Bolam. (England)

The Judge's words; 'I myself would prefer to put it this way, that he 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. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting 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. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying: "I do not believe in anaesthetics. I do not believe in antiseptics. I am going to continue to do my surgery in the way it was done in the eighteenth century." That clearly would be wrong.'

The Bolitho test; a modification to Bolam.

The decision in Bolitho v City and Hackney Health Authority (1997) created a modification to the ruling in Bolam. Lord Browne-Wilkinson gave the following two statements, which somewhat restrict the boundaries of the Bolam test:

1. The court should not accept a defence argument as being 'reasonable', 'respectable' or 'responsible' without first assessing whether such opinion is susceptible to logical analysis.

2. However, where there is a body of medical opinion which represents itself as 'reasonable', 'responsible' or 'respectable' it will be rare for the court to be able to hold

such opinion to be other than represented.

This Bolitho ruling means that testimony for the medical professional who is alleged to have carried out the medical negligence can be found to be unreasonable, although this will only happen in a very small number of cases.

The Montgomery Test;

The Court has recently held that the Bolam test no longer applies to the issue of Consent because a 'doctor-sensitive' test (i.e. what a responsible body of medical opinion would conclude are the risks that should be disclosed to a patient) is now outdated/unsatisfactory and does not reflect the modern doctor patient relationship and the shift toward patient self-determination/ autonomy. The Montgomery test is patient-sensitive and based upon materiality of risk - in other words, a doctor is under a legal duty to take reasonable care to ensure that the patient is aware of any material risk involved in the recommended treatment and of any reasonable alternative or variant in the treatment. A risk is material if, in the circumstances of the particular case, either:

• A reasonable person in the patient's position would be likely to attach significance to the risk; or
• The doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.

There are only two limited exceptions and these must not be abused. First, a doctor is entitled to withhold information if he or she reasonably considers that its disclosure would be seriously detrimental to the patient's health (the so-called therapeutic exception); and second, a doctor is also excused from conferring with the patient in circumstances of necessity such as where emergency treatment is required for a patient who is unconscious or otherwise unable to make a decision.

The Bailey test case; relates to the issue of causation.

The case of Bailey -v- Ministry of Defence 2008 (Court of Appeal) dealt with the situation of cumulative causes. The claimant underwent an unsuccessful gallbladder operation in the Royal Haslar Hospital run by the Ministry of Defence. There was extensive bleeding. There was substandard care in the postoperative period. She developed pancreatitis and was transferred to an intensive care unit in Portsmouth. She was later put on the renal unit in the Portsmouth Hospital where she aspirated her vomit leading to a cardiac arrest resulting in hypoxic damage to her brain.

At trial, the Judge found that there were ultimately two reasons for the claimant's inability to stop the aspiration of her vomit. One was the pancreatitis, which was not negligent. The other was her weakened state which, had she been treated properly including her resuscitation, would have been avoided. He could not decide on the available evidence of the experts which was the dominant cause but he concluded that each made a material contribution.

On appeal, the MOD argued that the "But For" test should apply, i.e. the claimant must prove that without the negligence, the injury would not have happened. On the evidence, this would have meant that the claim failed.

The Court of Appeal unanimously found that the Judge had been right, on the evidence, to conclude that the weakness of the claimant had made a material contribution to the injury and found in her favour. Lord Justice Waller said: -

"In a case where medical science cannot establish the probability that "but for" an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the "but for" test is modified, and the claimant will succeed".

Hunter.

Hunter v Hanley test is still the appropriate test in Scotland for liability for clinical negligence, ie it must be established that the course the healthcare professional has adopted "is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care".

Chester v Afshar 2004

An important English tort law case regarding causation in a medical negligence context. The House of Lords decided that a doctor's failure to fully inform a patient of all surgery risks vitiates the need to show that harm would have been caused by the failure to inform.

Dunne -v- National Maternity Hospital and Jackson

This is the test for Ireland. The Supreme Court's Judgment summarised and clarified the legal principles, which the Courts should adopt in all cases of medical malpractice and since then they have become known as the "six Dunne principles" and are as follows:

1. The true test for establishing negligence in diagnosis or treatment on the part of a medical practitioner is whether he has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care.

2. If the allegation of negligence against the medical practitioner is based on proof that he has deviated from a general and approved practice, that will not establish negligence unless it is also proved that the course he did take was one which no medical practitioner of like specialisation and skill would have followed had he been taking the ordinary care required from a person of his qualification.

3. If a medical practitioner charged with negligence defends his conduct by establishing that he followed a practice which was general, and which was approved of by his colleagues of similar specialisation and skill, he cannot escape liability if in reply the Plaintiff establishes that such practice has inherent defects which ought to be obvious to any person given the matter due consideration.

4. An honest difference of opinion between doctors as to which is the better of the two ways of treating a patient does not provide any ground for leaving a question to the jury as to whether a person who has followed one course rather than the other has been negligent.

5. It is not for a jury (or for a Judge) to decide which of two alternative courses of treatment is in their (or his) opinion preferable. But their (or his) function is merely to decide whether the course of treatment followed, on the evidence, complied with the carful conduct of a medical practitioner of like specialisation and skill that professed by the Defendant.

6. If there is an issue of fact, the determination of which is necessary for the decision as to whether a particular medical practice is or is not general or approved within the meaning of these principles, that issue must in a trial held with a jury be left to the determination of the jury.

Jamieson; for Coroner Court.

Neglect; failure to provide basic medical attention although there have been some notable extensions;

In *R (Davies) v Birmingham Deputy Coroner* [2003] EWCA Civ 1739, Brooke LJ

endorsed the view that errors in diagnosis and treatment are capable of amounting to neglect. He said (at paras 28-29):

[Moses J] reminded himself that a gross failure, in accordance with the *Jamieson* test, might be found even where an individual had purported to make a clinical decision or diagnosis. Gross failures were not limited to those cases where an individual had failed to take any action at all.

In *Cleo Scott v HM Coroner for Inner West London* [2001] EWHC Admin 105 at [28] – [29] Keene LJ said:

'… He was put in his cell on his own. No observations at specific intervals were required. All this seems to have flowed from the views formed by the medical practitioners at the prison, but that in itself, while relevant, cannot rule out neglect. There have been a number of cases where there had been medical attention but where neglect remained a possible element in a verdict ... Omissions on the part of medical practitioners are capable of forming part of the total picture which amounts to neglect.'

The meaning of "causing" death was a key issue in proceedings brought by the Chief Constable of Staffordshire (CCS) against HM Coroner for Coventry [2000]. The jury had found that the accidental death in custody of M, an alcoholic, had been aggravated by neglect. It was argued by the CCS that it was only in a case where neglect could be found to have aggravated or contributed to a death which was already in train at the time that a neglect rider could properly be left to the jury.

The High Court Judge disagreed. He looked closely at the landmark decision of Jamieson [1995] and despite the textbook explanations of the case, could not find the expression "clear and direct causal connection" in the original case report. Like other Judges, he said

the phrase should not be read too literally and the jury should take a common sense approach. Accordingly, he said the real test was whether there had been an opportunity of rendering care which could have prevented death. If there is no such opportunity, or if the steps would not have prevented death, then a neglect rider is not appropriate.

Neglect

I understand that the definition of Coronial neglect is still that of the Court of Appeal in 1994 which states that neglect is a "*gross failure to provide adequate nourishment or liquid, or provide or procure basic medical attention or shelter or warmth for someone in a dependent position (because of youth, age, illness or incarceration) who cannot provide it for himself. Failure to provide medical attention for a dependent person whose physical condition is such as to show that he obviously needs it may amount to neglect."*

Court of Appeal Burnett v Lynch March 2012

Court of Appeal ruled that a Judge was entitled to prefer the evidence of a patient as to whether a consultation had taken place even if there was no written record of the consultation.

Gregg v. Scott brought to the House of Lords in 2002

Loss of a chance

It was established that a patient must prove that a doctor's action, or lack of it, caused the patient to suffer injury and not just the chance of avoiding an injury. In practical terms this means that a doctor failing to diagnose a case of cancer in which a patient has only a 25% chance of survival would not be found negligent. Only if the chance of survival was over 50%, ie a probability of a cure rather than a chance of a cure, would negligence be found.

Pure diagnosis

In pure diagnosis cases, Courts have rejected the Bolam test as appropriate and made a distinction as per Muller v King's College Hospital [2017]. Examples of such cases will be looking at what was actually present on a histology slide, or some imaging. No reasonable body of practitioners will support mistakes in relation to what is on a type of investigation. The test is what was present, as a matter of fact, and whether the misdiagnosis was one that must have been made without the use of reasonable skill and care. In such cases, courts do not abdicate responsibility to resolve any conflicts of expert opinion by resorting to the Bolam-derived notion of a respectable body of medical opinion.

Misinformation

The Bolam test does not apply, as per a recent decision of Darnley v Croydon Health Services NHS Trust [2018]. A 26-year-old man was advised by receptionist in the emergency department that he would have to wait up to 4-5 hours to be seen. He felt too unwell to stay and went home, deteriorated overnight, due to a large extradural haematoma, was readmitted but left with severe and very disabling left hemiplegia.

The Supreme Court decided that the Trust did not have a duty for receptionists to provide accurate information as to precisely when a patient will be seen but did have a duty of care not to provide misinformation to patients, irrespective of whether this was provided by reception or medical staff.

The particular role of the individual has an important bearing upon the breach. The duty is to take reasonable care not to provide misleading information and, in Darnley, the standard was that of an averagely competent and well-informed person performing the role of an emergency department receptionist.

Criminal medical manslaughter (gross negligence manslaughter)

The Grossness of the Breach

I understand that the definition (for corporate manslaughter purposes) of a 'gross breach of duty of care' at s.1(4)(b) of the Corporate Manslaughter and Corporate Homicide Act 2007 is as follows*" a breach of a duty of care by an organisation is a "gross" breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances"*

I understand that the wording for the test of a gross breach in gross negligence manslaughter is *"truly exceptionally bad and such a departure from the standard of a reasonably competent Doctor that it consequently amounts to being criminal"* – see R (Oliver) v DPP [2016] EWHC 1771 (Admin), R v Misra [2005] 1 Cr App R 328 (21), and R v Sellu [2016] EWCA Crim 1716. In *R v Misra* and Srivastava [2005] 1 Cr App R 328, the court agreed with the direction by the judge that the term 'reprehensible' would be apt to describe the nature of the conduct.

Alastair Bint March 2021