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The Role of Expert Evidence in Medical Negligence Litigation in Malaysia

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ABSTRACT

The courts are continuing to allow greater participation in the justice system by experts. Expert evidence is admissible in court whenever there are matters or issues which require their expertise in terms of observation, analysis, description and resolution. In medical negligence litigation, the '*Bolam*' test is cited as the starting point. The test requires doctors to conform to a 'responsible' body of medical opinion. However, it has failed to define what a 'responsible' body of medical opinion is. The article aims to examine the role of expert evidence in medical negligence litigation cases. The scope of this article is limited to expert evidence in medical negligence litigation in Malaysia in the context of the standard of care required from doctors in the course of treatment, diagnosis and provision of information to their patients. The methodology is a legal, library-based research focusing mainly on primary and secondary sources. The findings indicate a need for reforms such as improving the quality of medical expert witness testimony by strengthening the qualifications for serving as a medical expert and providing more specific guidelines that govern the conduct of physicians throughout the legal process.

Keywords: Bolam test, expert evidence, medical negligence, litigation, doctors, course of treatment, diagnosis

INTRODUCTION

In medical negligence litigation, a key step is for the claimant to prove the doctor failed to meet the required standard of care. The traditional test in law in such cases is what is known as the *Bolam* test to prove a doctor is not negligent if what he/she has done is endorsed by a responsible body of medical opinion in the relevant specialty at

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the material time (*Bolam* vs *Friern Hospital Management Committee* (1957) 2 All ER 118). The standard has been criticised as one set by the medical profession and evidenced by expert testimony with minimal court scrutiny, and it has been suggested that stricter evaluation of such opinion is timely (Teff, 1998). The decision in *Bolitho v City and Hackney Health Authority* [(1992) PIQR P334, (1997) 39 BMLR 1, HL] suggests that the court should adopt a more interventionist stance in assessing expert evidence and in setting the standard of care. One such approach towards a more objective measure in determining the legal standard of care could be through the use of clinical guidelines.

In Malaysia, the tort system regulates and governs medical negligence litigation. It provides for compensation in cases where a doctor or any other medical personnel assisting in the treatment of a patient is proved to be negligent. The element of fault plays a vital role in negligence cases from the very beginning thus, the tort system has been criticised on the grounds that burden of proof rests on the patient or the plaintiff (in medical negligence claims) (Puteri Nemie, n.d.). Although this is the stance of the law, it has to be noted to prove that a doctor had positively breached a standard of care is onerous for the plaintiff due to the existence of the *Bolam* test. Due to the fact that the plaintiff has the burden of proving the doctor or defendant had strayed from the recognised standard of care, the profession imposes upon the plaintiff the burden of establishing first what the professional standard of care is in any given case and that the defendant has departed from it (Puteri Nemie, n.d.). It should be noted that the only acceptable manner of proof of the standard of care is another doctor's testimony. This has led to a situation where a patient has to face the unwillingness of one doctor to provide evidence against a fellow doctor. This kind of scenario has been dubbed as "conspiracy of silence" (*Salgo v Leland Stanford Jr. University Board of Trustees* 317 O 2d 1093 (1960)), which has effectively prevented plaintiffs of numerous medical negligence cases from prevailing at trial and deterred others from instituting litigation.

This article examines the role of expert evidence in the context of the standard of care required in the medical profession in medical negligence litigation in Malaysia. The *Bolam* principle has long been the criterion in Malaysia in assessing a doctor's level of competency (NorchayaTalib , 2010). However, being aware of some of the criticisms of the *Bolam* principle, the authors of the present study are of the opinion that the interests of the public and the medical profession are best served when scientifically sound and unbiased expert evidence testimony is readily available to plaintiffs and defendants in medical negligence litigation. In this article, the authors argue that although expert medical opinion of accepted practice is relevant, it should not be conclusive of the standard of care.

THE *BOLAM* PRINCIPLE

Before addressing the *Bolam* principle, it is important to briefly state the facts in *Bolam v Friern Hospital Management Committee* [(1957) 2 All ER 118]. In this case, the allegation was that a doctor had been negligent in administering electro-convulsive treatment (ECT) or therapy to a patient without a relaxant drug or restraining his convulsive movements. There were two medical opinions about the treatment of patients who receive ECT. One recommended that relaxant drugs should be used, and the other advised against it because of the risk of fractures. The patient, who had not been warned of the risks involved, had not been given the relaxant drugs, and had not been restrained when receiving the treatment. He suffered fractures as a result of not being properly restrained when receiving the treatment. The patient filed a suit on the basis of negligence against the doctor. McNair J in his direction to the jury at p.121stated:

> *…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. Putting it another way round, a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view…*

Although the statement above was only a direction to the jury in a High Court case, it was adopted by the House of Lords with approval in later cases and has regularly been restated in clinical negligence cases. The *Bolam* principle states that a doctor is not negligent if he or she has acted with a practice accepted as proper by a responsible body of medical professionals skilled in that particular art: it is immaterial that there exists another body of opinion that would not have adopted the approach taken by the doctor in question. As long as a "responsible body of medical opinion" exists that approves of the actions of the doctor, then the doctor escapes liability (Harpwood, 2009; Kian, 2003). What the law requires from the doctor is to prove that what he or she did is acceptable within the medical profession.

It cannot be denied that the *Bolam* principle puts a patient or a plaintiff in a very difficult position to prove that the doctor or the defendant had breached a standard of care owed to him or her. The *Bolam* principle allows the doctor to rely on a body of responsible medical professionals or medical opinion to absolve him or her of professional medical negligence. The courts have always interpreted the *Bolam* principle by stating that they cannot find a defendant negligent as long as there is a common practice or custom that supports the defendant's actions. However, the problem with the "custom test" is that it is viewed as purely descriptive as opposed to what ought to be done by medical practitioners (Puteri Nemie, n.d.). Hence, the most commonly accepted manner of proof of professional standard as per the *Bolam* principle is another doctor's testimony.

The authors are of the opinion that the *Bolam* principle despite being criticised has its own merits. For example, if the *Bolam* principle is not followed, there can be adverse effects to the medical profession and society at large. Doctors will opt for "defensive medicine" namely the treatment for their patients they consider to be "legally safe" even if they believe such a treatment may not be strictly warranted. This may be unnecessarily expensive and time-consuming. Apart from that, it will also encourage medical litigation, which in turn will increase premiums and overall healthcare costs. This might affect good doctor/patient relationships and possibly dissuade young doctors from joining high risk specialist fields for fear of litigations (Shanmugam, 2002).

Cases before the Advent of *Bolam* Principle

In the context of this article, a short analysis of several contentious cases is important as to what prompted the court to come up with the *Bolam* principle. This is relevant in understanding the *Bolam* principle as well as the reasons why courts have left such an important matter in the hands of the medical profession instead of enacting it into a law. Before the courts established the *Bolam* principle, they found it difficult to set a standard for the medical profession and majority of them opined that such matters should be left to medical judgments. In *Mahon* v *Osborne* [(1939) 2 KB 14], the plaintiff was admitted to the hospital for an abdominal operation. He later died and a swab was found in his body. The plaintiff was entitled to call expert evidence that the accident would not have occurred without negligence. In this case, the Court of Appeal held that the standard of care is to be measured by expert evidence. Lord Justice Goddard at p.47 stated:

> *I would not for a moment attempt to define in vacuo the extent of a surgeon's duty in an operation beyond saying that he must use reasonable care, nor can I imagine anything more than disastrous to the community than to leave it to a jury or to a judge, if sitting alone, to lay down what is proper to do in any particular case without the guidance of witnesses who are qualified to speak on the subject… As it is the task of the surgeon to put swabs in, so it is his task to take them out, and in that task he must use the degree of care which is reasonable in the circumstances and that must depend on the evidence.*

From the above, it is important to note that Justice Goddard seems to be aware of the fact that the medical profession has always been shrouded with a lot of complications and technicalities, which a judge may not be able to comprehend. Therefore, the message seems to be very clear that in order to reach a just and accurate decision, medical experts should be the ones helping the court to deal with such complex issues. Hence, a doctor cannot be said to be guilty of negligence if he or she has acted in accordance with a practice accepted by a responsible body of professional opinion. In other words, a doctor who is in breach of his or her duty has to be judged by his peers and not by the court.

In the case of *Roe* v *Minister for Health* [(1954) 2 QB 66] the plaintiff became paralysed after receiving an injection in hospital. Phenol had leaked into the syringe causing the paralysis. At this time, it was known that phenol could get into the syringe through invisible cracks. The court held that the defendants were not negligent as, judged by the standard of a reasonable person at the time of the accident, they could not have avoided the accident. The court would not condemn a defendant with 'the benefit of hindsight'. Perhaps, it is vital here to make a reference to the passage from the judgment of Denning LJ which indeed provides a clue to the philosophy of the *Bolam* principle. His Lordship at p.83 said:

> *If the anaesthetists had foreseen that the ampoules might get cracked with cracks that could not be detected on inspection, they would no doubt have dyed the phenol a deep blue; and this would expose the contamination. But I do not think that their failure to foresee this was negligence. It is so easy to be wise after the event and to condemn as negligence that which is only a misadventure. We ought always to be on our guard against it, especially in cases against doctors and hospitals. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks.*

Based on the statement above, Denning LJ had in mind that medicine as a profession has pros and cons in the course of treatment. Being aware of the considerable risks in the medical profession, perhaps it is justified the decision taken by the courts that a doctor or defendant should be judged by his peers in medical negligence cases.

The other relevant case to cite here is the case of *Hunter* v *Hantley* [(1955) SLT 231, (1955) SC 200]. In this case, the plaintiff claimed the doctor treating him was negligent in using a needle which was unsuitable. Lord President Clyde at p.217 stated:

> *To succeed in an action based on negligence, whether against a doctor or anyone else, it is of course necessary to establish a breach of that duty to take care which the law requires, and the degree of want of care which constitutes negligence must vary with circumstances… But where the conduct of a doctor, or indeed of any professional man, is concerned, the circumstances are not so precise and clear as in the normal case. In the realm of diagnosis and treatment there is*

ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis and treatment on the part of the doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of acting with ordinary care.

From the above, there is no doubt that there is a heavy burden of proof on a claimant in order to file a case against the doctor or a professional man on the basis of negligence. This is due to the fact that the claimant would have to establish that the doctor or a professional man deviated from the ordinary skill that is required as far as the profession is concerned. In order to succeed in his or her claim, the claimant would have to establish that no professional man of ordinary skill would have followed the course taken by the defendant i.e. in the course of diagnosis and treatment. Thus, the usual practice of other professionals in the same area will be a significant factor in determining this issue.

"Looking at the decisions of the courts before the advent of the *Bolam* principle, it is evident that the earlier cases have paved the way for the development of the *Bolam* test as used in medical negligence cases. Medicine is clearly an inexact science of which its outcome is rarely predictable. It would be a disservice to the community at large if liability were to be imposed on hospitals and doctors for everything that happens to go wrong (Puteri Nemie, n.d.). Hence, there must be a proper tool to gauge the standard of care of a doctor in determining his or her liability in medical negligence cases" (Puteri Nemie, n.d.).

Challenges to the *Bolam* Principle

The justification for the *Bolam* principle was stated by Lord Scarman in *Maynard* v *West Midlands RHA* (1985) 1 All ER at p. 635 when he said:

Differences of opinion exist, and continue to 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 the other; but that is no basis for a conclusion of negligence.

Based on this, the authors would like to point out that regardless of the justification of the *Bolam* principle a number of criticisms were expressed over the years. Some of the criticisms are: first, it failed to draw a distinction between 'what is done' and 'what ought to be done'. The key point of contention is that 'what is done' even if by most people, could still be considered negligent if it falls below the standard of what ought to be done. Second, the *Bolam* principle is seen as unfair to claimants and too protective of professionals. This is due to the fact that the doctor is only considered to be negligent based on what is determined by a body of professionals. Third, the rule is yet another example of professions protecting one another. It is important to note that in the case of medical negligence following the *Bolam* principle, courts have resorted to doctor's testimony for help. Fourth, the *Bolam* principle requires the defendant to conform to a 'responsible' body of medical opinion. However, the *Bolam* principle has failed to address or define what is a 'responsible' body of medical opinion? The case has also failed to address the issue of how many doctors would be required to form a 'responsible body of medical opinion? Moreover, we are bound to face some daunting tasks in dealing with the issue of a 'responsible' body of medical opinion especially where the practice or specialty has few registered practitioners. Fifth, the *Bolam* principle rests on the assertion that it is entirely up to the medical profession to decide how much information they should give to their patients. Although this approach appears to be favourable to those in the medical profession, we ought to remember that issues involving ethics and the fundamental rights of individuals should not be disregarded at whatever cost (Teff, 1998).

Despite the challenges to the *Bolam* principle, the authors are of the opinion that the principle strikes a win-win situation between the rights of doctors, patients and the general public. If the *Bolam* principle is not followed, there can be adverse effects to the medical profession and society at large. For example, doctors will opt for "defensive medicine" as well as choosing the treatment for their patients they consider to be "legally safe" even if they believe that such treatments may not be strictly warranted. This may be unnecessarily expensive and time-consuming.

THE DEVELOPMENT AND APPLICATION OF THE *BOLAM* PRINCIPLE IN MALAYSIA

This section will address the developments in the application of the *Bolam* principle in Malaysia. In Malaysia, the *Bolam* principle has long been the criterion in assessing a doctor's level of competency (NorchayaTalib, 2010). In other words, the *Bolam* principle has been well received by the Malaysian courts in determining the doctor's standard of care in medical negligence cases. In the context of this article, the authors do not intend to highlight all the cases, but only a few for the sake of better understanding. The selection of these cases is based on two criteria. First, where the *Bolam* principle was applied especially in cases of diagnosis and treatment. Second, where the *Bolam* principle was not applied especially in cases of seeking information or medical opinion/advice before a treatment could be administered by a doctor. One of the earliest cases where the *Bolam* principle was applied is the case of *Swamy v Mathews* [(1968) 1 MLJ 138]. In this case, the majority judgment accepted the testimony of the defendant doctor and his explanation that the prescription and the dosage given to the plaintiff, although at variance with the manufacturer's recommendation, were made based on his personal experience. The majority decision in discounting the contrary evidence clearly showed the reliance of the court to the so-called medical opinion. The reasonableness of the treatment was not examined by the court. The medical practitioner was not found to be negligent on the ground that medical practitioners need not have the highest degree of skill.

The development in the application of the *Bolam* principle in Malaysia can also be seen from the decision of the Privy Council in *Chin Keow v Government of Malaysia* [(1967) 2 MLJ 45]. In this case, the trial judge, Ong J., adopted the *Bolam* test of negligence and found the doctor to be negligent for prescribing a penicillin injection as a routine treatment for the patient and that he did so without asking a single perfunctory question to attempt to discover whether she was sensitive to the drug. Such is not considered a proper practice by a responsible body of medical opinion. The Federal Court, however, rejected Ong J.'s findings of negligence but on appeal, the Privy Council adopted Ong J.'s decision. The basis for the Privy Council's adoption of Ong J's decision was due to the fact that it was expressly written on the patient's card that she was allergic to penicillin.

Another relevant case law demonstrating the development in the application of the *Bolam* principle in Malaysia is the case of *Elizabeth Choo v Government of Malaysia & Anor* [(1970) 2 MLJ171]. In this case, Raja Azlan Shah J stated that a professional will not be deemed to be negligent if he or has taken steps that would normally be taken by others who are in the same position. However, a professional who takes a different view from another professional in the same profession is not necessarily in breach of his duty of care provided that his opinion is still in accordance with what is regarded as proper by a body of similarly skilled professionals. Thus, applying the *Bolam* principle to this issue, the court held that the anaesthetist is not negligent as he had followed the general and approved practice. The technique that he adopted was approved by a responsible body of medical professionals since 1956. Therefore, it did not matter if there was another body of opinion that would have taken a contrary view.

It is also important to note that the judicial decision in *Elizabeth Choo* was further consolidated in the case of *Kow Nan Seng v Nagamah&Ors* [(1982) 1 MLJ 128]. Here, the Federal Court held that the duty of a doctor to his or her patient is to adhere to the reasonable standard of care and expertise. If there were differences in opinion in terms of the types of plasters that may be used, the defendant would not be liable as long as he or she opted for a treatment that was generally accepted within the profession. The court applied the *Bolam* test and held that in this case, the defendant was liable as all doctors were aware of the fact that if a plaster was applied blood circulation would be affected . It is important to note that in this case there were conflicting opinions whether a complete plaster cast or a plaster slab is to be used.

In Malaysia, being aware of the challenges to the *Bolam* principle, the courts on certain occasions have departed from this well established principle - a familiar concept to most doctors. This departure perhaps could best be understood in the context of the existence of a different test for the medical profession in cases of provision of information. The first decision in which the court refused to apply the *Bolam* principle and instead adopted the principles set forth in *Rogers v Whitaker* [(1992) HCA 58; (1992) 175 CLR 479] was in *Kamalam a/p Raman &Orsv Eastern Plantation Agency* (*Johore*) *Sdn Bhd & Anor* [(1996) 4 MLJ 674]. In *Rogers* vs *Whitaker*, Mrs Whitaker became almost totally blind in her left eye as a result of a condition known as sympathetic ophthalmia, after a surgery was conducted on her right eye. The surgery was not conducted negligently, but the plaintiff's allegation was grounded on the defendant's failure to advise her of the risk of sympathetic ophthalmia, which resulted in her condition. In *Kamalam a/p Raman & Ors vs Eastern Plantation Agency* (*Johore*) *SdnBhd& Anor*, the trial judge did not regard himself as being bound to find medical practitioners negligent if there is a body of medical opinion that approved the doctor's practice. In this case, Mr D was taken to the estate clinic after complaining of giddiness and having fainted at work. The attending doctor (D1), having examined Mr D, prescribed medication and discharged him. On two subsequent occasions thereafter, Mr D was attended to by D2. Eight days after the first visit to the clinic, as a result of giddiness and fits, Mr D was taken to a hospital for emergency treatment and was subsequently transferred to another hospital. He died the next day, the cause of death being stroke, which could and should have been diagnosed much earlier.

The full reception of the *Whitaker* test (i.e. as laid down in the Australian case of *Rogers v Whitaker* [(1992) HCA 58; (1992) 175 CLR 479] in Malaysia may be seen in the Federal Court judgment in *Foo Fio Nav vs Dr Soo Fook Mun* [(2007) 1 MLJ 593]. In this case, the plaintiff was injured when the car she was travelling in was involved in a collision. She was taken to the nearest hospital, the Asunta Hospital. The plaintiff had dislocated her cervical vertebrae which caused much pain in her neck region. A cervical collar was placed around it to prevent unnecessary movement. After conservative treatment for a few days, the defendant surgeon performed two surgeries. After the first surgery, the plaintiff was paralysed and when medication failed to improve her condition, the defendant performed the second surgery. The plaintiff claimed that the defendant failed to explain the risk of paralysis arising from the first surgery, and instead informed her that it was a minor procedure, on the basis of which she gave her consent. The second surgery was performed without her consent being obtained. The plaintiff stated that had she been warned of the risk of paralysis she would not have readily agreed to proceed with the first surgery.

The Federal Court held that the applicable test in determining the standard of care of a medical practitioner in relation to disclosure of information and risks is not the *Bolam* test. Instead, the medical practitioner has a duty to warn a mentally competent patient of the risks of a proposed procedure so as to enable the patient to decide whether to proceed or decline it accordingly. Professional opinion and acceptable professional practice, but its reasonableness may be questioned by the courts (PuteriNemie , 2007).

Bolitho- Reinterpretation of the *Bolam* Principle

Having addressed the development in the application of the *Bolam* principle above, it is important to make a reference to the decision of the House of Lords in *Bolithov City & Hackney Health Authority* [(1997) 4 All ER 771] as a reinterpretation of the *Bolam* principle. *Bolitho* was a clinical negligence case that reached the House of Lords. The central legal issue was whether or not non-intervention by a doctor caused the plaintiff's injury. The facts of the case were that Patrick Bolitho, a two-year-old child, suffered catastrophic brain damage as a result of cardiac arrest due to respiratory failure. The senior paediatric registrar did not attend to the child, as she ascribed to a school of thought that medical intervention, under those particular circumstances, would have made no difference to the end result. Liability was denied on the grounds that even if she had attended to the case, she could not have done anything that would have materially affected the outcome. This view was supported by an impressive and responsible body of medical opinion. However, Lord Browne-Wilkinson rejected the argument put forward. According to Lord Browne-Wilkinson, the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such an opinion has a logical basis.

The judgment in *Bolitho* might impact upon the principle of *Bolam* in that, the court is likely to take a much more interventionist stand in appraising the professed standard of care (Samanta & Samanta, 2003). This is due to the fact that the courts will still have a say in the hearing of medical negligence cases by looking at two stages during the trial process. The first stage would be for the court to assess whether the decision had responsible peer support, based on an approach that was structured, reasoned and defensible. The professed opinion must withstand 'logical analysis'. This broadly reflects the *Bolam* test as it is known. The second stage, and this is where *Bolitho* might really take effect, is to assess on a 'risk analysis' basis the validity of accepting the treatment or course of action offered by the defendant and, more importantly, the validity of rejecting competing decisions. In undertaking such an analysis, the court may look at a number of factors, including the magnitude of the risk, the comparative risks of alternative interventions and treatments, the seriousness of the consequences, the ease by which the risk might be avoided, and the implications of such avoidance in terms of finances and resources of healthcare (Samanta & Samanta, 2003).

CONCLUSION AND RECOMMENDATIONS

The test for the standard of care in law expected of doctors is based on the principle laid down in *Bolam's* case. Hence, a medical practitioner is deemed as failing to reach the standard of care if a responsible body of r medical peers does not supports the action in question. However, the judgment in *Bolitho* suggests that expert opinion now has to withstand rigorous scrutiny from the judiciary. But the *Bolam* principle had not given much scope to the judiciary to intervene and had ensured that any medical treatment that conforms to a body of professional opinion is not negligent.

The authors are of the opinion that *Bolitho* has not curbed the power delegated to the medical profession by *Bolam*. *Bolitho* simply requires the judge to scrutinise medical evidence in the same fashion as they would do to expert evidence in any other type of cases of negligence. The decision only allows them to scrutinise medical opinions. To that extent, a faithful application of both *Bolam* and *Bolitho* would mean that the court will accept the views of a respected body of experts. It is useful to remind ourselves that the House of Lords in *Bolitho* was careful to say that it is only in rare cases and would "very seldom" be right for a judge to reach a conclusion that the views genuinely held by a competent expert are unreasonable. *Bolitho* has still not changed the status quo and judges have not been made more knowledgeable in medical matters through the outcome of the case (PuteriNemie, n.d., 2004, 2007).

Despite the acceptance of the *Bolam* test in Malaysia, there is still room for improvement especially regarding the quality of medical expert witness testimony. First, doctors need to be better educated and trained with necessary skills and knowledge so that they could perform a better job as expert witnesses in medical negligence cases. Second, a doctor who is called as an expert witness by the court should be very familiar and well versed with the medical field in question that is being heard by the court. Third, doctors should not protect their peers in the profession without putting forward a solid justification during the course of trial. Medical/expert opinions need to be scrutinised thoroughly. So doctors who are summoned as experts in medical negligence cases must act fairly, objectively and above all impartially in the process of providing their expert opinions to the court. Fourth, doctors/physicians appearing as expert witnesses in court should be very familiar with the medical standards required before accepting the role of an expert witness. Fifth, it is also vital that doctors/physicians expert witnesses' exercise care in assessing the relationship between the breach in the standard of care and the patient's condition.

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