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An Analysis of the Bolam Test for identifying Medical Negligence and its waning importance in the Medico-Legal Sphere

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Death is a poignant reality in the field of medicine; a medical professional has to be categorical in his decisions regarding the patients in a surgery or a complex medical procedure as more often than not their lives are dependent on such decisions. Hence a medical professional who is treating a patient owes a duty of care toward them. Not adhering to this duty of care leads to medical negligence. Thus, to formulate an efficient way of detecting the negligence of a medical professional, the courts in The United Kingdom in 1957 came up with the Bolam test. After nearly 60 years of the formulation of this test, the legal and jurisprudential world has started to raise its well-deserved eyebrows over this peculiar legal concept. The following article studies the very concept of medical negligence and its different forms, it also deals with the various tests used to detect this offence and, the origin and the decreasing importance of Bolam's test.

Keywords: *medical negligence, bolam's test, the duty of care.*

INTRODUCTION

The concept of medical negligence is a part and parcel of the concept of negligence. In the jurisprudential realm, negligence is described as a normative legal doctrine, and is defined by

the Oxford Law Dictionary as, "a want of attention to what ought to be done or looked after,"[1] Thus, for detecting negligence following fundamental tests are used by the courts all over the world –

- There is an established duty of care that is owed to the plaintiff.
- A breach of such duty of care occurs.
- Due to such a breach direct legal injury has been caused to the plaintiff.

The concept of reasonable duty of care was confounded by the popular case of Donoghue v Stevenson[2] in 1932, whereby the presiding Judge, Lord Atkin propounded that, to avoid any foreseeable injury to one's "neighbour", every manufacturing business has to take reasonable precautions (or care) while performing its functions. As per the facts of the case, a woman in Paisley (a town in The United Kingdom) went to a bar and ordered a ginger beer. After consuming the same she noticed a snail at the bottom of the beer mug, this later caused her illnesses and thus she suffered an injury[3]. Therefore, the courts of the UK decided that a general duty of care was owed to a person's neighbour. The word neighbour here means a person directly affected by one's actions.

This principle of duty of care is widely used in the medical field today, with just a bit of change, it is said that the duty of care toward a patient begins the moment they are admitted to the hospital, this duty is not exclusive to the doctors and professionals who admitted the patient but is also mandatory for every doctor who is employed by the hospital. For example, if a person is suffering from a cardiac arrest and there is a doctor present in the proximity of that patient then that doctor is bound to help them and it is even expected from them to do so.[4]

The breach of such duty of care is necessary to establish that an act of negligence has taken place. In the cases not related to professional negligence, the standard to establish this breach of duty

[1] Hurwitz B, 'How Does Evidence Based Guidance Influence Determinations of Medical Negligence?' (*The BMJ*, 28 October 2004) <https://www.bmj.com/content/329/7473/1024> accessed 14 January 2023
[2] *Donoghue v Stevenson* (1932) UKHL 100
[3] *Ibid*
[4] Danielle Bryden & Ian Storey, 'Duty of Care and Medical Negligence' (2011) 11 Continuing Education in Anaesthesia Critical Care and Pain 124

of care is deduced after predicting what a reasonable man would have done in the same circumstances, in The United Kingdom this test is also called "the test of the man on the Clapham omnibus."[5]

However, in the cases of professional negligence, like medical negligence, this standard is changed to the test of the average skill of the persons involved in the said profession. Bolam v Friern Hospital Management Committee[6] is the most popular case on deciding a standard of care for medical negligence. This case confounded the important rule, whereby a doctor's actions would not be liable for negligence if any competent body of medical opinion supports or defends the said acts, in other words; if a doctor's actions are in accord with the standards set by a responsible body of medical professionals then they are not liable for medical negligence[7]. This particular case and its subsequent rule are studied in depth later in the article. There are certain pertinent exceptions to this rule of duty of care, as pointed out in the case of Crawford v Board of Governors of Charing Cross Hospital[8] where a patient was admitted to the hospital and was suffering from an uncommon disease about which a research paper was published six months ago, however, the nurse had not read the paper and thus was clueless about the complication, due to this the patient died. The nurse was held not guilty of negligence, reaffirming the notion that new information takes some time to be disseminated in the medical sphere, and not being updated with the same is not a breach of duty of care.

Medical negligence can be of either civil or criminal nature, the difference between the two is decided upon by studying the quantum of injury suffered by the claimant or the prosecution and the magnitude of the negligent act. This is also further studied in the article. The case of Laxman Balkrishna Joshi v Trimbak Bapu Godbole And Anr[9] decided in the supreme court of India in 1968 defined medical negligence and its parameters succinctly, the court said that there are three types of duties a doctor owes to his patient:

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[5] *Ibid*
[6] *Bolam v Friern Hospital Management Committee* (1957) QB
[7] *Ibid*
[8] *Crawford v Board of Governors of Charing Cross Hospital* (1953)
[9] *Laxman Balkrishna Joshi v Trimbak Bapu Godbole & Anr* (1968) 7 SCC 128

- A duty to decide whether to undertake the case of the patient.
- Duty of care in determining which treatment to give.
- And a duty of care in carrying out the said treatment with care and caution.

The doctor must also perform the treatment on his patient with a reasonable degree of knowledge and skill and also a reasonable degree of care. The law in particular circumstances does not require the highest nor the lowest degree of care and competence while performing medical treatment. If a doctor happens to transgress any of the above-stated parameters he shall be liable for the offence of negligence.

OVERVIEW OF MEDICAL NEGLIGENCE

Criminal Medical Negligence: Since the olden times' medical negligence has been considered a crime, the oldest known document on medical negligence was the Code of Hammurabi found in Babylonia in 20 BCE[10], it considered medical negligence to be a grave crime against the prevalent society and thus, meted out gruesome punishments against it. The purpose of these criminal proceedings was to vindicate those who cause grave harm to society.

The universally accepted definition of criminal negligence is, when carelessness while performing a medical treatment is so severe that it is entitled to be "gross" then, the negligence is called criminal negligence, in such cases the negligent acts are more severe than civil medical negligence cases[11]. In India, criminal medical negligence is punishable under various sections of the Indian Penal Code, 1860. However, among them, the most contentious and popular one is, Section 304A[12] which punishes the offender for a rash or negligent act resulting in the death of a person for two years. The Supreme Court in the case of Dr. Suresh Gupta v Govt of NCT Delhi[13] held that for criminal negligence to be established the threshold has to be high and the alleged negligent act must be "gross" and severe enough to be classified as negligence thus the court quashed the proceedings against a doctor for criminal negligence under section 304A

[10] Karunakaran Mathiharan, 'Supreme Court on Medical Negligence' (2006) 41 Economic and Political Weekly 112
[11] Danielle Bryden & Ian Storey (n 4) 126
[12] Indian Penal Code 1860, s 304A
[13] *Dr Suresh Gupta v Government of NCT Delhi & Anr* (2004) 6 SCC 422

citing the above rule. This decision was challenged by many jurists, the reason being that the word "gross" does not appear anywhere in section 304A of the IPC and the court does not have the authority to bring in additions to the existing laws. Therefore the judgement was sent for review and is still pending under a five-member bench of the Supreme Court.[14]

In the case of Jacob Mathew v State of Punjab,[15] the court reaffirmed its notion about classifying gross negligence as decided in the Suresh Gupta case. The court in its judgement said that the fact that the hospital was negligent in not keeping oxygen cylinders readily available is true however, the nature of such liability is civil and not criminal as the hospital was not grossly or severely negligent in its actions and thus doesn't attract the punishment of section 304A of the IPC. Contesting a suit of criminal medical negligence takes a toll on the defendant doctor's reputation and status in society, he or she also has to be continually involved in the processes of the courts which causes a major hindrance to his or her profession. Thus to hold a doctor liable for negligence it has to be shown beyond reasonable doubt that a grossly negligent act has been committed or a vital process has been omitted during the medical procedure by the said doctor. The court in the absence of guidelines and rules over the prosecution and arrest of doctors and medical professionals laid down certain guidelines for the inspecting officer and the complainant which are to be followed for filing a case of negligence against a doctor. These guidelines are nothing but an application of the Bolam's test, the complainant before filing for a criminal complaint has to take the opinion of a competent medical professional, preferably a government one over the alleged act of negligence and only if that professional approves the same will the courts entertain the case of the complainant. A similar process is issued to the inspecting officer whereby, he has to take the credible opinion of a competent medical professional before arresting a doctor for negligence.

In a subsequent case of The State of Punjab v Shiv Ram[16] the Supreme Court decided that the burden of proof to prove the criminal negligence of a doctor lies with the prosecution or the complainant and not the accused doctor. "Unless negligence is established, Primary Liability

[14] Karunakaran Mathiharan (n 10) 113
[15] *Jacob Mathew v State of Punjab* (2005) 6 SCC 1
[16] *The State of Punjab v Shiv Ram* (2005) 7 SCC 1

cannot be established."[17] Other sections of the IPC which punish medical negligence are Section 337[18] (causing hurt to a person) and Section 338[19] (causing grievous hurt to a person). Unlike 304A these sections do not punish the guilty for causing death.

In the cases of criminal medical negligence, a criminal standard of proof is followed to hold a person liable. Accordingly, the accused has to be proven guilty beyond reasonable doubt for him to be convicted and sentenced to an appropriate punishment. This is so because of two reasons, one, when a criminal trial is initiated the two parties involved are; the state and the defendant. Here, the term "state" means any and every institution of authority as defined under Article 12[20] of the Indian Constitution, this includes police, special research units, etc which can be used to gather evidence. On the other hand, the defendant is an individual with no resources of such scale and is vulnerable as he already faces stigma and vitriol from society, this creates a significant power differential between the state and the defendant. Two, when a court convicts an individual for a crime his civil liberties are taken away and he is locked up in a prison cell, thereby restricting the liberty and freedom enjoyed by an individual. Therefore due to such a high threshold of taking away a person's liberties and freedoms and the very apparent power differential which exists between the state and the defendant, the court or the jury has to be certain that the alleged criminal act was committed, and any shred of reasonable evidence or doubt pointing to the contrary must be presented and decided upon by the present judicial authority.[21]

Civil Medical Negligence: In the cases of civil medical negligence, the person filing a suit of medical negligence is called a claimant and, he is required to prove via a balance of probabilities that the medical practitioner was negligent in his treatment. The compensation for the same is paid to bring the claimant to status quo ante (the position he was in before experiencing the negligent act). A monetary value will be also dispensed to the claimant, this value will not only

[17] *Ibid*
[18] Indian Penal Code 1860, s 337
[19] Indian Penal Code 1860, s 338
[20] Constitution of India 1950, art 12
[21] Doogue & George, 'Beyond Reasonable Doubt (Criminal) vs. Balance of Probabilities (Civil)' (*Doogue + George*, 18 November 2022) <https://www.criminal-lawyers.com.au/human-rights/beyond-reasonable-doubt-criminal-vs-balance-probabilities-civil> accessed 15 January 2023

be counted based on the loss that occurred but also on the mental pain and trauma suffered. A pertinent example of compensation dispensed for the mental pain and hassle induced due to medical negligence is the case of State of Haryana v Santra[22] a poor labourer woman wanted to willingly sterilize herself for future family planning, this was done instead of the scheme started by the government, after going to the hospital to get sterilized the doctor treating her only sterilized her right Fallopian tube and the left one was untouched. Even though the hospital had not completely sterilized her, it issued a certificate for complete sterilization. In a few months, Santra's pregnancy was discovered and she gave birth to a girl, taking all of this into account the court decided that the state government of Haryana was negligent in its treatment of the patient and issuance of the certificate and thus they were liable to pay for all the expenses that arose while rearing the newly born child of Santra till the child becomes an adult.

Medical professionals in India are regulated by the Indian Medical Council[23], which has the power to ban or disqualify any doctor in India for professional misconduct. However, the institute failed to achieve its goals. In the famous case of Indian Medical Association v V.P. Shantha,[24] the supreme court decided that medical treatment should be considered as a 'service' defined under section 2 (1) (o) of the Consumer Protection Act, 1986[25]. This revolutionized the way medical negligence cases were filed as it gave the aggrieved patients a chance to approach the consumer courts for resolution and compensation for the alleged negligent acts. Before this judgement for people to claim medical negligence, they had to go through the civil courts. This was a tiring and tedious process for the patients and their families.

The standard of proof used in civil negligence cases is called the balance of probabilities. This means that the claimant has to prove to the court that his claim of medical negligence is more than likely than the statement produced by the defendant. Thus, unlike the criminal standard of proof, the claimant doesn't have to prove anything beyond a reasonable doubt rather he has to prove his side is correct more often than not than the defendant. The reason for the use of such

[22] *State of Haryana v Santra* AIR (2000) SC 1888
[23] Indian Medical Council Act 1956
[24] *Indian Medical Association v VP Shantha* (1995) 6 SCC 651
[25] Consumer Protection Act 1986, s 2(1)(o)

a test is that in a civil suit, the power differential is almost equal as it has two individuals contesting a tort or a wrong, moreover, no one's liberty is at stake as after losing a civil suit the defendant won't be jailed instead he will have to compensate the claimant for the damages suffered by him.

THE BOLAM TEST AND ITS WANING IMPORTANCE

Critical Analysis of the Bolam Test: This test was established in the earlier stated case of Bolam v Friern Hospital Management Committee, in this case, Mr. Bolam a mentally ill person was voluntarily admitted to the Friern Hospital Trust as a patient. To find a treatment for his bleak mental health, he gave his wilful consent to the doctors of the aforementioned hospital to use electroconvulsive therapy (ECT). While administering the said therapy, the hospital did not give Mr. Bolam any muscle relaxants, and neither did they restrain him from moving anywhere. After starting the electro-convulsive therapy Mr. Bolam went through a spontaneous and painful electric shock, as he had not been given any relaxants and neither was he restrained, he flailed about violently eventually injuring himself and thus filed a suit for compensation against the hospital. In his plea, he stated that besides not being administered muscle relaxants and keeping him unrestrained, the hospital also did not warn him of the possible painful experiences that he might go through. McNair J said that as per expert witnesses, muscle relaxants weren't used as extensively for administering ECT and that physical restraints might have led to fractures, also doctors didn't inform their patients about the risks in treatment if the treatment was not a serious one. Thus, he formulated the judgement that if a responsible body of medical opinion agrees with a certain method of medical treatment then, the doctor won't be liable for following in the footsteps of such an established practice.

In India, the Laxmi Balkrishna Joshi case in 1968 was the first one to mention the use of the Bolam test for identifying medical negligence. while the Jacob Mathew case, was officially recognised as a test for dealing with the cases of medical negligence, in another case of Dr. Martin D'Souza v Mohd Ishfaq[26] in 2009 the court reaffirmed the notion that for a claimant to

[26] *Dr Martin F D'Souza v Mohd Ishfaq* (2009) 1 CPR 230 SC

file for medical negligence against a doctor he has to take the opinion of a competent medical authority, thereby solidifying the existence of Bolam in India.

The Waning Importance of the Bolam Test: The Bolam test has been criticised and challenged many times in the United Kingdom by various legal scholars, judges, and jurists. The most frequently heard complaint about the test was that it was easier for the defence to present medical experts who would endorse the methods used by the defendant thus, freeing him from the blame, hence it became tough for the plaintiffs to file a case and attain justice[27]. The Bolam test is a sociological doctrine instead of a normative one[28] thus it relies on the opinion of people for determining the standard of negligent behaviour rather than creating norms and rules outlining the same.

In the case of Bolitho v Hackney Health Authority[29] in 1997 the courts decided to reform the Bolam test and brought in an additional rule, whereby technical decisions by experts would still be subject to judicial scrutiny and evaluation and, if they failed to satisfy the court's logical and rational analysis then, the accusation of negligence may be sustained. In India, the Supreme Court in two cases marked the importance of the Bolitho test. In the case of Samira Kohli v Prabha Manchanda and Anr[30] in 2008 the court opined that "A new beginning has been made in the Bolitho v Hackney Health Authority, however, the court has chosen the concept of real consent given in Bolam over this test". While in the case of Vinitha Ashok v Lakshmi Hospital and Ors[31] in 2001 the court stated that "if the professional opinion is not able to withstand logical analysis of the court then, the body of opinion will be liable to be discarded by the court."

The case of Montgomery v Lanarkshire Health Board[32] rang the death knell for the Bolam test in the UK, the judgement given in this case emphasizes the concept of informed consent. The court in this judgement opined that every able-bodied adult person undergoing treatment is entitled to be informed about the details of the treatment they are a part of, and, if they refuse

[27] Harpwood V, 'Medical Negligence: A Chink in the armour of the Bolam test' (1996) 64 Medico-legal journal 179
[28] *Ibid*
[29] *Bolitho v City and Hackney Health Authority* (1996) 4 ALL ER 771
[30] *Samira Kohli v Prabha Manchanda & Anr* (2008) 1 CPJ 56 SC
[31] *Vinitha Ashok v Lakshmi Hospital & Ors* (2001) 8 SCC 731
[32] *Montgomery v Lanarkshire Health Board* (2015) UKSC 11

the method to be used by the doctor then the doctor has to respect their wishes. If this process of informed consent is not followed then, the defence of Bolam's test won't be available to the defendant's doctor and he would be liable for medical negligence. Thus the above tests and their respective case laws have dawned a new age in the field of medico-legal jurisprudence. Moreover, for the first time since the inception of the Bolam test, the medical negligence trials would be fought from the perspective of the patient and not the medical profession.

CONCLUSION

"*Medicine is of all the arts the noblest, but owing to the ignorance of those who practise it, and of those who, inconsiderately, form a judgment of them, it is at present far behind all the other arts*."

– Hippocrates

Medical negligence is a volatile legal topic, numerous courts, jurists, legal scholars, and governments all over the world are trying hard to reach an ultimate conclusion regarding this topic and patient rights. It is usually divided into two parts civil and criminal medical negligence, in India patients can approach the consumer courts in civil medical negligence suits as medical treatment is considered as a service in the country. As for criminal negligence, there is no clear answer on how to even initiate the said proceedings against a doctor, the kind of evidence required to hold a doctor liable is also convoluted. Thus, the courts have urged the Government in various cases since Jacob Mathew, to formulate certain guidelines or rules regarding medical negligence and its procedural nature.

The Bolam test provided a cover to the allegedly negligent doctor, this was so because for even initiating a suit for negligence against the doctor the patient had to take the opinion of an expert medical authority, thus spawning a self-perpetuating system that defended the alleged doctor. The other tests mentioned in the article are an attempt made by the courts to create a balance between the two parties, namely; patients and the doctors. The Supreme Court of India was correct when it opined in the Jacob Mathew case that, the government must create certain guidelines for tackling the complex issue of medical negligence with efficiency and not put any of the two parties at a significant disadvantage. It is only after the creation of such guidelines

that the medico-legal world will be able to adjudicate better on the issues relating to medical negligence, specifically criminal medical negligence.