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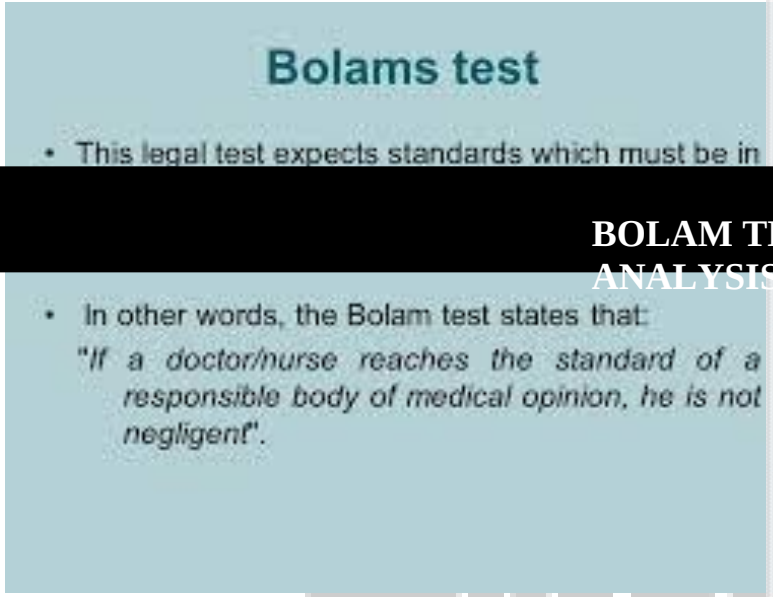

BOLAM TEST: A CRITICAL ANALYSIS

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THE BOLAM TEST: A CRITICAL ANALYSIS

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Introduction

The *Bolam* test of breach – that classic and well-known statement of the law, with its genesis being a defendant's reliance upon a body of responsible peer professional opinion - is the "universal test" of professional negligence. It was laid down by the Queen's Division Bench in *Bolam v. Friern Hospital Management Committee*. McNair, J., in his opinion, explained the law in these words: *"...where you get situation which involves the use of some special skill 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 the Clapham omnibus*[1]*, 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."* Thus, the ratio of the *Bolam* case was that, *"...he [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."* To reiterate, if a doctor who is accused of negligence presents expert opinion to the effect that he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art that will absolve the doctor. On a close reading of *Bolam*, McNair, J., himself did not intend the doctor's

[1] Hypothetical ordinary and reasonable person, used by the courts in England law where it is necessary to decide whether a party has acted as a reasonable person or not.

expert's evidence to be conclusive of the question of breach, that is certainly how it came to be interpreted and, on that basis, it was judicially criticized.[2]

It was said to be "over protective and deferential" towards doctors. It had the potential to be satisfied by the production of a dubious expert whose professional views existed at the fringe of medical consciousness. There was a perception that the medical profession was above the law, that the *Bolam* test deprived courts of the opportunity of precipitating changes where required in professional standards, and that the courts were being "dictated to" rather than "exercising" their judgment. It was said that "professions may adopt unreasonable practices. Practices may develop in professions; not because they serve the interest of the clients, but because they protect the interests or convenience of members of the profession". More dramatically, there was a view that *Bolam* did not necessarily protect the community against unsafe medical practices, and that more judicial safeguards for the public were required. It was contrary to the increasingly "rights based society" to dismiss patients' concerns as obviously as the *Bolam* test countenanced.[3] Further, it was contended that a judicial scrutiny of medical expert opinion was no different from the type of careful analysis that a judge must make in respect of other professional evidence, be it "a judgment by an accountant, lawyer, underwriter or other professional" – if the court was the final arbiter in respect of these professionals, then so too should it be with the medical profession.[4]

In contrast to the law followed in United Kingdom, the law in the United States is premised on the notion of the fundamental right of patients to determine what should or should not be done with their own bodies. In Australia, the *Bolam* test has been rejected by the High Court of Australia following earlier decisions in the State Supreme Courts. The Australian courts did not accept that the setting of standards by the medical profession was an acceptable way of determining the entitlements of a patient who has suffered harm. The test is being criticized in the country of its origin (England) in view of right to life available under European Convention on Human Rights and Human Rights Act,

[2] Kennedy and A. Grubb, Medical Law, 3rd ed., (London 2000), p. 427
[3] Lord Woolf, "Are the Courts Excessively Deferential to the Medical Profession?" (2001) 9 Med L. Rev. 1, p. 3
[4] Kennedy and A. Grubb, Medical Law, 3rd ed., (London 2000), p. 425

1998 (England). In England, the *Bolam* test is now considered merely a rule of practice or of evidence and not a rule of law. The test needs to be reconsidered in India also in view of Article 21, which guarantees right to medical treatment and care. The same is the purpose of this paper which attempts to analyze the applicability of the *Bolam* test in Indian cases of medical negligence and what are the improvements which can be attributed to this test, or for that matter, the test for determining doctor's liability in medical negligence.

ANALYZING BOLAM

Having regard to the conditions obtaining in India, as also the settled and recognized practices of medical fraternity in India, it is held that to nurture the doctor patient relationship on the basis of trust, the extent and nature of information required to be given by the doctors should continue to be governed by the *Bolam* test rather than the "reasonably prudent patient test"[5]. A doctor cannot be held negligent either in regard to diagnosis or treatment or in disclosing the risks involved in a particular surgical procedure or treatment, if the doctor has acted with normal care, in accordance with a recognized practice accepted as proper by a responsible body of medical men skilled in that field, even though there may be a body of opinion that takes a contrary view. The Supreme Court of India has taken a view in the case of *Samira Kohli v. Dr. Prabha Manchanda* that "where there are more than one recognized school of established medical practice, it is not negligence for a doctor to follow any one of those practices, in preference to the others. But if medical practitioners and hospitals become more and more commercialized, and if there is a corresponding increase in the awareness of patient's rights among the public, inevitably, a day may come when we may have to move towards Canterbury[6]. But not for the present."[7]

In a leading case of India dealing with doctor's liability in cases of medical negligence, the SC affirms that the *Bolam* test as a test for deciding the professional liability of a medical professional holds good in India. In the same case the court also said that: "the

[5] It requires the doctor to disclose what he can reasonably see as information that is significant in the patient's evaluation in decision-making.
[6] Canterbury v. Spence, 150 U.S. App. D.C. 263. Shifting our culture from 'a professional practice standard' to 'a reasonable person standard'.
[7] Samira Kohli v. Dr. Prabha Manchanda (2008) 2 SCC 1

investigating officer should, before proceeding against the doctor accused of rash or negligent act of omission or commission, obtain an independent and competent medical opinion, preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial opinion applying the *Bolam* test.[8] That is the reason why the courts of our country follow the *Bolam's* test as is stated in one of the SC cases that: "In England, *Bolam* test is now merely considered a rule of practice or of evidence. It is not a rule of law. However, as in the larger bench of this court in *Jacob Mathew v. State of Punjab*, Lahoti, CJ., has accepted *Bolam* test as correctly laying down the standards for judging cases of medical negligence, we follow the same and refuse to depart from it.[9]

CRITICISING BOLAM

Even though *Bolam* test was accepted by our Supreme Court as providing the standard norms in cases of medical negligence, in the country of its origin, it is questioned on various grounds. It has been found that the inherent danger in *Bolam* test is that if the courts defer too readily to expert evidence, medical standards would obviously decline. Michael Jones in his treatise on Medical Negligence criticized the test as it opts for the lowest common denominator. The learned author noted that an opinion was gaining ground in England that *Bolam* test should be restricted to the cases where an adverse result follows a course of treatment which has been intentional and has been shown to benefit other patients previously. This should not be extended to certain types of medical accidents merely on the basis of how common they are. It is felt "to do this would set us on the slippery slope of excusing carelessness when it happens often enough.[10]

In England, a five judge bench of the House of Lords ruled that: "…the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice. The use of the adjectives – responsible, reasonable and respectable

[8] Jacob Mathew v. State of Punjab (2005) 6 SCC 1

[9] V. Krishna Rao v. Nikhil Super Speciality Hospital (2010) 5 SCC 513

[10] Michael Jones, "Medical Negligence", Sweet & Maxwell, 2008, 4th edn. P.246

for the professional body of medical men shows that the court has to be satisfied the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.[11]

Not only England, but other commonwealth countries like Australia have a differing stand on the said principle. A five judge bench of the Australian High Court identified the basic flaw involved in approaching the standard of duty of care of a doctor as laid down in *Bolam* (supra), and held that: "…the law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment." The court virtually discarded the *Bolam* test and adopted a more nuanced position – the opinion of the professionals would matter, but they would have to yield to common sense.[12]

It was a 20th century law, now the mindsets have changed, now people are more aware of their rights not only as a citizen but also as a patient availing the expert services of doctor. Now there is a crucial need of relooking the *Bolam* as a standard for medical negligence. A seven judge bench of the U.K. Supreme Court in a more recent judgment traced the changes in the jurisprudence of medical negligence in England, and held that "patients are now widely regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession".[13] This reflects the evolution which is necessary in order to protect the interests of the patients as well as the doctors for that matter.

The reason why there is a need to protect the doctors also is innumerated in a leading case of House of Lords, Lord President Clyde said that: "…in the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man is clearly not negligent merely because his conclusion

[11] Bolitho v. City and Hackney Health Authority (1997) 3 WLR 1151
[12] Rogers v. Whitaker (1992) 109 Aus LR 625
[13] Montgomery v. Lanarkshire Health Board (2015) UKSC 11

differs from that of other professional men." Lord Scarman added to this that: "…difference in opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive to all other 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."[14]

The situation in India is a bit complex. But even then, the test has been broadly accepted as a general rule in India. We may refer three cases of the Supreme Court of India. In *Achutrao Haribhau Khodwa v. State of Maharashtra*[15], the SC held that: "the skill of medical practitioners differs from doctor to doctor. The nature of profession is such that there may be more than one course of treatment which may be advisable for treating the patient. Courts would be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his knowledge, ability and skills with due care and caution. But as long as the doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor guilty of negligence." In *Indian Medical Association v. V.P. Shantha*[16], the SC held: "…the approach of the courts is to require that the professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties." In *Vinitha Ashok v. Lakshmi Hospital*[17], the SC clarified that: "if it can be demonstrated that the professional opinion is not capable of withstanding the logical analysis, the court will be entitled to hold that the body of opinion is not reasonable or responsible."

The theory that a doctor cannot be negligent if he has acted in accordance with a practice that a "reasonable body of medical men" would find acceptable, is called the "*Bolam* test". This test the ringing endorsement in both *Jacob Mathew*[18] and *Martin F. D'Souza*[19]. In fact, Lahoti, CJI., also observed that: "…the water of *Bolam* test has flown and passed under several bridges, having being cited and dealt with in several

[14] Hunter v. Hanley 1955 SLT 213
[15] Achutrao Haribhau Khodwa v. State of Maharashtra (1996) 2 SCC 634
[16] Indian Medical Association v. V.P. Shantha (1995) 6 SCC 651
[17] Vinitha Ashok v. Lakshmi Hospital (2001) 8 SCC 731
[18] Jacob Mathew v. State of Punjab (2005) 6 SCC 1
[19] Martin F. D'Souza v. Mohd. Ishfaq (2010) 7 SCC 11

judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and well-condensed one"[20]. This as we shall see, is far from correct. The court appears to have relied on the *Bolam* under the impression that it is a "one size fits all" test for medical negligence claims. However, it is submitted that the court has failed to take into consideration the innate fallibility of the *Bolam* test, the trenchant criticism it has received from academic quarters, as well as its rejection and dilution by courts in many commonwealth nations, including India.[21]

Vivenne Harpwood, in her book, *Modern Tort Law*,[22] has summarized some of the criticism of the *Bolam* principle:

- The rule allows the professionals to set their own standards, when professional standard should be reviewed by the courts.
- The test is a state of the art descriptive test, based on what is actually done, whereas in negligence generally the test is a normative test, based on what should be done.

This tilt in favour of the doctors was further explained by Prof. Harpwood as: "….it means that provided the doctor concerned was able to produce expert witness prepared to testify that they would consider the course of action taken by the defendant to be in keeping with a responsible body of medical practice, he or she could escape liability. Professional people are well organized and have an incentive to protect one another from negligence claims except in cases of blatant negligence. The result is that the claimants are at an disadvantage."

The Federal Court of Malaysia, also rejected the *Bolam* test, the court stated that: "…the Bolam principle in substance restraints the courts from scrutinizing and evaluating the professional conduct of a doctor possessed of a special skill and competence and…it is enough that he acted in accordance with one of the bodies of opinion and the courts can never declare a doctor to be in any way negligent. This overprotective and deferential approach perhaps conforms to

[20] Jacob Mathew v. State of Punjab (2005) 6 SCC 1

[21] Aditya S. Bapat, Advocate Bombay High Court, Martin F. D'Souza v. Mohd. Ishfaq: A Critique

[22] Vivenne Harpwood, Modern Tort Law, retrived from www.books.google.com. p.125

the well know phrase that "the doctor knows the best"."[23] To borrow a quote from Lord Woolfe….. the phrase "doctor knows the best" should now be followed by the qualifying words "if acts reasonably and logically and gets his facts right".[24]

The view expressed in *Bolitho* (supra) came to be endorsed by the Supreme Court of India in *Vinitha Ashok v. Lakshmi Hospital* as: "in a large majority of cases, it has been demonstrated that a doctor will be liable for negligence in respect of diagnosis and treatment in spite of a body of professional opinion approving his conduct where it has not been established to the satisfaction of the court that such opinion relied on is reasonable or responsible. If it can be demonstrated that the professional opinion is not capable of withstanding the logical analysis, the court would be entitled to hold that the body of opinion is not reasonable or responsible."[25]

CONCLUSION

To deny recovery to deserving claimants merely because the law—and a section of both the medical and legal professions—have engendered a misconception of negligence is unfair. Instead of playing the blame game in medical negligence cases, a more sensible approach is to acknowledge that doctors are not infallible; that like any other human being they are also prone to occasional negligence. Rather than being trapped in a culture of infallibility, it is better to recall Alexander Pope's famous observation that "to err is human." Finding a doctor liable in negligence need not be a dagger in his or her back. The medical negligence jurisprudence based on *Bolam* is unnecessarily conservative. *Bolam* was decided in post-War Britain when there was a pressing need to protect hospitals from the litigation explosion that was occurring in the United States. Today, even Britain is relaxing the *Bolam* approach to medical negligence. Australia has relegated the *Bolam* test to its appropriate place as a matter of evidential rather than substantive law. This has yet to occur in Singapore and Malaysia, largely due to the fear that any relaxation of *Bolam* will result in a medical malpractice and healthcare crisis that is occurring elsewhere and evidently in India too. Unnecessary litigation can be avoided by promoting a culture of collaborative autonomy where patients are properly informed and actively involved in the process; the empirical evidence shows that well informed patients are less likely to sue even when they have a good claim. Preventing genuine claims and disempowering patients will entrench a culture of distrust and shift the locus of the doctor-patient relationship from the clinic to the courtroom, a sure way of inviting a medical malpractice crisis. The law on

[23] Foo Fio Na v. Dr. Soo Fook Mun, (2007) 1 Mal LJ 593
[24] Supra, n. 54 at para 78
[25] Vinitha Ashok v. Lakshmi Hospital (2001) 8 SCC 731

medical negligence has been captured by incomprehensible rhetoric and fear politics, one effect of which is to have rendered the standard of care sacrosanct. The *Bolam*/*Bolitho* test of "logical defensibility" or "irrationality" has a Janus-like quality[26]. It acknowledges that judges have the final power and responsibility to determine reasonable standards in medical negligence, but in the same breath says that judges are only allowed to test the logical defensibility of the medical experts' views as to what constitutes reasonable practice. This is clearly a test that is designed to fetter judicial power, and for that reason alone, should be rejected. Ultimately, it is the judge's responsibility, under the law of negligence, to determine reasonable standards and—in the absence of a jury—to apply them to the facts. Judges are trusted to do this with respect to all other cases of negligence, including professional negligence; they should be ousted to do likewise with respect to medical negligence. In an age when patient-based rights seem to be in the ascendancy, it is worthwhile emphasizing that the medical profession has "rights" too, one of which is a clear exposition and application of legal principle as to when, and why, *Bolam* evidence will not "carry the day" and absolve a defendant doctor of breach.

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[26] Having two faces.

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