and Wales in Relation to Negligent Health Care Treatment

In addressing the question as to whether the system of tort compensation in England and Wales is fit for purpose in the context of claims arising out of medical and other healthcare treatment, this essay will look at the issue from both the perspectives of substantive and procedural law. Claims arising from healthcare treatment and compensation following therefrom are basically rooted in the three fundamental tests in tort of negligence: existence of duty of care, breach of duty of care and definite connection between damage claimed and the breach of duty.[2] However, the law in clinical negligence has naturally evolved to assume a distinct character over time with the landmark being the decisions in *Bolam v. Friern Hospital Management Committee*[3] and *Bolitho v. City and Hackney Health Authority.*[4] This case of *Bolam v. Friern Hospital Management Committee*[5] has taken a distinct character over the years hence,

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[1] F. Elliot, 2013

[2] N. Rickman & P. Fenn, 'Clinical Negligence in the UK: Would it Be Safe to Throw the Baby out With the Bath Water?' Available at <www.researchgate.net/publications> accessed December 5 2018

[3] (1957) 1 WLR 582

[4] (1997) 4 All ER 771

[5] [1957] 1 WLR 582

the *locus classicus* in this area of law wherein the test to be satisfied in order to establish negligence was stated as follows:

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art...there may be one or more perfectly proper standards, and if he conforms with one of those proper standards then he is not negligent...a mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds.[6]

This principle, 'the *Bolam* test' was further explained and applied in the case of *Maynard v. West Midlands Regional Health Authority*[7] wherein it was mentioned that:

> It is not enough to show that subsequent events show that there is a body of competent professional opinion which considers there was a wrong decision, if there also exists a body of professional opinion equally competent, which supports the decision as reasonable in the circumstance...a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to another: but that is no basis for conclusion of negligence.[8]

The *Bolam* test was also approved by the House of Lords in the case of *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*[9] as: 'A rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by an acceptable body of medical opinion even though other doctors adopt a different practice'[10] – although it was clearly emphasised in this case that the *Bolam* test entails a divergent standard of skill on the part of a specialist as opposed to a general practitioner.[11] This therefore means that the standard of skill expected of a specialist practitioner is as to the degree of skills he or she possesses – although a mere reasonable degree of skill will suffice.[12] However, notwithstanding the merits of the *Bolam* test, there abound many criticisms of it by critics. Some critics have relentlessly argued that whether a conduct is negligent or not should be determined by the courts and not the doctors themselves.[13] The medical profession was perceived to be 'above the law' due to the application of the *Bolam test* as it deprived the courts of the opportunity of 'precipitating changes where required in professional standards', and thus, portraying the courts as being 'dictated to' rather than exercising their judgment.[14]

The writer contends that this perception of the *Bolam test* as being dictative to the courts is indeed, a cause for concern as the courts were traditionally established to act as final arbiters in any given legal society. Again, various judgments by the courts highlighted the shortcomings of the *Bolam* test. Notably, in the case of *Foo Fio Na v. Dr. Soo Fook Mun*[15] it was held to be 'over protective and deferential' toward medical practitioners.[16] Similarly, in *Khoo v. Gunapathy d/o Muniandy*[17], the court adjudged it to be vulnerable to satisfaction 'by the production of a dubious

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[6] Cameron & Gumbel, *Clinical Negligence: A Practitioner's Handbook,* Oxford: Oxford University Press, 2007, p.7
[7] {1984] 1 WLR 634
[8] Cameron, and Gumbel, *op. cit*, p.7
[9] [1985] 1 AC 871
[10] Cameron, and Gumbel, *op. cit*, p.7
[11] *Ibid.*, p.7
[12] *Ashcroft v. Mersey Regional Health Authority* [1983] 2A All ER 245; affd [1985] 2 All ER 96, CA
[13] J. K. Mason & G. T. Laurie, *Law & Medical Ethics*, 9th ed: Oxford: Oxford University Press, 2013, p.149
[14] R. Mulheron, 'Trumping Bolam: A Critical Legal Analysis of Bolitho's "Gloss"' (2010) 69 *The Cambridge Law Journal*, 609, 613
[15] [2007] 1 M.L.J. 593
[16] See also the case of *Rogers v Whitaker* [1992] 175 CLR 479 where the Australian High Court held that except in cases of emergency or necessity, all medical treatment is preceded by the patient's choice to undergo it having been properly informed by the medical practitioner.
[17] [2002] 2 S.L.R. 414, at [63]

expert whose professional views existed at the fringe of medical consciousness'. Then in *Scott v. Lothian University Hospitals N.H.S. Trust,*[18] the *Bolam* test was found deficient because 'professions may adopt unreasonable practices. Practices may develop in professions… not because they serve the interest of the clients, but because they protect the interests or convenience of members of the profession'. The court further held that 'Professional practice is not conclusive evidence of the prudence of a course of action where that practice, which a profession has adopted as a matter of its own convenience, involves risks that are foreseeable and readily avoided.'[19] At this time, the revolution for the evidence-based medicine was gaining momentum[20] and as a result of the foregoing background, there obviously existed the need to fill in the *lacuna* occasioned by the adoption of the *Bolam* test hence, the decision in the case of *Bolitho v. City and Hackney Health Authority*[21] particularly the *dictum* of Lord Browne-Wilkinson to wit:

> The court has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such opinion has a logical basis. In particular, in cases involving, as they so often do, weighing up of risks against benefits, the judge before accepting a body of opinion as being reasonable, responsible or respectable will need to be satisfied that, in forming their views, the experts have directed their minds to the questions of comparative risks and benefits and have reached a defensible conclusion on the matter.[22]

The following dictum has made one leading academic critic of the *Bolam* test to exclaim: 'Eureka!'[23] The legal effect of the *Bolitho* decision is that, peer professional opinion which purportedly represents evidence of responsible medical practice can be departed from, if that opinion is determined by the court to be 'not capable of withstanding logical analysis', or is otherwise 'unreasonable' or 'irresponsible'[24] – hence a gloss to the *Bolam test.*

3. The *Bolitho* Gloss on the *Bolam* Test

The effect of this gloss is that *Bolitho* turned *Bolam* into it axis, as the court and not the medical profession, became the final arbiter of medical breach.[25] The intriguing aspect of *Bolitho* is that its operation is generally regarded as a 'rare' occurrence, only to apply in exceptional circumstances where 'the evidence shows that a *lacuna* in professional practice exists', and 'extreme'.[26] Hence, the *Bolitho* test occasioned a notable asymmetry into the litigious challenges facing the adversely-affected patient and the accused doctor.[27] However, for instance, in relation to the preference of an expert evidence over that of another, in *Smith v. Southampton University Hospital NHS Trust,*[28] it was stated that the judge should give reasons for such preference and that it will be insufficient to simply state that preference nor to state that the preferred expert was representative of a responsible body of medical opinion.[29] For the *Bolitho* test to apply, the court has to consider whether the doctor's expert testimony:

a. took account of a clear and simple precaution which was not followed but which, more probably than not, would have avoided the adverse outcome;
b. considered conflicts of duties among patients, and resource limitations governing the medical practice;
c. weighed the comparative risks/benefits of the medical practice, as opposed to other course(s) of conduct;
d. took account of public/community expectations of acceptable medical practice;
e. was correct in light of the factual context as a whole;
f. was internally consistent; and

[18] [2006] Scot. C.S. (O.H.), at [33], [36]
[19] Also, in *AB v. Leeds Teaching Hospital N.H.S. Trust [2004] EWHC 644 (Q.B.)* the court refused to apply the *Bolam* test because it was unreasonable in the circumstance.
[20] Foster, 2007, p.2
[21] [1998] AC 232; [1997] 4 All ER 771, HL
[22] [1998] AC 232, at 242
[23] J. Herring, *Medical Law and Ethics,* 5th ed: Oxford: Oxford University Press, 2014 p.108
[24] Mulheron, *op. cit.,* p. 613
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*
[28] [2007] EWCA Civ 387
[29] P. Balen, *Clinical Negligence,* Bristol: Jordan Publishing Limited 2008, p.172

g. adhered to the correct legal test governing the requisite standard of care.[30]

'If the answers to any of these is 'no', then a 'red flag' should arise, because it then constitutes a ground upon which English courts, over the past decade, have been prepared to reject peer medical opinion as being indefensible'.[31] Recently, in relation to advice given by doctors to their patients (informed consent), the UKSC, while overruling the decision in *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*[32] and while affirming the decisions in *Pearce v. United Bristol Healthcare NHS Trust*[33], *Wyatt v. Curtis*[34] and *Chestar v. Afshar*[35], decided in *Montgomery v. Lanarkshire Health Board*[36] that the *Bolam* test does not apply 'as the doctor was under a duty to take reasonable care to ensure that the patient was aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments'. The legal effect of this decision is that *the era of medical paternalism is no more.* In addition, it is pertinent to state that the law recognises the need to ensure that fear of tortious liability does not become counter-productive by way of discouraging a person from doing the desirable at any material point in time. Thus, the *Compensation Act*[37] provides that in determining whether the defendant should have taken particular steps to meet a standard of care, the court shall 'have regard to whether a requirement to take those steps might: (i) Prevent a desirable activity from being undertaken at all to a particular extent or in a particular way; or (ii) Discourage persons from undertaking functions in connection with a desirable activity.'

4. Conclusion and Recommendations

The decisions in Bolam and Bolitho have formed an essential component of substantive law in clinical negligence claims. The Bolam decision has its merit in the fact that it recognises the sacred place of expert opinion in a science-based endeavour like medical practice. However, its weaknesses were never difficult to see. In *Foo Fio Na v. Dr. Soo Fook Mun*[38] it was held to be 'over protective and deferential' toward medical practitioners. Similarly, in *Khoo v. Gunapathy d/o Muniandy*[39], the court adjudged it as to be vulnerable to satisfaction 'by the production of a dubious expert whose professional views existed at the fringe of medical consciousness.' Then in *Scott v. Lothian University Hospitals N.H.S. Trust,*[40] the Bolam test was found deficient because 'professions may adopt unreasonable practices. Practices may develop in professions… not because they serve the interest of the clients, but because they protect the interests or convenience of members of the profession'. The court further held that 'Professional practice is not conclusive evidence of the prudence of a course of action where that practice, which a profession has adopted as a matter of its own convenience, involves risks that are foreseeable and readily avoided.'[41] Thus, there definitely existed a vacuum to be filled, and which arguably the Bolitho test intervened to fill. The two tests (Bolam and Bolitho) become complementary such that 'a two-step procedure came to be recognised in English law as being necessary to determine the question of alleged medical breach: first, whether the doctor acted in accordance with a practice accepted as proper for an ordinarily competent doctor by a responsible body of medical opinion; and secondly, if 'yes', whether the practice survived Bolitho judicial scrutiny as being 'responsible' or 'logical'.[42] In seeking justice in any alleged case of clinical negligence, it is the opinion of this writer that it ought to be sought from a tripartite perspective: justice for the offended, justice for the offender and justice for the community. In other words, the law ought to be fair to these three interests who in one way or the other are affected by any instance of clinical negligence. The Bolam test appears to have been too much in favour of the medical practitioner while giving little attention to

[30] *Ibid.*
[31] *Ibid.*
[32] [1985] 1 AC 87
[33] [1999] E.C.C. 167
[34] [2003] EWCA Civ 1779
[35] [2004] UKHL 41
[36] [2015] UKSC 11; {2015] 2 W.L.R. 768
[37] 2006, c. 29, s.1 (a – b)
[38] [2007] 1 M.L.J. 593
[39] [2002] 2 S.L.R. 414, at [63]
[40] [2006] Scot. C.S. (O.H.), at [33], [36]
[41] Also, in *AB v. Leeds Teaching Hospital N.H.S. Trust [2004] EWHC 644 (Q.B.)* the court refused to apply the Bolam test because it was unreasonable in the circumstance.
[42] Mulheron, *op. cit.,* p. 613

the interest of the offended and the community. However, the Bolitho test, to some reasonable extent, attempts to make up for this loophole. The combined effect of the Bolam and Bolitho tests, in the opinion of this writer, would be that the medical practitioner and his scientific constituency are permitted the space to apply their discretion as experts in attending to patients but that the extent they can do this would be subject to further checks in the interest of the patient and the larger society. In other words, while the expert opinion of the medical constituency is respected, this opinion must never be unreasonable, and may not be relied upon 'where a case does not involve difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters, but turns on failure to take a simple precaution the need for which is obvious to the ordinary person considering the matter.'[43] The above cited cases on the weaknesses of the Bolam test underscore this assertion. To this extent, it may be rightly affirmed that from the perspective of substantive law, the Bolam-Bolitho paradigm provides a healthy framework for negotiating justice between the plaintiff and the defendant, and of course without leaving out the larger society. The Bolam-Bolitho praxis, therefore, provides a system of checks and balances wherein medical personnel are allowed the space to rightly express their professional discretion yet without unreasonably sacrificing accountability.

Then from the perspective of procedural law, the writer finds certain components of the medical tort compensation system in England and Wales instructive for the purpose of the argument here. In the first instance, by virtue of the principle of vicarious liability, the National Healthcare System (NHS) is the party to be sued in any instance of claims of negligence against its employees.[44] While this method may be said to undermine individual responsibility, it has been praised for the fact 'that hospitals are better placed than individual clinicians to institute risk management policies.'[45] In other words, the hospitals are in a better position to implement a holistic proactive regime against medical injuries. Hence, one can say that the compensation system is looking beyond mere sanctioning of individuals and operating on a progressive principle that seeks to propel the entire health sector towards assuring greater safety for patients. This, admittedly, can be held as a plus for the tort compensation system given that such posture is in line with the philosophy which holds that for any instance of compensation and sanction to be fully justifiable, 'it should be concerned about the future and not the past.' The purpose should not simply be 'to make a person suffer for what he has done... ' (rather) it should 'aim at producing good results in the future...'[46]

Very importantly, some procedural changes introduced via Woolf Reforms arguably would contribute significantly in making the clinical compensation system more efficient. The Pre-Action Protocol, a product of these reforms, is in the opinion of this writer a welcome response to the major challenges of tort compensation system. This protocol provides for transparent and complete exchange between the plaintiff and the defendant before the actual hearing of a suit. This is intended to help them clarify and concretise the points of dispute before being heard by the court. This helps to smoothen and accelerate the court process as it promotes 'healthy environment by way of cooperation and civil litigation.'[47] Among the subjects on which the parties are expected to agree upon during this pre-trial exchange is 'the use of an expert witness where relevant.'[48] Still in a bid to quicken litigation process, the Woolf reforms impose 'a timetable thus removing the pace of the trial from the hands of the litigant.'[49]

Importantly, the protocol makes Alternative Dispute Resolution (ADR) more likely between parties and the result has been significant. There 'was a 25 percent reduction in the number of cases' in the country between June and November 1999. 'Further fall of 25% was recorded 'by the end of January 2000.' More recent figures reveal that number of clinical negligent claims fell to less than 190, 000 in 2005 as compared to 220, 000 in 1998. Within this period, of all cases listed for trial, only 8% came up for hearing as 70% became settled out of court. All this shows

[43] In *French v. Thames Valley Strategic H.A.* [2005] EWHC 459 (Q.B.), at [112] per Beatson J.
[44] 'Medical Malpractice Liability: United Kingdom (England and Wales)' <http://www.loc.gov/law/help/medical-malpractice-liability/uk.php> accessed 14 December 2018
[45] Rickman & Fenn, *op. cit.*
[46] K. Olcott, *Ethics: The Philosophy of Morals,* (5th edn Prentice Hall, Englewood Cliffs 1999) 109
[47] Law Teacher, 'Woolf Reforms' http://www.lawteacher.net>lawteacher>civillaw>Essays
[48] Law Teacher, ibid
[49] Law Teacher, ibid

that Woolf reforms potentially 'promote greater incentive for the parties to settle their differences now.'[50] The Compensation Act 2006 explicitly creates room for Alternative Dispute Resolution.[51] But significantly, the Act[52] provides that 'An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.' This provision is obviously intended to encourage parties to amicably resolve their differences outside the court by exploring apology and redress with the defendant being assured that this apology and offer of redress shall not be held in evidence of negligence against. This, in this writer's view, is a commendable provision as it promotes peaceful settlement above the 'hostility' of court litigation. It may be persuasive to argue that humans feel much disposed to friendly settlement of their differences as against the pain and uncertainties of court disputes; however, certain factors such as fear of legal consequences could always impede apology and offer of restitution – a crucial catalyst to such amicable settlement. The Compensation Act seems to be attempting to address this problem.

Another area where the current tort compensation system in the country may have been promising is in the area of cost of litigation. Although it has been submitted that the Woolf Reforms have led to increase in the cost of litigation as a result of work requiring 'to be done at earlier stage' (pre-trial exchange) there is still evidence that the reforms have at the same time brought about cost reduction as the pre-trial exchange does result to speedier settlements.[53]

To sum up our argument here, it is reiterated that the current system of tort compensation in England and Wales – to the extent it is able to operate within the balancing framework of the Bolam-Bolitho paradigm and the Woolf Reforms - is adequate for the purpose. This purpose, as has been argued here, ideally is to ensure that in granting compensation, fairness is evenly extended to three interests – the victim, the offender and the community. However, it must be admitted that for the tort compensation system to optimise its objectives, the nation must move beyond the legislations that have been passed in this regard and bring into force necessary administrative tools for the proper functioning of the legislations. For instance, Richard Goldberg[54] observes that 'The 2006 NHS Redress Act was intended to offer patients a quicker and fairer alternative to expensive and lengthy legal battles... But the Department of Health has failed to produce the necessary secondary legislation to make it operational, leaving the Act totally unworkable in England.' Similarly, Nina Lakhani[55] affirms that 'Plan to help victims of NHS negligence is left to languish on statute book'. On this note, it is submitted that the recommendation by the Bristol Inquiry report that the clinical medical negligence system in the country should be abolished and replaced with 'an alternative system for compensating those patients who suffer harm arising out of treatment from the NHIS'[56] may not be the proper option given that, as has been argued here, a more vigorous implementation of the existing laws will better optimise the gains of the current system. Besides, the current system accommodates some form of 'alternative system' for compensation by virtue of the Woolf Reforms and a legislation like the Compensation Act; and it may be added that totally replacing the litigation system with an alternative compensation system may not be a very prudent idea.

[50] Law Teacher, ibid
[51] Law Teacher, 'The Compensation Act and the Culture Created' <http://www.lawteacher.net/tort-law/essays/the-compensation-act-2006-and-the-culture-created-law-essay.php> accessed on 14 December 2018
[52] s.2 (6)
[53] Law Teacher, ibid
[54] Goldberg, R 'Medical Malpractice and Compensation in the UK' (2012) 87*Chicago-Kent Law Review,* 129, 132
[55] N. Lakhani, 'Plan to Help Victims of NHS Negligence is Left to Languish on Statute Book' Available at <http://www.independent.co.uk/life-style/health-and-families/health-news/plan-to-help-victims-of-nhs-negligence-is-left-to-languish-on-statute-book-1779386.html> accessed 14 December 2018
[56] Goldberg, R, *op. cit.* p. 132