Testing the Bolam Test: Consequences of Recent Developments

Mr K Shanmugam, SMA Lecturer 2001

A. INTRODUCTION

The Bolam Test is a familiar concept to most doctors – it is the measure of whether one has discharged his or her standard of care in the management of the patient. It is not a test which applies only to doctors; it applies to all professionals. This test was developed through a series of English cases culminating in ***Bolam v Friern Hospital Management Committee*** (1957) 1 WLR 582. It has since also been refined and explained further in subsequent cases.

The test is the standard of the ordinary skilled man exercising and professing to have that special skill – he does not have to be the best doctor. Often therefore, the burden is discharged by calling expert evidence to show what other doctors, of similar standing and exercising that particular skill, would have done for the patient, in that situation.

But there have been questions raised as a result of some recent cases as to whether Courts are increasingly beginning to impose their own judgment and opinion on the matter; and be less reliant on the expert witness who comes to Court to say what he or she would have done in a similar situation. These cases include ***Bolitho v City & Hackney Health Authority*** (1997) ALL ER 71 (which has sometimes been treated as an exception to the *Bolam* test) and some recent Singapore cases. In this lecture, I will show that these cases do not contradict or qualify the Bolam test and that while doctors are understandably concerned about increased medical litigation, nevertheless, the Courts have generally been trying to adhere to the principles set out in *Bolam*.

I will trace the development of the *Bolam* test in Singapore, England and Australia.

I will also say that the Bolam test strikes the correct balance between the rights of doctors, patients and the general public. If the *Bolam* test is not adhered to, there can be adverse consequences to the medical profession as well as to society. There are three consequences which are easy to identify:-

a) doctors will opt for "defensive medicine". Doctors will choose the treatment for the patient which is most likely to be "legally safe" even if they believe that such treatment may not be strictly warranted. This may be unnecessarily expensive and time-consuming;
b) it will encourage more medical litigation, which in turn will increase premiums and overall health care costs; and
c) it will affect good doctor/patient relationships and possibly dissuade good young doctors to shy away from high risk specialist fields.

I will first consider the basic elements of an action in negligence, against a doctor.

B. LIABILITY OF A DOCTOR FOR NEGLIGENCE

There are three elements which have to be established in a claim for negligence against doctors.

i) Duty of Care

First, a duty of care has to be shown. A patient who brings a claim against his doctor or a hospital will easily establish that the doctor or hospital owes him a duty of care. A general practitioner accepting a patient undertakes a duty to him.

ii) Breach of the Duty

The second element that the patient has to prove is that the doctor was careless. He must show that the doctor fell below the required standard of care. This is the *Bolam* test.

The Standard of Care that a doctor has to show, as set out in *Bolam* is as follows:-

a) the standard of care required of a doctor is that of the ordinarily skilled doctor exercising and professing to have that skill. He need not possess the highest expert skill; it is sufficient if he exercises the ordinary skill of an ordinary competent doctor exercising that particular field; and
b) a doctor who had acted in accordance with a practice accepted at the time as proper by a responsible body

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of medical opinion skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique.

iii) Causation - The breach caused the injury

Finally, the breach must have caused or at least contributed to the injury suffered.

In practice, proving causation is sometimes the most difficult aspect of a patient's claim and it is an area where a number of cases have been fought.

Lily Pai v Henry Yeo, a recent Court of Appeal decision illustrates this point.

The Court of Appeal had found Dr Yeo to have been negligent in failing to refer Lily Pai to a specialist earlier given the suspicion which he had about her condition. This eventually led to her blindness in one eye. However, the Court of Appeal said that there was insufficient medical evidence to show that the patient's blindness would have been prevented had she gone to a see an eye specialist immediately.

The Court found that the patient had not proven that Dr Yeo's negligence and/or breach of duty **caused** or **materially contributed** to the loss of her vision in the left eye.

This case illustrates that a doctor will be found liable to pay damages to the patient only if the breach caused or contributed to the injury.

C.THE DEVELOPMENT AND APPLICATIONS OF THE BOLAM TEST

With the above general principles in mind, I propose to now outline recent developments in the application of the Bolam test.

An important consideration is the application of the Bolam test to the doctor's explanation of treatment and the duty to warn patients. The position in Singapore is slightly different from the position adopted by certain states in USA. In some of these states, a patient's consent is vitiated if he is given inadequate information concerning the proposed treatment.

In England and Singapore, the Courts have instead applied the *Bolam* test to determine if a doctor has adequately explained the treatment or warned the patient (see for example, ***Sidaway v Governors of the Bethlem Royal Hospital***).

This approach is based on very sensible considerations. If the doctor is required to explain **every** possible risk, he could do more harm. For instance, where the risks involved are relatively remote, a Court in England has held that there were obvious disadvantages in warning a patient of such risks: *"On the one hand you alarm unnecessarily, and on the other hand, you may put him in a position where he feels that he should take the decision, albeit the doctor is obviously much better qualified to weigh up the advantages and the desirability of the proposed operation as against the risks."* (See ***O'Malley v Board of Governors of the National Hospital for Nervous Diseases***).

By way of contrast, I should also highlight that the Australians have taken a slightly different position as illustrated in ***Rogers v Whittaker*** (1992) 175 CLR 479.

The Australian Court held that whether the patient has been given all the relevant information is not a question the answer to which depends upon medical standard of practices, i.e. it did not apply the *Bolam* test. The Australian position is that the doctor has to consider:-

a) the nature of the treatment;
b) the desire of the patient for information;
c) the temperament and health of the patient; and
d) the general surrounding circumstances,

in deciding whether to disclose or advise of some risks in a proposed procedure. The doctor is under a duty to warn the patient of all material risks. A risk is material if, in the circumstances, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significant to it. The Court assesses whether a risk was material or not.

With that, I turn now to deal with ***Bolitho v City & Hackney Health Authority*** (1997) 4 ALL ER 71, a decision which is seen by some as qualifying the *Bolam* test.

In this case, the patient was a two-year-old boy who had a past history of hospital treatment for Croup, and was re-admitted to hospital under the care of two doctors.

The following day, he had difficulty breathing on two occasions. On both occasions, doctors were paged to attend to the patient but none of the doctors who were paged attended even though they said they would. On these two occasions, the patient appeared to return to a stable state rather quickly. However,

about half-an-hour after the second occasion, the patient suffered total respiratory failure and a cardiac arrest, resulting in severe brain damage and subsequently died.

The Court held that a doctor could be liable for negligence in respect of diagnosis and treatment ***despite*** a body of professional opinion sanctioning his conduct, if the Court is satisfied that the body of opinion relied on was **not reasonable or responsible**.

In the vast majority of cases the fact that distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion. However, as set out in Bolitho, if it could be demonstrated that the professional opinion was not capable of with standing logical analysis, the judge would be entitled to hold that the body of opinion was **not reasonable or responsible**. This does potentially open the door for the Court to impose its own views and disregard expert opinion, though in exceptional cases.

I will now consider the application of the *Bolam* test in Singapore post *Bolitho*.

D. APPLICATION OF BOLAM IN SINGAPORE

I will now briefly consider a few recent decisions from the courts in Singapore.

The Bolam test was applied in ***Denis Mathew Harte v Dr Tan Hun Hoe & Anor*** (Unreported).

In that case, it was held, at first instance, that:-

a) Bolitho clarifies the ambit of the Bolam test: a doctor cannot escape liability for negligent treatment or diagnosis simply because he leads evidence from a number of medical experts who are genuinely of the opinion that the doctor's treatment or diagnosis accorded with sound medical practice;
b) the doctor had not acted below the minimum standard of care and skill required of him as a urologist, in the pre-operative treatment, care and management of the patient;
c) on a balance of probabilities, both testes suffered contusion injury from the fall in the toilet and not from the patient's surgery;
d) when the patient complained of post-operative pain, the doctor should have seen the patient immediately. The doctor had failed in his duty of care when he did not arrange for the patient to be examined as soon as possible, after having been told of the extent of the patient's unusual pain and swelling;
e) the Court rejected the expert opinion on both sides on the point that a bruise must necessarily appear black or as "black as a gown". He said, *"It seems to me that in a very severe case of bruising that might well be the colour. But bruising from a less substantial trauma involving microvascular damage cannot to my mind, become as black as that."*

Recently, the Court of Appeal affirmed the decision but varied the award on damages.

The second recent case in Singapore which I would like to consider is ***Vasuhi d/o Ramasamypillai v Tan Tock Seng Hospital Pte Ltd*** (2001) 2 SLR 165.

In this case, the Court said that:-

a) in *Bolitho*, the *Bolam* test was accepted by the House of Lords as the locus classicus of the test for the standard of care required of a doctor or any other person professing some skill or competence;
b) in *Bolitho*, Lord Browne Wilkinson put the *Bolam* test in its proper perspective when he said that it does not allow a doctor or hospital to avoid liability for negligent treatment merely because there is evidence from a number of medical experts to the effect that the treatment accorded to a patient accords with what other doctors might have done. The Court had to be satisfied that such opinion has a logical basis; and
c) the doctor was not negligent in relying on the available test results and on his own assessment of the deceased's condition for the purpose of deciding whether or not to discharge him on 8 August 1997.

Finally, I will touch briefly on ***Gunapathy Muniandy v Dr James Khoo and two others*** (Unreported). This case is notable for the amount of damages which was awarded – the highest so far for medical negligence in Singapore.

The Defendants were neurosurgeons who had to assess whether a patient had a malignant tumour or not; and what treatment was appropriate in the circumstances. The Defence brought some world renowned experts, to show that their diagnosis that there was a tumour and the therapy they gave was in correct and in accordance with a substantial body of medical opinion.

The High Court disregarded the expert evidence which was led in support of the doctor. The Court said that the doctor has to ensure that the practice which he adopts must stand scrutiny of logic and sense. In addition, the reputable and responsible expert who support the doctor must support him with logic and sense. The Court relied on, inter alia, Bolitho as

the basis for this finding. This decision is under appeal, and I propose to say no more about it.

In the cases after 1997 when Bolitho was decided, two trends appear to have emerged:-

a) the first is that the number of cases against doctors had risen suggesting that there is indeed some truth in the contention that *Bolitho* encourages medical litigation; and
b) the other is that the amount of damages awarded to successful patients in medical negligence cases have also increased, most notably in ***Mdm Gunapthy's*** case where the amount of damages awarded was well above the next highest case.

Against this background, I will consider the impact of these cases on medical litigation and conclude by considering the impact which rising medical litigation has on both the profession and society in general.

E. IMPACT OF INCREASED MEDICAL LITIGATION

From the available data, it seems clear that the current trends suggest that the number of complaints, claims, quantum of awards and insurance premiums are and will be on the rise. This appears true of medical litigation in the US, the UK and Singapore. Statistics show that the number of cases against doctors have risen; and damages awards have also risen. And if the American experience is anything to go by, then the actions of doctors will be increasingly challenged resulting in higher malpractice costs, increasing malpractice premiums and most significantly, a substantial increase in the practice of defensive medicine.

The negative effects can be categorised as follows:-

i) Medical Procedures which may not be in the best interestsof the patients

Rising medical malpractice premiums often cause doctors to choose procedures which limit their risks, even when these are more costly or not necessarily in the best interests of the patient.

ii) Rising Insurance Premiums and Health Care Costs

There also seems to be a direct relationship between the increased cost of medical litigation, insurance premiums and health care costs. This is logical since they are all directly related.

iii) Denial of Access to Health Care

The threat of medical litigation suits can sometimes even deny people access to health care. In the extreme case of some hospitals in the US, for example, there is a "lawsuit tax" which adds US$500 to the cost of a two-day maternity stay.

iv) Stress for Doctors

Needless to say, being sued is a stressful experience. The injury to the reputation of a doctor arising from a mere allegation of negligence can be very serious indeed. The mere threat of lawsuits is enough to cause anxiety and to affect the way doctors approach their work.

v) Erosion of Trust in the Patient-Physician Relationship

Mutual trust is essential to the doctor-patient relationship, since patients who trust their doctors are more likely to be open with their doctors and derive maximum therapeutic benefit. Unfortunately, it is inevitable that with the increase of medical litigation and the publicity that accompanies it, the patient will increasingly view his or her doctor with suspicion.

CONCLUSION

It is not difficult to conclude that increased medical litigation is not to be welcomed. We should, as a society, try to avoid going down the route of excessive medical litigation.

As we think about this, it is useful to remind ourselves, that the rights of the doctors have to be balanced by the rights of the patients, while at the same time keeping the societal interests in perspective. My view is that the *Bolam* test, properly applied, does balance the rights. It protects doctors who act in accordance with the provisions accepted by their profession; and it allows a patient to sue, when he can show that his doctor had fallen below what the profession considers acceptable. *Bolitho* can be seen as a narrow exception to the *Bolam* test - it makes practical common sense because you cannot expect a Court to whollyaccept the views of several medical experts to exculpate a doctor if that medical expert evidence is illogical. *Bolitho* simply requires the judge to scrutinise medical evidence in the same fashion as they would expert evidence in any other type of negligence case. To that extent, a faithful application of *Bolam* and *Bolitho* would mean that the Court will accept the views of a respected body of experts. The House of Lords in *Bolitho* was careful to say that there is only in rare cases and that it would "very seldom" be right for a judge to reach a conclusion that the views genuinely held by a competent expert are unreasonable.

As I stated earlier, if the Bolam test is strictly applied, then I think we can achieve a proper balance between the rights of patients and doctors. A doctor will be liable if he falls below the standard of his peers and

he should not complain. He will not, however, be liable simply because others might have handled the case differently. But, if we move away from the *Bolam* test, either by frequently resorting to and misapplying the *Bolitho* exception, or by going around Bolam, then the risk is vastly increased medical litigation. That is a consequence that we should seek to avoid, because that is not in the interests of our society.

While doctors in Singapore are anxiously casting their eyes at recent cases, it should be emphasised that all recent decisions have consistently reaffirmed the *Bolam* test. Our Courts have accepted the Bolam test and have often applied it quite strictly. Our Courts have not shown themselves ready to adopt the American position. Of course, there are individual decisions which the medical profession may not agree with. However, the point remains that in general, the *Bolam* test is strictly applied and generally a patient can succeed only when he show that his doctor has practised in a way that the rest of the medical profession will find unacceptable. The medical profession should take comfort from that.

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