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COMMENTS

THE BOLAM TEST LIVES ON

Bolitho v *City and Hackney Health Authority*[1]

IN recent years, considerable criticism has been levelled at the test for determining the standard of care in negligence with respect to persons within the medical profession. The test is based on a long line of cases dating back more than a hundred years, but it takes its authority in modern times from Mr Justice McNair's direction to the jury in the case of *Bolam* v *Friern Hospital Management Committee*,[2] and is hence universally known as the *Bolam* test. Mr Justice McNair's dictum starts with the general proposition that in "a situation which involves the use of some special skill or competence ... the test as to whether there has been negligence or not is ... the standard of the ordinary skilled man exercising and professing to have that special skill".[3] It then goes on to deal specifically with cases of medical negligence, and states that 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 ... [or p]utting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view".[4]

The test has – with a few exceptions[5] – been applied consistently by

1 [1997] 3 WLR 1151 ("*Bolitho's* case).
2 [1957] 1 WLR 582.
3 *Ibid*, at 586.
4 *Ibid*, at 587.
5 See, *eg*, *Hucks* v *Cole* [1993] 4 Med LR 393 (a case actually decided in 1968), in which a doctor *was* found to be negligent, and in which it is arguable whether the *Bolam* test was really applied. Note, though, that both the Court of Appeal and the House of Lords in *Bolitho's* case considered the decision in *Hucks* v *Cole* to be consistent with an application of the test. For further discussion, see *infra*, text at note 23 *et seq*.

the English courts.[6] However, it has not always found favour in other jurisdictions. In Australia, for example, the courts, while accepting the general formulation of the standard of care in *Bolam's* case,[7] have *not* determined that standard simply by reference to the practice followed or supported by a responsible body of opinion in the relevant area, even in medical negligence cases.[8] And during the last twenty years or so, strong doubts about the appropriateness of the *Bolam* test, specifically in cases involving the failure to inform patients of material risks associated with treatment, have been expressed in various jurisdictions.[9]

The concerns raised by the so-called "informed consent" cases, have led to a heightening of the more general debate about whether it is acceptable in *any* context for the medical profession to be the sole arbiter of what constitutes medical negligence.[10] Particular concern has been expressed by those who consider that, rather than being regarded merely as a tool to assist in determining whether or not there has been negligence, the *Bolam* test has been elevated "to the status of an unquestionable proposition of law ... that professional practice *will not* be reviewed by the courts".[11] There have been suggestions that, if the opportunity arose, the highest English court might wish to reconsider the appropriateness of the *Bolam* test. However, in *Bolitho's* case, the House of Lords has now chosen to reaffirm the continued application of the test, at least where cases involving

6 See, *eg*, *Chatterton* v *Gerson* [1981] QB 432, *Whitehouse* v *Jordan* [1981] 1 WLR 246, *Maynard* v *West Midlands Regional Health Authority* [1984] 1 WLR 634 ("*Maynard's* case) and, arguably, *Sidaway* v *Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 ("*Sidaway's* case) – though note that some commentators consider that only Lord Diplock in *Sidaway's* case really based his judgment on the *Bolam* test (see, *eg*, Ian Kennedy, *Treat Me Right* (Oxford, 1988)).

7 See, *eg*, *Papatonakis* v *Australian Communications Commission* (1985) 156 CLR 7, *Cook* v *Cook* (1986) 162 CLR 376 and *Weber* v *Land Agents Board* (1986) 40 SASR 312.

8 See, *eg*, *Albrighton* v *Royal Prince Alfred Hospital* [1980] 2 NSWLR 542.

9 Lord Scarman, in *Sidaway's* case (*supra*, note 6), preferred a test similar to that used in parts of the United States, based on the need to obtain the informed consent of the patient rather than the right to rely solely on the judgment of the doctor, and, more recently, the Australian High Court in the case of *Rogers* v *Whitaker* (1993) 67 ALJR 47 at 52, decisively rejected the *Bolam* test in favour of an approach based on the expectations of "a reasonable person in the patient's position". In so doing, the court adopted a very similar position to that of the Supreme Court of Canada in the case of *Reibl* v *Hughes* (1980) 114 DSLR 3d 1.

10 See, *eg*, Dieter Giesen, 'Medical Malpractice and the Judicial Function in Comparative Perspective' (1993) 1 Medical Law International 3, at 4, Rupert M Jackson and John L Powell, *Professional Negligence* (3rd ed, 1992) at 473, and John Keown 'The Rise and Rise of "the *Bolam* test"' [1995] SJLS 342 at 363.

11 Kennedy & Grubb, *Medical Law: Text with Materials* (2nd ed, 1994) at 452. See, too Keown, *supra*, note 10, at 346 and 363-4.

claims relating to negligent treatment[12] are concerned. There will be many who see this as a lost opportunity, and it is unlikely that the decision will silence the voices raised against what is commonly regarded as a paternalistic approach to determining negligence, and one which substitutes for the opinion of the court the opinion of the very profession whose standards are in question.

Bolitho's case arose from tragic circumstances. A two-year-old child, Patrick Bolitho, was admitted to hospital for the second time in a week, suffering from breathing difficulties. The senior paediatric registrar, Dr Horn, appointed a nurse to look after him on a one-to-one basis. On the day after he was admitted, Patrick suffered from an episode during which he turned very white and had great difficulty breathing. The nurse was sufficiently concerned to call the sister on duty, and the sister, who was also very concerned, immediately called Dr Horn (rather than going through the normal channels and calling a less senior member of staff). Dr Horn, who had examined the child only a short time before, said on hearing of the deterioration in his condition that she would attend as soon as possible. She did not, however, attend Patrick, although, in the event, he appeared to recover quickly from this episode. Just over an hour later, a second, very similar, episode occurred. Dr Horn was again called. She was in afternoon clinic, but said that she had asked the senior house officer in paediatrics to attend in her place. However, the senior house officer did not attend Patrick, apparently because she never received the message. Half an hour later, Patrick suffered from a final episode. He became agitated and began to cry. While the doctors were being called, he suffered cardiac arrest as a result of his blocked respiratory system. He was revived after about ten minutes, but he sustained severe brain damage as a result of this experience, and died some time later. His mother, as administratrix of his estate, continued the action for negligence against the defendant health authority which had been initiated on his behalf.

On the basis of evidence established before the trial judge, Hutchison J, the health authority accepted that Dr Horn had breached her duty of care in failing to attend (or to ensure that a suitable deputy would attend) Patrick after receiving the telephone calls describing his first two episodes. It was also established that, had a prophylactic intubation procedure to provide

[12] Little attention was given in *Bolitho's* case to the other major area of medical negligence claims – those relating to the failure to inform of material risks. Indeed, Lord Browne-Wilkinson specifically stated that he was *not* considering questions of disclosure of risk when examining the situations in which a defendant doctor could be held liable in negligence. It is, therefore, possible that a future House of Lords could see such cases as sufficiently distinct to allow of a different analysis.

an airway been carried out, it would have prevented Patrick from suffering cardiac arrest in the event of respiratory failure. This procedure would have had to have been carried out before the final episode. The key issue to be decided was, therefore, technically a question of causation, albeit a question of causation determined by reference to the relevant standard of care. It was summarised by Hutchison J, in a way which shows that he – together, presumably, with counsel for both parties – clearly saw the case as one involving application of the *Bolam* test:

> [I]f Dr Horn would have intubated, then the plaintiff succeeds, whether or not that is a course which all reasonably competent practitioners would have followed. If, however, Dr Horn would not have intubated, then the plaintiff can only succeed if such failure was contrary to accepted medical practice ... Common to both sides is the recognition that I must decide whether Dr Horn would have intubated (or made preparations for intubation), and, *even if she would not, whether such a failure on her part would have been contrary to the accepted practice of the profession*.[13]

On Dr Horn's evidence, Hutchison J found that she would not have intubated. The second aspect of the issue therefore became critical. Was the failure to intubate contrary to the accepted practice of the profession? In this respect, Hutchison J heard evidence from eight distinguished medical experts.The five called on behalf of Patrick (of whom the most eminent in this field was Dr Heaf, a consultant paediatrician in respiratory medicine at the Royal Liverpool Children's Hospital, the largest children's hospital in the United Kingdom) were all of the opinion that, certainly after the second episode, any competent doctor would have intubated, since Patrick's condition indicated that he was in a state of respiratory distress progressing inevitably to hypoxia and respiratory failure. The three called on behalf of the defendants (of whom the major witness was Dr Dinwiddie, a consultant paediatrician in respiratory diseases at the Hospital for Sick Children, Great Ormond Street) all said that Patrick's symptoms, as recounted to Dr Horn by the nurse and the sister, were not consistent with those of a child passing through the stages of progressive hypoxia, and that intubation would not, therefore, have been appropriate.[14]

[13] *Supra*, note 1, at 1155 (as referred to in the judgment of Lord Browne-Wilkinson, whose emphasis has been added).

[14] On the facts, Hutchison J held that the accepted evidence of the nurse and the sister who attended Patrick prior to the final episode suggested that his behaviour was inconsistent with a child passing through the stages of progressive hypoxia.

Hutchison J applied to these divergent views the dictum of Lord Scarman in *Maynard* v *West Midlands Regional Health Authority* that: "in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another".[15] He concluded that since both Dr Heaf and Dr Dinwiddie were distinguished and truthful experts, it was not his place to decide between them. Therefore, given that not intubating would have met the standard of a respectable body of professional opinion (that represented by Dr Dinwiddie and his colleagues), it had not been proved that the admitted breach by Dr Horn in failing to attend Patrick had caused his damage, since a respectable body of doctors would not have intubated even if they had attended him.

The case was appealed to the Court of Appeal,[16] where Dillon and Farquharson LJ dismissed the appeal, with Simon Brown LJ dissenting. When the case came before the House of Lords, Lord Browne-Wilkinson delivered the judgment of the court.

The first point with which his Lordship dealt was the argument (raised for the first time before the Court of Appeal) that the *Bolam* test could not, and should not, be applied in any case involving a question of causation. Simon Brown LJ accepted this argument and it was on this ground that he dissented in the Court of Appeal.[17] Lord Browne-Wilkinson, however, was firmly of the opinion that in a case such as this one, which involved a mixed issue of standard of care and causation, the application of the test was appropriate. In as much as his Lordship saw the primary question – even where the causation issue was concerned – as relating to the applicable standard of care, he may have been correct.[18] This, however, begs the question of whether that standard ought indeed to have been determined solely by the use of a rigid application of the *Bolam* test.

The rest of Lord Browne-Wilkinson's judgment involved an analysis of the *Bolam* test, and, in particular, the weight which Hutchison J gave in applying the test to the evidence of Dr Dinwiddie, the principal witness for the defendants. Hutchison J found Dr Dinwiddie to be an impartial and

15 [1984] 1 WLR 634, at 639 (*Maynard's* case).

16 (1992) 13 BMLR 111.

17 Simon Brown LJ considered that Hutchison J had been wrong in accepting Dr Horn's evidence that she would not have intubated. For this reason, his focus on the question of intubation was quite different. The House of Lords considered that he had misread Hutchison J's judgment, since it was entirely up to Hutchison J, as the trial judge, to assess Dr Horn's evidence with regard to what she would have done.

18 It should be noted, however, that Kennedy & Grubb (*supra*, note 11) commenting (at 459) on the Court of Appeal decision in *Bolitho's* case, regarded it as "curious" that the majority considered the *Bolam* test to be relevant in determining causation.

knowledgeable witness. However, he also sympathised with the argument made by counsel for Patrick that, in the circumstances, it was difficult to see the failure to intubate as either logical or reasonable, given that intubation would have been the "safe" option to take in anticipation of a recurrence of the life-threatening event. Hutchison J ultimately accepted, though, that "the difficulty of this approach ... was that it invited me to substitute my own views for those of medical experts".[19]

Hutchison J's words are very telling, since they illustrate the unjustifiable degree to which the *Bolam* test has eroded the judge's role. Five medical experts had expressed opinions which formed the basis for Hutchison J's own view that intubation would have been the logical course to follow. In preferring the opinions of those experts, he would *not* have been ignoring medical opinion and taking the position of an uneducated layman. He would instead have been basing his judgment on the views of the experts whose approach he considered to be logical and reasonable rather than the views of the experts whose logic he doubted. In any other type of case, it would be accepted automatically that to decide between the evidence of competing witnesses is one of the primary tasks of the trial judge. But in medical cases, the combined effect of the *Bolam* test and the decision in *Maynard's* case is apparently to tie the hands of the judge in this respect. As long as *any* responsible body would take the opposite view from that favoured by the majority of experts and the judge himself, the judge must hold that the case has not been established on the balance of probabilities.

Before the House of Lords, counsel for Patrick attempted to argue that this position was wholly unsatisfactory. The argument was accorded little weight by Lord Browne-Wilkinson. In his Lordship's opinion, the *Bolam* test was to be applied to the case, and under that test the defendant was entitled to escape liability as long as the court was of the view that the experts who gave evidence on behalf of Dr Horn were a "responsible body of medical men" or were expressing views which reflected a "respectable" body of medical opinion.

Lord Browne-Wilkinson recognised that, occasionally, the courts *are* prepared to find the views of experts to be neither respectable nor responsible. In this respect he referred to the decision of the Privy Council on appeal from Hong Kong in *Edward Wong Finance Co Ltd* v *Johnson Stokes and Master* [20] and the English Court of Appeal decision in *Hucks* v *Cole*.[21] In his Lordship's opinion, though, such decisions should be few and far between since:

[19] Referred to by Lord Browne-Wilkinson, *supra*, note 1, at 1158.
[20] [1984] AC 296 (*Johnson Stokes and Master's* case).
[21] *Supra*, note 5.

> In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion ... in my view it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence ... it is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the bench mark by reference to which the defendant's conduct falls to be assessed.[22]

Of the two exceptional cases referred to by Lord Browne-Wilkinson in which a decision to reject the views of expert witnesses was reached, it is noteworthy that *Johnson Stokes and Master's* case did not even involve a question of of medical negligence – it was a case turning on a involved a question of legal practice. The experts in question were therefore lawyers – and thus members of a profession whose practices and procedures judges, as lawyers themselves, were much more likely to have felt able to condemn. And although the other exceptional case referred to by Lord Browne-Wilkinson *did* involve a question of medical negligence in which the views of expert witnesses were rejected, it did not prove sufficient to influence the outcome of *Bolitho's* case.

In *Hucks* v *Cole*, a doctor had failed to treat with penicillin a patient who had septic areas on her skin, even though he knew that the areas contained organsims which could lead to septicaemia. In spite of the fact that a number of distinguished doctors gave evidence to the effect that they would not have administered penicillin in those circumstances, the trial judge was prepared to hold the doctor negligent, and his finding was upheld by the Court of Appeal, where Sachs LJ observed that:

> When the evidence shows that a lacuna in professional practice exists by which risks of grave danger are knowingly taken, then, however small the risk, the court must anxiously examine the lacuna – particularly if the risk can be easily and inexpensively avoided. If the court finds, on an analysis of the reasons given for not taking those precautions that, in the light of current professional knowledge, there is no proper basis for the lacuna, and that it is definitely not reasonable that those

[22] *Supra*, note 1, at 1160.

> risks should have been taken, its function is to state that fact and where necessary to state that it constitutes negligence.[23]

The majority of the Court of Appeal in *Bolitho's* case apparently considered the decision in *Hucks* v *Cole* to be consistent with the *Bolam* test (and its subsequent application in *Maynard's* case),[24] but they took the view that in *Hucks* v *Cole* unnecessary risks had been taken, and the views of the experts who supported the defendant had not stood up to analysis, neither of which was true in *Bolitho's* case.[25] In the House of Lords, Lord Browne-Wilkinson appears to have been of a similar opinion, implicitly concluding that *Bolitho's* case failed to meet the criteria for a finding of negligence referred to by Sachs LJ in *Hucks* v *Cole*. His Lordship had two principal reasons for reaching his decision – one relating to his doubts about the true views of Hutchsion J with respect to the expert evidence, the other relating to the nature of the treatment which it was argued ought to have been administered.

[23] *Ibid*, at 397. This passage was referred to by Lord Browne-Wilkinson (see *supra*, note 1, at 1159). See, too, Keown, *supra*, note 10, at 347 for his views about the case. In some ways, the facts of *Hucks* v *Cole* presented a stronger case for the plaintiff than did *Bolitho's* case, because it involved a widespread, but clearly inexcusable, failure to carry out a simple procedure in circumstances not involving the pressure of an emergency, whereas *Bolitho's* case concerned a failure to administer a more intrusive treatment to a child in an emergency situation (where a judgment call is always more difficult to assess). Moreover, in *Hucks* v *Cole*, it was, as Sachs LJ pointed out, not really a question of there being two schools of thought about administering penicillin, since the doctors who said that they would have acted in the same way as the defendant expressed views which did not really stand up to analysis. On the other hand, it can be argued that the more immediate the danger to life, the greater the risk which is justified in dealing with that danger, and, in this respect, *Bolitho's* case may even have offered a more powerful case from the plaintiff's point of view.

[24] Farquaharson LJ was of the view that there was "no inconsistency between the decisions in *Hucks* v *Cole* and *Maynard's* case. It is not enough for a defendant to call a number of doctors to say that what he had done or not done was in accord with accepted clinical practice. It is necessary for the judge to consider that evidence and decide whether that clinical practice puts the patient unnecessarily at risk", while Dillon LJ suggested that the approach adopted by Sachs LJ in *Hucks* v *Cole* would be justified in a situation where "the reasons of one group of doctors do not really stand up to analysis". Simon Brown LJ (the dissenting judge in the Court of Appeal) did not express any views on the meaning and effect of the *Bolam* test. (See *supra*, note 16).

[25] Kennedy and Grubb (*supra*, note 11, at 459-460) describe the decision of the majority of the Court of Appeal as one in which "it is fair to say that what the court gives with one hand it takes away with the other" since, having accepted in theory the possibility of questioning medical practice, "[b]oth judges made it clear that the burden on the plaintiff of demonstrating the unreasonableness of accepted practice is very (perhaps impossibly) onerous".

Lord Browne-Wilkinson observed that Hutchison J may, in the first place, only have doubted both the logic and the reasonableness of the evidence of those experts who would not have intubated because these doubts had been planted in his mind by counsel for Patrick. If this were so, then he was, to an extent, merely repeating counsel's arguments when he expressed his concerns in this respect. Even if this were not so, the nature of the intubation procedure – an invasive undertaking which would have involved anaesthetising and ventilating Patrick, and thus subjecting him to great discomfort as well as the normal risks associated with surgery and anaesthetic – was one which meant that it could not be regarded as an automatic solution to the crisis. The majority of experts *might* have taken the view that the risks involved were more than justified by the life-threatening nature of Patrick's condition, but some experts would not have done so. To doubt the logic of the experts who were of the view that intubation was not called for was one thing, but to hold that their opinions were unsustainable, or, in Lord Browne-Wilkinson's words, that these opinions could not "be logically supported *at all*"[26] was quite another.

Once Lord Browne-Wilkinson approached the critical issue in this way, it was virtually certain that he would decide that the action must fail. And that is the key to the problem of applying the *Bolam* test. The reality is that the test (or at least the inflexible way in which that test has come to be applied by the courts) has so distorted the process of determining medical negligence, that it is almost impossible to envisage a case in which the test is applied in its present form where a court will be able to hold that a doctor *has* been negligent. Once what ought to be simply a matter of finding the evidence of one set of witnesses more convincing than the evidence of the opposing witnesses becomes instead a matter of actually having to condemn those opposing witnesses as irresponsible, unworthy of respect, and holding opinions so unreasonable that they cannot possibly be supported by logic, the chances of a court being willing to commit itself to such a finding become unlikely in the extreme.

Perhaps, on the facts of *Bolitho's* case, even a court applying a more moderate and reasonable test might have refused the claim. That, however, does not affect the fact that the test which was actually used in the case – a test which it appears will be with us for years to come – stacks the odds so firmly against the plaintiff in a medical negligence action that it is almost not worth going to court in the first place. That such a position

[26] *Supra*, note 1, at 1160 (emphasis added).

cannot be good for any society is surely self-evident. It is to be regretted that the House of Lords in *Bolitho's* case did not take the opportunity, if not to reject the *Bolam* test altogether, then at least to adopt a more realistic approach to its application.

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