

Is it time to say bye-
bye bolam in medical
law?



**ASSIGN
BUSTER**

The test which has become enshrined in law as the benchmark by which medical negligence is assessed follows the 1957 ruling in the case of *Bolam v Friern Hospital Management*[1] . Referred to since simply as the *Bolam* test it determined that a member of the medical profession will not be guilty of negligence if he or she exercised reasonable care in accordance with a practice accepted as proper by a responsible body of medical opinion.

Therefore in order to satisfactorily defeat a claim of clinical negligence under *Bolam* a healthcare professional is required to do nothing more than adduce evidence from the respected peers from his or her speciality who agree with the standard of practice which is the subject of the action. This means that a defendant doctor will not be deemed to have been at fault providing his or her course of action is one that is professionally backed by colleagues despite the fact that other members of the medical may take an opposing view. This essay will examine the effect of *Bolam* and address the question of whether its precedent represents a relic from a bygone era which no longer has a place in a modern legal system or whether it adequately serves society by striking a necessary balance between the medical profession and the patients to whose care they are entrusted.

One of the main drawbacks of the *Bolam* test is that it gives legal sanction to a self-regulatory system that operates for the benefit of clinicians in that it is the medical profession themselves and not the courts that decide the yardstick by which reasonable practice is measured. In a departure from its usual role as arbiters of what proper standards of care should be the courts are consequently relegated to a passive, acquiescent role compliantly rubber stamping medically determined definitions of reasonable clinical practice.

Bolam also provides a cloak of protection around medical practitioners in that it places an often insurmountable challenge on claimants to show that no responsible body of professional opinion exists that would advocate the course of conduct under question. Although doctors may take the view that the course of action being considered may not have been one that they would themselves have adopted they may feel reluctant to go further and go on record to officially opine that the conduct of a colleague was actually below the levels that should be expected. This obstacle to proving liability inevitably acts to discourage claimants from pursuing cases and renders it highly problematic for legal practitioners to advise on the likely success of the claims in those that do.

When examining the power and control *Bolam* affords the medical fraternity it perhaps comes as no surprise that its ruling came only nine years after the birth of the National Health Service when the appointed omnipotence and lofty pedestal upon which doctors were placed by a grateful public was at its highest and was reflected by judicial attitudes that viewed the risk of medical negligence as “*a dagger at the doctor’s back*” [2] . *Bolam* itself involved damages claimed for the injuries sustained by a patient during electro-convulsive therapy for the treatment of mental illness, a remedy which itself fell into serious disrepute and viewed as outmoded since the 1970’s. [3] It set the legal standard during a period in which the conduct of doctors went largely unchallenged and was automatically judged to be motivated by medical goodwill and professional integrity. [4]

Post *Bolam* society has gradually undergone a radical and fundamental change with a wealthier and more educated and informed public and a

<https://assignbuster.com/is-it-time-to-say-bye-bye-bolam-in-medical-law/>

doctor / patient relationship which has broadly transformed from that of humble appreciation to one of high demand and expectation. [5] Following a shift change towards a rights based society and the promotion of core values protecting the individual right to fair and just treatment the public increasingly expect a consistent and proper method of redress and regulation when systems are shown to have failed them. High profile and shocking scandals involving the corrupt, dishonest and even criminal behaviour of medical practitioners have also acted to massively shake public confidence and trust in a body of professionals previously presumed to operate only with the highest principles of morality and virtue. These include serious cases such as those of notorious murderer Dr Harold Shipman, Dr Andrew Wakefield who published a fraudulent research paper falsely claiming a link between the MMR vaccine and the appearance of autism and bowel disease, gynaecologist Rodney Ledward who was struck off for a number of offences including poor quality of clinical care and carrying out unnecessary medical procedures and that of Richard Neale another gynaecologist found guilty of failing to provide appropriate care to patients and lying about his qualifications. [6]

In the four decades that followed *Bolam* its prerogative was largely unchallenged with any endeavours by the lower courts to expand on its principle proving futile and leading to a swift overrule and reinstatement by the House of Lords that the standard of care to be decided was a matter for medical judgement.[7] However in the late 1990's just prior to the introduction of the Human Rights Act 1998 and perhaps following a recognition of changing public attitudes and the erosion of deference

afforded to the medical profession, the House of Lords examined the central issue of *Bolam* in *Bolitho v City Hackney Health Authority* [8] and chose to look at the question of whether it is the courts or the medical profession which exercised supreme authority over what amounted to the standard of care demanded of clinicians. In that case their lordships ruled that the medical profession would only escape liability for their actions if the expert witness testimony of peers on which they sought to rely was found by the court to be logical and reasonable. Although the judgement affirmed that the final say was with the courts Lord Browne-Wilkinson somewhat mitigated its force when he stated that it would be rare that the courts would find a competent medical expert to be unreasonable. [9]

Notwithstanding forecasts for its scarce application *Bolitho* does allow for the judicial scrutiny of expert evidence rather than mere endorsement and gives the courts authority to prefer the testimony of one body of experts over another. In an examination of case law post *Bolitho* , McClean [10] found that the case was sparingly referred to and that the courts still appeared to be more inclined to follow the standard form of *Bolam* without utilising *Bolitho* permitted analyses of professional opinion. Mulheron[11] however concluded that that *Bolitho*'s influence could be seen despite the fact that it was not often openly acknowledged. It is worth noting that the logic of expert medical evidence has been directly examined in some cases that have led to findings of negligence where they would previously have been afforded a harbour of sanctuary under *Bolam* . In *Reynolds v North Tyneside Health Authority*[12] the court followed *Bolitho* and held that expert testimony that

supported a practice that was untenable lacked a logical basis and accordingly could not be defended.

In *Penney v East Kent Health Authority*[13] a case that concerned false negative cervical screen results, the courts ruled on the basis of what the actions of the screener should have been when exercising reasonable care and rejected the defendants' expert testimony that the slides could have been reported as negative- on the basis that it was inconsistent with public confidence and illogical.

Considerations of public policy have previously played a part in judicial unwillingness to set a more prescriptive standard for doctors out of fears that it will result in overly defensive medicine in that clinicians will avoid getting involved with more pioneering and radical treatments due to fears of litigation. The Medical Innovation Bill championed by Lord Saatchi and currently in the consultation stage seeks to replace the *Bolam* test on the basis that it actually creates an unnecessary restriction on doctors by preventing them from deviating from normal practice in order to explore and develop new innovative techniques and surgical procedures[14]. The Bill which claims to prioritise the best interests of the patient proposes legislation permitting the medical profession to retreat from accepted medical practices in particular circumstances which include the existence of a plausible reason, an assessment of the risks associated with the proposed treatment and a full multi-disciplinary discussion.

The Bill has received a great deal of criticism from the medical profession itself who feel that it is unnecessary and fear that it will compromise patient

safety and “ encourage quackery”[15]. The chairman of the British Medical Association, Dr Mark Porter commented, “ At present, the law on medical negligence is framed to deter clinical interventions that might harm patients out of proportion to the potential benefits. The BMA is not aware of any evidence that shows this has stopped innovative and potentially successful treatments being trialled”[16]. Whilst medical advances must not be stifled the aims of law surrounding medical negligence litigation must do more than cover the back of the doctor. It is difficult to see how *Bolam* can be criticised for curtailing medical progress when its test is met merely on the basis of peer support. As argued by Dr Gerard Panting, “ Fear of litigation has been cited as the driving force behind defensive medicine. But would that be so bad? If it causes one clinician to seek that views of a second.....I, as a patient, am all for that”[17].

The question of determining whether standards of care have been sufficiently reached by members of the medical profession in clinical negligence cases will always be a formidable one for the courts given the undeniably complex and highly technical issues often in question. In an arena where developments are ever evolving and fast paced and concern practices that sometimes defy reliable determinants and cannot always be explained with complete scientific accuracy the answers to legal questions examining the adequacy of levels of care will inevitably heavily depend upon the views of the medical fraternity itself. In such circumstances it is difficult to imagine a fair and just system of medical litigation which does not apply a *Bolam* type test which accordingly makes it difficult to eliminate. Legislation that provides greater liberty for the medical environment to play God with

unregulated experimentation which would unavoidably compromise patient safety seems a backward step and a return to paternalism which is unjustified. Notwithstanding an acknowledgement and sympathy for the complicated and highly specialised topics often faced by the courts in medical litigation *Bolam* must not be used to allow judges to abdicate responsibility for ensuring that proper standards of care are being followed. If forcefully applied and fully embraced *Bolitho* represents an opportunity for the courts to apply a healthy check and balance to the vulnerabilities of *Bolam* and to ensure that it is not used to legitimise and maintain unsound, antiquated or shoddy practices of patient treatment simply on the basis that it is supported by fellow practitioners.

Bibliography

Alghrani A, Bennett R, Ost S, “ *The Impact of the Loss of Deference towards the Medical Profession*” – *Bioethics, Medicine and the Criminal Law Volume I* (Cambridge University Press 2012)

BMA News “ *Medical innovation bill allows ‘reckless practice’*” (15th May 2014) accessed 1 st June 2014

Carr C, *Unlocking Medical Law and Ethics* (Routledge 2012)

Crossley J, “ *BMA takes scalpel to Saatchi Bill*” (Zenith PI 27th May 2014) accessed 1st June 2014

Dixon-Woods M, Yeung K, Bosk C, “ *Why is UK medicine no longer a Self regulating profession? The role of scandal involving “bad apple” doctors*” *Social Science and Medicine* xxx (2011) 1-8

<https://assignbuster.com/is-it-time-to-say-bye-bye-bolam-in-medical-law/>

Harpwood V, *Medicine, Malpractice and Misapprehensions* (Routledge Cavendish 2007)

Lord Woolf “ *Are the Courts excessively deferential to the medical profession?*” (2001) 9 Medical Law Review 1

McCartney M, “ *Withdraw Saatchi’s quackery bill*” British Medical Journal 29th April 2014

McClellan A, “ *Beyond Bolam and Bolitho*” 2002 5 Med L International 205

Mulheron R, (2010) “ *Trumping Bolam : A Critical Legal Analysis of Bolitho’s Gloss.*” Cambridge Law Journal 69, 609-638

Panting G, “ *Doctors on the defensive*” *The Guardian* (1st April 2005)

Saatchi M, “ *We must liberate doctors to innovate.*” *The Telegraph* 26th January 2013

Stone C, “ *From Bolam to Bolitho : unravelling medical protectionism*” Medical and Legal Limited accessed 27th May 2014

2013

Table of cases

Bolam v Friern Hospital Management Committee[1957] 2 All ER 118

Bolitho v City and Hackney Health Authority

Hatcher v Black The Times 2nd July 1954[1997] 4 All ER 771

Maynard v West Midlands Regional Health Authority [1985] 1 All ER 635

<https://assignbuster.com/is-it-time-to-say-bye-bye-bolam-in-medical-law/>

Penney v East Kent Health Authority [2000] 55 BMLR 63

Reynolds v North Tyneside Health Authority [2002] Lloyds Rep Med

Sidaway v Bethlem Royal Hospital Governors [1985] AC 871

Whitehouse v Jordan [1981] 1 All ER 267

1[1957] 2 All ER 118

2as per Lord Denning, *Hatcher v Black* The Times 2nd July 1954

3Gary Null “ Electroconvulsive Therapy: A Second Opinion.” 16th April 2010
p. 5

4Christopher Stone “ From Bolam to Bolitho : unravelling medical
protectionism.” Medical and Legal Limited accessed 27th May 2014

5Lord Woolf “ Are the Courts excessively deferential to the medical
profession?” (2001) 9 Medical Law Review 1; see also A. Alghrani, R. Bennett
& S Ost, “ The Impact of the Loss of Deference towards the Medical
Profession” – Bioethics, Medicine and the Criminal Law Volume I (Cambridge
University Press 2012); Vivienne Harwood, *Medicine, Malpractice and
Misapprehensions* (Routledge Cavendish 2007)

6Dixon-Woods M, Yeung K, Bosk C, “ Why is UK medicine no longer a Self
regulating profession? The role of scandal involving “ bad apple” doctors”
Social Science and Medicine xxx (2011) 1-8

7see – *Whitehouse v Jordan* [1981] 1 All ER 267; *Maynard v West Midlands Regional Health Authority* [1985] 1 All ER 635; *Sidaway v Bethlem Royal Hospital Governors* [1985] AC 871

(4) [1997] 4 All ER 771

8[1997] 4 All ER 771

9ibid at 779

10Alistair McClean, “ Beyond Bolam and Bolitho” (2002) 5 Med L

International 205

11Rachael Mulheron (2010) “ Trumping Bolam : A Critical Legal Analysis of Bolitho’s Gloss.” *Cambridge Law Journal* 69, 610-637. See also Carr C, *Unlocking Medical Law and Ethics* (Routledge 2012) p. 11

12[2002] *Lloyds Rep Med* 459

13[2000] 55 *BMLR* 63

14Maurice Saatchi, “ We must liberate doctors to innovate.” *The Telegraph* 26th January 2013

15Margaret McCartney, “ Withdraw Saatchi’s quackery bill” *British Medical Journal* 29th April 2014; see also Justin Crossley, “ BMA takes scalpel to Saatchi Bill” (*Zenith PI* 27th May 2014) accessed 1st June 2014

16BMA News “ Medical innovation bill allows ‘ reckless practice’ 15th May 2014

17Gerald Pating “ Doctors on the defensive” *The Guardian* (1st April 2005)