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WRITE-UP

THE BOLAM TEST: AN UNFAIR DECISION IN THE TORTS OF PROFESSIONAL NEGLIGENCE.

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Introduction

In his book, Winfield and Jolowicz on Torts, by Rogers W.V.H 13th edition, Sweet and Maxwell, the learned author defined negligence as:

"Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. Thus its ingredients are: (a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty; (b) breach of that duty; (c) consequential damage to B…"

The torts of professional negligence is not well developed in our Ghanaian jurisprudence like other common law countries. Over the years, our courts have dealt with few numbers of cases on this subject. Because of the dearth of authorities in our law reports, most of the decided cases on this subject has been decided on the *Bolam v Friern Hospital Management Committee*[1] principle, (popularly known as the *Bolam* Test).

The author is of the view that the *Bolam* Test should be sparingly applied especially in situations where it will lead to injustice under the guise of judicial precedent. Holding on too much to precedent even where it will lead to injustice is likely to infringe on one's fundamental human rights. In L*ondon Transport Executive v Betts*[2] , Lord denning dissented in two cases in the House of Lords in 1959 and 1960 on the question of precedent. In the first case referred to supra he said:

"it seems to me that when a particular precedent, even in your Lordship's House, comes into conflict with a fundamental principle, also of your Lordship's House, then the fundamental principle must prevail. This must at least be true when on the one hand, the particular precedent leads to absurdity or injustice, and on the other hand, the fundamental principle leads to consistency and fairness. It would, I think, be a great mistake to cling too closely to a particular precedent at the expense of fundamental principle."

Talking about precedent Lord Denning also said:

"If a lawyer hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes tumbling down about them. They will be lost in 'The codeless myriad

1 [1957] 1 WLR 582. This direction was approved by the Privy Council in Chin Keow v Government of Malaysia

2 [1967] 1 WLR 813 at p.816, and Lord Edmund-Davies in Whitehouse v Jordan [1981] 1 WLR 246. (1959) AC 213

of precedent. That wilderness of single instances'. The common law will cease to grow. Like a coral reef it will become a structure of fossils."

This paper is aimed at criticising the wholesome application of the Bolam Test by judges and lawyers on over reliance on this principle in situations where it would lead to injustice to the victim.

The standard of skill and care

Whether a medical practitioner is sued in contract or torts, he or she is not obliged to achieve success in every case that he treats. His duty, like that of other professional men, is to exercise reasonable skill and care. Perhaps the most well-known formulations of this principle is that used by Tindal C.J when summing up to the jury in *Lamphier v Phipos*[3] , a medical negligence action tried in 1838.

"Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skills. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill, and you will say whether, in this case, the injury was occasioned by the want of such skill in the Defendant."

This principle has been eloquently restated on a number of occasions over the last 150 years, of which the following are a selection:

Tindal CJ in *Hancke v Hooper*[4] : "A surgeon does not become an actual insurer; he is bound to display sufficient skill and knowledge in his profession. If from some accident, or some variation in the frame of a particular individual, an injury happens, it is not a fault in the medical man."

Erle CJ in *Rich v Pierponi*[5] "A medical man was certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge: but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge. What that was the jury were to judge. It was not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possible have used some greater degree of care."

3 Seare v Prentice (1807) 8 East 348.
4 (1835) 7 C & P 81
5 (1862) 3 F. & F. 35

From these principles, there is no doubt that a reasonable amount of skill and knowledge is required of a medical professional to perform his duties. But where he is negligent in performing his duty as a medical professional as required he will be held liable and the *Bolam* principle should not avail such a medical professional. I am strongly of the opinion that the *Bolam* principle has caused so much injustice to victims at various hospitals and its application should be tread on carefully. However, I am not advocating that every negligence caused by a medical professional in the course of his duties should be held liable. But the strict application of the Bolam principle should be ignored.

The Bolam Principle

McNair J. directing the jury in *Bolam v Friern Hospital Management Committee supra* said:

"But where you get a situation which involves the use of some special skills or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

Lord Clyde in *Hunter v Hanley*[6] also said:

"But where the conduct of a doctor, or indeed of any professional man, is concerned, the circumstances are not so precise and clear cut as in the normal case [of negligence]. 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 developed less skill or knowledge than others should have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty if acting with ordinary care..."

McNair J then stated at p. 122:

"A doctor is not guilty of negligence if he has acted in accordance with a practice accepted at proper by a responsible body of medical men skilled in that particular art."

What these cases really espouses are that a doctor is not negligent if he acts in accordance with a responsible body of medical opinion.

Coming to the Ghanaian jurisprudence on this I will refer to the case of *Dr Sandys Arthur v Ghana Medical Association*[7] per Irene

6 1955 S.C 200 at pp. 204-205
7 [2012] 52 GMJ 109 CA

Danquah JA applied the bolam principle and held thus:

""But where you get a situation which involves the use of some special skills or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

The learned judge applied the ratio as stated in the Bolam Test to come to arrive as its decision.

The learned judge further held:

"The English court has taken the view that when it comes to the determination of matters concerning the conduct of a member of a profession, it is his own colleagues with good repute and competency who are in the reasonable position to determine the matter."

The question is will these professionals in the same professional body with competency be fair to the victim? Also will the rigid application of precedent on this subject result in fairness and justice to the victim?

In the case of *Gyan v Ashanti Goldfields Corporation*[8] the Court of Appeal applied the rigid principle in the Bolam principle without taking into consideration the injustice that would be caused. The court per Esiam JA held:

"When a plaintiff pleaded negligence against a defendant, he could not succeed in a court of law if he did not substantiate by credible evidence the allegations of negligence upon which his claims was based. In the instant case, since the negligence alleged related to the practice of medicine, it implied negligence in the exercise of a particular skill. The true test for establishing negligence in diagnosis or treatment on the part of a doctor was whether he had been proved to be guilty of such failure as no doctor of ordinary skill would be guilty if acting with ordinary skill. The true test for establishing negligence in diagnosis or treatment on the part of a doctor was whether he had been proved to be guilty of acting with ordinary care. Therefore as the evidence on record showed that the nurse who treated the infant plaintiff did what most, if not all medical men would have done in the circumstances on that occasion and as the plaintiff had failed to lead any evidence to substantiate his allegation that the nurse had failed to follow laid down medical regulations, the plaintiff had failed to prove that his paralysis was attributable to any

8 [1991] 1 GLR 466

omission or negligent act of the defendants and the action would therefore be dismissed."
The Court per Ofori-Boateng JA dissented and said:
"But as the plaintiff's plea of res ipsa loquitur remained, the burden of explaining how the plaintiff came to harm still remained on the defendants and if in the course of the explanation it appears that the defendants used a very inexperienced nurse to determine the disease without any test or the necessary clinical experience, and without supervision from the doctor on duty prescribed the wrong treatment and so paralysed the plaintiff, the use of the correct procedure for administering the wrong treatment contrary to all the precautions a cautious doctor would have taken, would, under these circumstances still constitute gross negligence and not an exemptions from it… [A] defendant can be held to have been negligent even though there is evidence that he acted in accordance with common practice. Indeed, if a hospital is negligent and breaches the duty hospitals owe to patients, the extensiveness of that negligence, because it is committed by many hospitals in general, cannot cure the practice of its negligent nature."

The dissenting view by the learned judge is in tune with Lord denning's advocate against the strict application of precedent in situations where it can lead to injustice and abuse of fundamental rights. I further submit that the Bolam principle should be cautiously used in deciding cases of medical negligence. A strict application of the Bolam principle implies that even if the defendant is liable, he or she will be exonerated because of the application of the principle. This to my mind is contrary to good conscience and equity.

The learned judge further held in the *Gyan* case supra as follows:

"The law on following a common practice has been laid down in various English authorities which I am strongly persuaded to rely on. For example, in Bolam case supra, McNair J, directing the jury, told them that a doctor was not negligent if he adopted a practice *which a responsible "body of skilled medical men accepted as proper."* But if the common practice is fraught with negligence, as I think the practice of the defendants' hospital is, even if truly it is the practice of all the hospitals in Ghana, then the practice is not the one "*which a responsible body of skilled medical men would accept as proper."*

Facts in the Gyan case
The defendant-corporation owns the Ashanti

Goldfields Hospital at Obuasi. In May 1976 the plaintiff, a one-year old son of an employee of the defendant, was taken to the hospital with a very high temperature. The senior nurse at the out-patient department who mistakenly thought that the child was suffering from malaria gave him a chloroquine injection without any prior test or reference to the doctor on duty. It turned out that the cause of the fever was not malaria but polio and the wrong administration of the chloroquine injection led to paralysis of the infant child's right leg. The plaintiff sued per his next friend, his father, for negligence on the part of the defendant's servant. The main ground of negligence was the contention that if a proper diagnosis had been made prior to the treatment, it would have been discovered that the plaintiff the plaintiff was suffering from polio or at least, polio should have been suspected. In such a case, the choroquine injection would have been avoided and the child and the child would not have been paralysed. It was further contended that the senior nurse who had administered the drug failed to follow laid down medical regulations, but those regulations were not clearly specified by the plaintiff. In the alternative the maxim, res ipsa loquitur. The defendant denied liability on the ground, inter alia, that under normal conditions where there was no polio epidemic, as was the case at the material time, the incidence of polio was so low as compared with that of malaria because of the small risk of paralysis from polio. Therefore there was nothing irregular about the decision of the nurse to administer the chloroquine injection which was the proper remedy for malaria. The above contention of the defendants was substantially confirmed by specialists from the School of Medical Sciences, University of Science and Technology. The defendants sought to buttress their defence by stating that only Korle-Bu Teaching Hospital in Accra had the facilities for diagnosing polio, and therefore it was in order to administer a malaria drug to a patient who went to the hospital with fever. The trial judge accepted the expert evidence and dismissed the plaintiff's action. The latter being dissatisfied with the judgment, appealed to the Court of Appeal.

I am further persuaded to disagree with the Bolam principle by relying on another English case of *Cavanagh v Ulster Weaving Co. Ltd*[9] . This case makes it quite clear that defendant can be held to have been negligent even though there is evidence that he acted in accordance with common practice. This decision is conformity to the dissenting view in the *Gyan* case supra by the learned judge,

9 [1960] AC 145 ,HL

Ofori-Boateng JA.

Conclusion

In determining whether a medical practitioner exercised reasonable skill and care, the court should except in obvious cases have regard to the practice of other practitioners of similar status. This necessary involves receiving expert evidence. However the position of the law is that the court is not bound by expert evidence. The judge was only to be assisted by such expert evidence at a conclusion of his own after examining the whole of the evidence before him.[10] From this two general principles may be stated with some confidence:

(a) If a medical practitioner acts in accordance with the general and approved practice of the profession, or some responsible part of the profession, he will not be held liable negligent, save in exceptional circumstances.

(b) If a medical practitioner practitioner departs from the general and approved practice for no good reason, and damage results, he is likely to be held negligent.

From the foregoing, I will finally conclude by advocating that the Bolam Test should be applied in case where principle (b) has been infringed otherwise it may lead to injustice to the victim. Where principle (a) is applied, the Bolam Test can be applied save in exceptional cases where the medical practitioner does not possess the relevant qualification, experience and skill within the medical. In a nutshell, our courts should refrain from applying the Bolam Test rigidly.

10 Section 112 of the Evidence Act, 1975 (NRCD 323)