

Medical negligence: making a case for the Bolitho test in determining negligence cases in Kenya.

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School

By

Muli Faith Mutindi

122588

Prepared under the supervision of

Dr. Josephat Kilonzo



Word count (8468)

ACKNOWLEDGEMENT


First and foremost, I would like to thank God for granting me the knowledge and understanding as well as strength and favour to complete this project. I would also like to thank my supervisor, Dr. Josephat Kilonzo, who guided me through this process. It would not have been possible without the dedication and work that he put into the supervision of my research and writing.

Lastly, I would like to thank my family, Simon Muli, Mary Muli, Catherine Muli and Alex Muli who supported me through prayer and encouraging words. I would also like to thank my close friends Joy Wanjiku, Hazel Taiti and Shenaila Syuki for standing by me and holding my hand through this process.



DECLARATION

I, MULI FAITH MUTINDI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

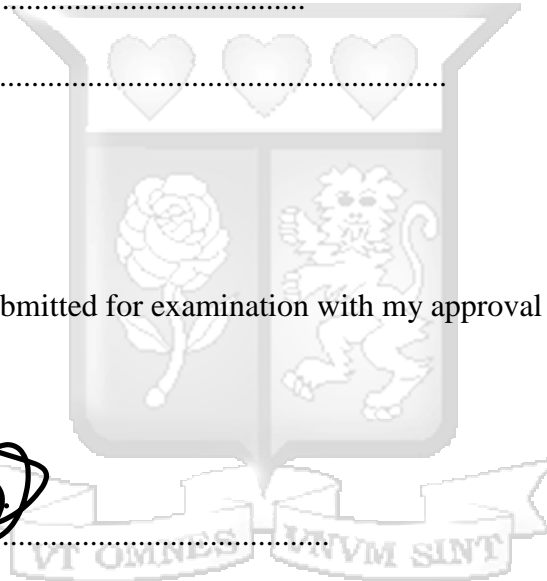
Signed: 

Date: ...12/03/2024.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

DR. JOSEPHAT KILONZO.



ABSTRACT

In *Bolam v Friern Hospital Management Committee* the Bolam test was set out for breach of duty of care to be constituted by acting contrary to standard of procedure which comes from the opinion of a body of expert opinion. The problem with this was the weight that it gave an expert opinion was greater than all other evidence that is produced before the court and solely focused the court on established practice.

The Bolitho test from the case of *Bolitho v City and Hackney Health Authority*, came as a replacement for the test with its focus on the reasonableness of practices undertaken in the delivery of medical care, its focus shifted from what ought to be done in a situation ignoring the unique variables and went to whether the actions undertaken considered the patient's safety regardless of the body of expert medical opinion being in contradiction.

In Kenya, the standard test for the determination of negligence is the use of the Bolam test as seen in the case of *Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome (Suing as the Legal Representative of Rooney Mutharimi (Deceased))* where the test was restated that breach of duty of care arises from the deviation from the normal practices to be determined by a responsible body of opinion of medical practitioners. This test has been restated in a majority of the cases of medical negligence with courts rarely ruling contrary to their opinion.



LIST OF ABBREVIATIONS

KMPDB- Kenya Medical Practitioners and Dentists Board

MOH – Ministry of Health



LIST OF CASES

Bolam v Friern Hospital Management Committee (1957) 1 WLR 582

Bolitho v City of Hackney Health Authority (1996) 4 All ER 771

Donoghue v Stevenson (1932) AC 562

Dr. John Gachanja Mundia v Francis Murira and Tigania Mission Hospital (2015) eKLR

J.O.O and 2 others v Praxedes P Mandu Okutoyi and 2 others (2011), eKLR.

J.O.O and 2 others v Praxedes P Mandu Okutoyi and 2 others (2018), eKLR.

LWW (Suing as the administrator of the estate of the late BMN(Deceased) v Doctor Charles Githinji [2012] eKLR.

Montgomery v Lancashire Health Board (2015) UKSC 11

Ricarda Njoki Wahome (Suing as administrator of the estate of the late Wahome Mutahi (Deceased) v Attorney General and 2 others (2015) eKLR.

Rogers v Whitaker (1992) 175 CLR 479

Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome (Suing as the Legal Representative of Rooney Mutharimi (Deceased) (2020) eKLR.

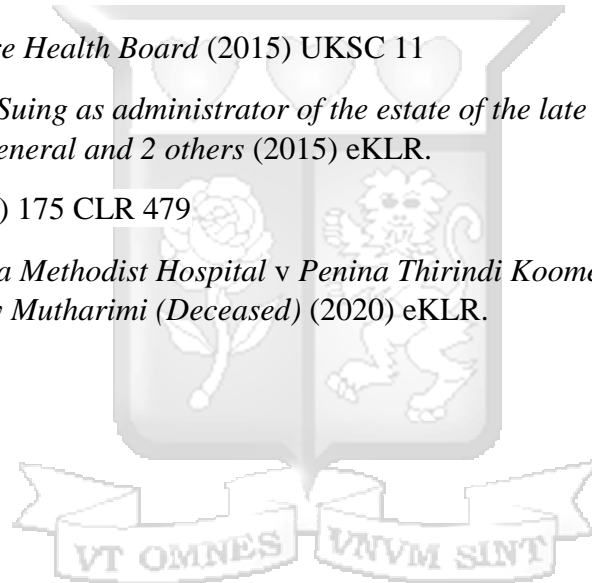
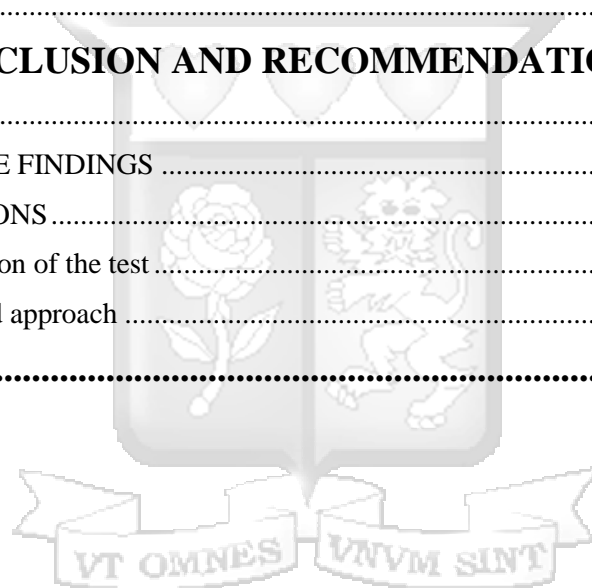


TABLE OF CONTENTS

ACKNOWLEDGEMENT.....	ii
DECLARATION.....	iii
ABSTRACT.....	iv
LIST OF ABBREVIATIONS	v
LIST OF CASES	vi
CHAPTER 1: INTRODUCTION.....	1
1.1 BACKGROUND	1
1.2 STATEMENT OF THE PROBLEM	3
1.3 STATEMENT OF OBJECTIVES	3
1.4 RESEARCH QUESTIONS.....	3
1.5 HYPOTHESIS	4
1.6 JUSTIFICATION OF THE STUDY	4
1.7 CONCEPTUAL FRAMEWORK: NEGLIGENCE AS AN ETHICAL SUBJECT	4
1.8 LITERATURE REVIEW	5
1.8.1 On the use of the Bolam test	6
1.8.2 On the migration to the Bolitho Test.....	7
1.8.3 On the best approach for the determination of negligence	7
1.9 RESEARCH DESIGN AND METHODOLOGY	9
1.10 LIMITATIONS.....	9
1.11 CHAPTER BREAKDOWN	9
CHAPTER 2: BOLAM TEST AND ITS ORIGINS.....	11
2.1 INTRODUCTION	11
2.2 ORIGINS OF THE BOLAM TEST.....	11
2.3 CRITICISMS LEVELLED AGAINST THE BOLAM TEST	12
2.4 THE MOVE AWAY FROM BOLAM.....	13
2.4.1 Australia: Rogers v Whitaker.....	13
2.4.2 England: Bolitho v City of Hackney Health Authority.....	14
2.5 CONCLUSION.....	15
CHAPTER 3: THE APPLICATION OF BOLAM IN KENYA	17
3.1 INTRODUCTION	17
3.2 JURISPRUDENCE FROM KENYAN COURTS	17

3.2.1 Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome (Suing as the Legal Representative of Rooney Mutharimi (Deceased)	17
3.2.2. Dr. John Gachanja Mundia v Francis Murira and Tigania Mission Hospital	18
3.2.3 Ricarda Njoki Wahome v The Attorney General, Dr. Ronald Kidiavai Lwegado and Dr. Geoffrey Muiruriki Ng'ang'a.....	19
3.3 CONCLUSION	20
CHAPTER 4: THE BEST APPROACH FOR NEGLIGENCE	21
4.1 INTRODUCTION	21
4.2 COMPATIBILITY OF THE BOLITHO TEST WITH KENYAN LAW	21
4.3 THE BOLITHO TEST'S CONTRIBUTION TO THE STANDARD OF CARE ARGUMENT	22
4.4 IMPLICATIONS OF THE BOLITHO TEST ON THE DETERMINATION OF NEGLIGENCE.	23
4.5 CONCLUSION	25
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS.....	26
5.1 CONCLUSION	26
5.2 SUMMARY OF THE FINDINGS	26
5.3 RECOMMENDATIONS	27
5.3.1 Careful application of the test	27
5.3.2 A patient centred approach	27
BIBLIOGRAPHY	28



CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

The right to healthcare to the highest attainable standard is provided for in Article 43(1) of the Constitution of Kenya 2010.¹ With the progress in medicine, so has there been an increase in the number of negligence and malpractice cases in the field. Statistics have shown that approximately twenty percent of patients perish or are injured as a result of medical negligence while three tenths are misdiagnosed.²

Medical negligence and malpractice are prosecuted under the law of torts in Kenya. The field is seemingly stagnant and remains outdated seeing as the courts use outdated principles and decisions to litigate suits.³ The approach taken to determine negligence is set out in the case of *Donoghue v Stevenson* where there requires to be a duty of care due, a breach of duty of care and damage or injury suffered by the claimant to be directly due to the breach of the respondent.⁴ The final test for medical negligence and malpractice for the Kenyan courts is the Bolam test set out in the case of *Bolam v Friern Hospital Management Committee*.⁵ In this case, the court stated that a doctor is not guilty of negligence if their actions amount to a standard that is acceptable by their peers or a body of their peers.⁶

There are cases showing the common trend of reliance on expert opinion in line with application of the Bolam test as well as the attention to the duty of care owed, breach of the duty of care and the direct causation approach.

In the case of *Ricarda Njoki Wahome v Attorney General and two others* the complainant sued for the loss of expectation of life, loss of dependency and damages for pain and suffering after losing their loved one to a surgery for the removal of a growth at the base of their neck which went wrong when they developed cardiac and pulmonary issues which subsequently lead to their death.⁷

¹ Article 43(1), Constitution of Kenya (2010).

² Were E, Jamah A, The shocking truth on 'killer doctors', Standard Media, 2011.

³ Muthaka D, Kimani D, Mwaura S and Manda D, "A review of the regulatory framework for private healthcare services in Kenya" Kenya Institute for Public Policy Research and Analysis, KIPPRA discussion paper No.35, 2004,59.

⁴ *Donoghue v Stevenson* (1932) AC 362.

⁵ *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582.

⁶ *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582, paragraph 7.

⁷ *Ricarda Njoki Wahome (Suing as administrator of the estate of the late Wahome Mutahi (Deceased) v Attorney General & 2 others* [2015] eKLR, paragraph 6.

The Court used the Bolam test and concluded that based on expert opinion from other doctors that the doctors tending to the deceased had in fact not made an error in judgment and that they carried on procedure as per the standard of care.⁸

The case of *LWW v Dr. Charles Githinji* was filed following the death of BMN who died of an allergic reaction to medicine that was sold to her at a pharmacy owned by the respondent.⁹ The respondent sold it to her without taking a history of her health to note her allergies or symptoms.¹⁰ The Court noted that the respondent was a pharmacist acting in the capacity of a doctor and therefore the standard of duty of care was to be held as though he was a doctor.¹¹ An expert opinion was sought by the court from a doctor and it informed the decision that the complications leading to the deceased's demise was unforeseeable given the circumstance and common practice of administering regular over the counter medicine without requiring medical history that there was no negligence on the respondent's part.¹²

Criticisms have been levelled against the application of the Bolam test stating that the standard of care is not set by the court but a body of their peers where it is not the case for other professions in the determination of negligence.¹³ It is also indistinct between what is done and what ought to be done. The concern over the implications of the Bolam test was raised by the House of Lords in a later case of *Bolitho v City of Hackney Health Authority* where Lord Wilkinson stated that logic must be applied because the cases involve the weighing of risks against benefits and that a judge must assure that a defensible conclusion must be reached on the balance of risk and benefit.¹⁴

In Kenya, the Medical Practitioners and Dentist Act establishes the disciplinary council in Section 3.¹⁵ This council acts as an overseer for medical practitioners however there are concerns levelled

⁸ *Ricarda Njoki Wahome v The Attorney General, Dr. Ronald Kidiavai Lwegado and Dr. Geoffrey Muiruriki Ng'ang'a* (2015) eKLR, Paragraph 39.

⁹ *LWW (Suing as the administrator of the estate of the late BMN(Deceased) v Doctor Charles Githinji* [2012] Eklr.

¹⁰ *LWW (Suing as the administrator of the estate of the late BMN(Deceased) v Doctor Charles Githinji* [2012] eKLR, paragraph 2-5.

¹¹ *LWW (Suing as the administrator of the estate of the late BMN(Deceased) v Doctor Charles Githinji* [2012] eKLR, paragraph 14-16.

¹² *LWW (Suing as the administrator of the estate of the late BMN(Deceased) v Doctor Charles Githinji* [2012] eKLR, paragraph 19.

¹³ Samanta A, Samanta J, "Legal standard of care: a shift from the traditional Bolam test." *Clinical Medicine* (London) Volume 3 Number 5 ,2003,444.

¹⁴ *Bolitho v City & Hackney Health Authority* [1997] 4 All ER 771, para.6.

¹⁵ Section 3, *Medical Practitioners and Dentists Act* (Cap 253),2012.

as to the effectiveness as far as discipline and maintaining the standard of healthcare are concerned with the rising number of negligence and malpractice incidents.¹⁶The Kenya Medical Practitioners and Dentist Board is the body of peers that are consulted when using the current test applied in Kenya. This research paper goes into the evaluation for the best test for medical negligence while evaluating the use of the Bolam test, its criticisms. It then makes a case for the use of the Bolitho test as its replacement.

1.2 STATEMENT OF THE PROBLEM

The test of breach of duty of care has been applied in tort law for the longest time possible. The link between negligence and actions is the standard of duty of care to which individuals are held to establish the breach of duty. Based on the cases above, the standard of care that is accorded in medical negligence and malpractice cases is that of the Bolam test where the court relies on the expert opinion of other doctors to establish that the actions of the respondents in negligence and malpractice suits are reasonable. The common thread in the cases above is that there is emphasis on the causation of negligence based on common practice, this study will investigate the gap in the determination of negligence as a result of using the aforementioned test. The study will then set out to investigate the suitability of the Bolitho test in the determination of breach of duty of care as well as its compatibility with the Kenyan justice system.

1.3 STATEMENT OF OBJECTIVES

This research aims to:

- i) Examine the parameters of the Bolam test and the criticisms levelled against it.
- ii) Analyse the application of the Bolam test in Kenyan courts.
- iii) Analyse the parameters of the Bolitho test and why Kenyan courts should adopt it.

1.4 RESEARCH QUESTIONS

This paper focuses on the following questions:

- i) What is the Bolam test and its criticisms?
- ii) What is the approach taken by Kenyan courts in the application of the Bolam test?
- iii) To what extent should Kenyan Courts adopt Bolitho test?

¹⁶ Owiti H and Fundi E, 'Assessing the Legal Mechanisms for Redressing Medical Malpractice in Kenya: Just How Effective Are They?' Social Science Research Network, 2014 ,2.

1.5 HYPOTHESIS

This paper is founded on the assumption that the approach adopted by Kenyan Courts by relying on the Bolam test as opposed to Bolitho test leads to undesirable outcomes for victims of medical negligence.

1.6 JUSTIFICATION OF THE STUDY

There has been a rise in medical malpractice and negligence cases, some of which go unreported due to the lack of faith in the justice system to ensure that justice is served for those who suffer under the hands of negligent medical practitioners. This study approaches negligence from the perspective of morality of human actions as well as social utility. It will be unique in that it will provide a new perspective into medical negligence and malpractice cases. It will provide law makers tasked with the duty of preparing legislation on finding appropriate standard to which medical practitioners should accord care to their patients. It will aid Judges tasked with the responsibility of deciding medical malpractice and negligence suits by providing them with insights of how other courts have approached the same kind of suits. Finally, it will provide other researchers who are focused on researching how the doctrine of loss of chance and the Bolitho tests can apply in the Kenyan justice system.

1.7 CONCEPTUAL FRAMEWORK: NEGLIGENCE AS AN ETHICAL SUBJECT

The lens through which this study is viewed through is that of the concept of negligence as an ethical subject. The concept centres on the morality of human actions and their impact on society. Immanuel Kant's work is one of many that this concept borrows from. His work on the metaphysics of morals explains how there is a duty to act in a way that your actions are in accordance with moral law.¹⁷ He explains that, if actions are practiced universally and adapted by other members of society then eventually, they become a universal law. Standards of care in negligence can only be described as to be based on a reasonable practice, in medical negligence cases, courts seek expert opinions as part of the test to determine medical negligence leaving it to the reliance on common practice an indicator that Kant's idea of universality exists in negligence.¹⁸

¹⁷ Kant I, *Groundwork on the Metaphysics of Morals*, Cambridge University Press, United Kingdom, 1997,31.

¹⁸ Norrie K, 'Medical Negligence: Who sets the standard?' *Journal of Medical Ethics* ,1985,136---< [Medical Negligence: Who Sets the Standard? on JSTOR](#) > on 5 March 2023.

The result of negligent actions can be viewed not just as a breach of duty but as a deduction from social utility that is described by Jeremy Bentham, Sidgwick and Edgeworth. Social utility is seen as the arithmetic sum of the utility of all members of a society.¹⁹ Tort law is focused on corrective justice, awarding damages to an individual for a negligent act they have suffered however when applying this lens, the act does not only affect one person but the whole.

Moral and Ethical values have played a hand in the development of the law on negligence where courts have been given the power to preside over matters of morality.²⁰ The neighbourhood principle and the concept resulting from that being the proximity rule which evolved from Lord Atkin's decision in *Donoghue v Stevenson*.²¹ Duty of care is based on responsibility to treat others in their best interests.²²

Combining the elements of morality of human actions, social utility and moral and ethical values, the concept of negligence as an ethical subject is formed. The practices by medical practitioners are relied upon and through universality are adopted as the baseline to determine if there are deviations which then would constitute negligence. However, there could be fault in the norm if their actions contradict the process of assessing human actions. Aristotle places emphasis on the need for good habits which eventually form a norm that contributes to the common good.²³

Using this concept, the law of negligence can have developed by weighing the result of their actions against the social utility and due to the fact that morality and ethics have played a hand in the development of the law of torts then, developments can be made to ensure that the process of deciding medical negligence suits follows those same rules ensuring that the law of tort can be used as a corrective tool to mend the tears in the fabric of social utility created by medical negligence.

1.8 LITERATURE REVIEW

The study to make a case for the additional test of the determination of negligence and assessment of damages has not been written on in the Kenyan context however there is existing literature on

¹⁹ Harsanyi J , ' Morality and the Theory of Rational Behaviour's John Hopkins University Press ,Social Research Volume 44 Number 4 , 1977,624--<[Morality and the Theory of Rational Behavior on JSTOR](#)> on 6 March 2023.

²⁰ Mason A, "Law and Morality," *Griffith Law Review*, Volume 4, Issue 2 (1995),155.

²¹ *Donoghue Stevenson* (1932), paragraph 28-31.

²² Mason A, "Law and Morality," *Griffith Law Review* Volume 4, Issue 2 (1995),156.

²³ Aristotle, *Nicomachean Ethics Book II-IV*, Batoche Books, 1999, 20-56.

aspects of the study as well as critic of the legal system in the context of medical negligence. Wanjohi S has written on the concern for development of medical negligence law in Kenya with a special focus on the handling of cases by the Kenya Medical Practitioners and Dentists Board as well as the justice system.²⁴ The writer highlights issues with the Bolam test and self-regulation which leads to injustice and a declining standard in healthcare provision though briefly, concern for the lack of an unbiased standard of care is noted as well as the lack of progression in the test measuring negligence.²⁵

1.8.1 On the use of the Bolam test

Stauch M in his article defining the Bolam test and describing its use, noted that the Bolam test described it as an evidentiary principle and biased towards the medical practitioners considering it accords great emphasis on the expert opinion by fellow medical practitioners.²⁶ Harpwood V, in her review of the Bolam test acknowledges that this test has been mentioned to be too protective of the medical profession and it does not allow space for criticism of medical practice and upholds the status quo in the medical field, that of which could be at fault.²⁷ She points out the main points of challenging the test. Those being; what can be considered a responsible body of medical opinion and whether standard practice is the same as a responsible view. In this she comments that judges although cannot question the responsibility of a body, they can decide prior that the body qualifies as responsible. She then states that the Bolam test application has evolved to include a responsible view as one not held by the majority.²⁸ Keown J, warns about the “Bolamisation of medical law stating that it has allowed doctors to determine the standard of care and there is a delegation of the decision on whether the treatment is beneficial or not and in some instances, withdrawal of the care due to the lack of benefit.²⁹

²⁴Wanjohi S, ‘Appraising the Legal and Regulatory Framework on Medical Negligence in Kenya’ Published, Strathmore University, Nairobi, 2020.

²⁵ Wanjohi S, ‘Appraising the Legal and Regulatory Framework on Medical Negligence in Kenya’, 25-27.

²⁶ Stauch M, ‘Defining the Breach of Duty and the Use of the Bolam Test’ Nottingham Law Journal, Volume 9, Issue 2, 2000, 90.

²⁷ Harpwood V, ‘Medical Negligence: A Chick in the Armour of the Bolam Test’ Medico Legal-Journal, Volume 64, Issue 4, 1996, 179.

²⁸ Harpwood V, ‘Medical Negligence: A Chick in the Armour of the Bolam Test’, 180-181.

²⁹ Keown J, ‘Doctor Knows Best: The rise and rise of the Bolam Test’ Singapore Journal of Legal Studies, Volume 2, Issue 2, 1995, 348.

1.8.2 On the migration to the Bolitho Test

Fordham M , in her article critiquing the Bolam Test describes it as lacking the dimension of informed consent and leaving the medical practitioner as the only decision maker in what is ought to be done to a patient.³⁰She analyses the case of **Maynard v West Midlands Regional Authority (1984)** to show the departure from the Bolam test in the decision of the judges specifically Hutchinson J in his words showing that the test has replaced the judge in matters of deciding the appropriateness of actions undertaken.³¹ She then commends the Bolitho case for beginning the conversation in courts about moderation and reasonableness in testing for negligence in claims though not completely erasing the Bolam test from the courts of England.³²

A commentary on the Bolitho Test by Khan M points out how this test could both be the new Bolam or an end to it, he states that it is a mere modern reformulation of the rule.³³ On the matter of breach, the test requires that the medical practice be founded on a logical basis which requires reasonableness to be determined by the court. There is a move towards a judicial approach which is objective rather than a medical standard approach hence giving back responsibility to judges to determine whether there was negligence.³⁴ He states that in the post-Bolitho era , there may be an increase in Claimant success however , with application as a defence could also be used to protect the medical profession.³⁵

1.8.3 On the best approach for the determination of negligence

The existing literature seems to agree that the determination of negligence needs to be further investigated and improved in terms of including aspects of consent and information as well as finding a stable base line for the standard of care in medicine practice. Tucker J affirms this argument in his journal article detailing the need to focus on evidence provided to determine whether the actions of a medical practitioner are negligent.³⁶ He notes that with the progression in medical technology it should be easier for medical evidence to be provided to back arguments on either side and interpretation of expert opinions can be utilized to aid the deciphering of the

³⁰ Fordham M, 'The Bolam Test Lives On', Singapore Journal of Legal Studies, Issue 1, 1998, 141.

³¹ Fordham M' The Bolam Test Lives On', 145.

³² Fordham M' The Bolam Test Lives On', 149.

³³ Khan M, 'Bolitho-Claimant's Friend or Enemy', Medicine and Law, Volume 20, Issue 4, 2001, 486.

³⁴ Khan M, 'Bolitho-Claimant's Friend or Enemy' 487.

³⁵ Khan M, 'Bolitho-Claimant's Friend or Enemy' 489.

³⁶ Tucker J, 'A novel Approach to Determining Best Medical Practices: Looking at The Evidence' Houston Journal of Health Law and Policy Volume 10, Number 1 ,2010, 150-152.

evidence given.³⁷ He comments on the approach taken by the United States courts which is modelled after the Bolitho test in that it generally requires that the standard of care be that actions must logically and reasonably qualified and that evidence of the contrary is not justifiable by any reason.³⁸

Additionally, Julesz M adds to the discussion on approaches to medical negligence and the basis to award damages on in his journal article on the trend in medical negligence and the inclination to defensive medicine discussing the need to acknowledge that negligence can come from both intent and lack of intent to harm.³⁹ He states that there are factors in medical negligence that are unquantifiable considering that medical practice is a socio-economic pillar of society.⁴⁰ He puts across matters of empathy and ethics that cannot be separated by courts when faced with the task of determination of medical negligence claims.⁴¹ The take-away from his argument is that one is unable to ignore the feeling of empathy for victims of negligence and even as courts are guided by laws part of applying their discretion in the awarding of damages includes their empathy for the victims based on how much loss and suffrage they incur.⁴²

The argument is furthered by Jandoo S and Harland W in their discussion of the medical negligence crisis where they discuss how with the progression of the medical field, the standards of care require to be improved to prevent the increase in negligence cases.⁴³ They speak to the need for tortious liability as a compensatory mechanism based on the fault-based systems and how they can be developed to ensure that making negligent medical practitioners financially responsible for damage or injury affects the entire medical practice system in the fact that they will be less likely to act negligently lest they be found to be negligent.⁴⁴

³⁷ Tucker J, 'A novel Approach to Determining Best Medical Practices: Looking at The Evidence' ,179.

³⁸ Tucker J, 'A novel Approach to Determining Best Medical Practices: Looking at The Evidence',183.

³⁹ Julesz, Mate, 'Tendencies in Medical Negligence, with Special Reference to Hungary.' Zbornik Radova, vol. 53, no. 2, 2019, 670-671.

⁴⁰ Julesz, Mate, 'Tendencies in Medical Negligence, with Special Reference to Hungary.' 671.

⁴¹ Julesz, Mate, 'Tendencies in Medical Negligence, with Special Reference to Hungary.' 672.

⁴² Julesz, Mate, 'Tendencies in Medical Negligence, with Special Reference to Hungary.' 682.

⁴³ Harland, W, and Jandoo S, 'The Medical Negligence Crisis.' Medicine, Science and the Law, vol. 24, no. 2, April 1984, 123-124.

⁴⁴ Harland, W, and Jandoo S, 'The Medical Negligence Crisis.' 125-128.

CONTRIBUTION

This study contributes to the existing literature on the Bolam test and its application as well as criticism in the field of medicine by complimenting the arguments of writers like Stauch and Keown from the perspective of the Kenyan legal justice system that there should be a move from the traditional causation approach and that an objective and judicial approach should be included to promote equity and justice. It contributes to the discussion on the best approach of the test of medical negligence as making a case for the shift from the traditional Bolam test toward the Bolitho test which is a trend that can be noted on the existing literature following criticisms that have been levelled against it.

The study is unique in that it views medical negligence from the concept of the ethical approach to negligence which applies the theories of morality and social utility. It will be a study unique in the Kenyan jurisdiction and will further the literature on medical negligence in Kenya and how it should be handled by courts.

1.9 RESEARCH DESIGN AND METHODOLOGY

This study is mainly doctrinal research conducted through a desktop research approach using both primary sources and secondary sources to inch towards the prescriptive claim for the best approach for the determination of negligence. The primary sources include legislation and court cases. Secondary sources include books, book chapters, journal articles and other relevant reports.

1.10 LIMITATIONS

This research may be limited by the inaccessibility of some academic material as it may be behind a paywall and due to the fact that there is little literature on the medical negligence law in Kenya.

1.11 CHAPTER BREAKDOWN

This first chapter in the study entails the background, statement of problem, research objectives, research questions, hypothesis justification, literature review, conceptual framework, research methodology, assumptions and limitations of the study problem.

Chapter 2 critically analyses the Bolam test and how it is used to determine causation and eventually, liability for medical negligence. It studies the criticisms levelled against the test and their origins. This lays a foundation for the following chapter.

Chapter 3 looks into the application of the Bolam test in Kenya this is to get a grasp of the how it has applied in the medical legal field in Kenya. This lays a basis for the next chapter.

Chapter 4 goes into the analysis of what approach is best for the determination of negligence cases showing how the Bolitho test has been applied in the determination of negligence to further the development of medical negligence law. With the discoveries that will be made in the study, it lays a basis for my final chapter on recommendations.

Chapter 5 is the final chapter concluding the study and recommending the inclusion of the Bolitho test in the determination of medical negligence cases.



CHAPTER 2: BOLAM TEST AND ITS ORIGINS

2.1 INTRODUCTION

The objective of this chapter is to go into what the Bolam test is, its origins, how it is applied in medical negligence cases and some of the criticisms levelled against it. This demonstrates the use of the test in the determination of negligence and lead to the understanding as to why the courts have relied on this test for so long.

2.2 ORIGINS OF THE BOLAM TEST

The Bolam test originates from the English case of *Bolam v Friern Hospital Management Committee*.⁴⁵ The case was centred around the claim for damages against the Defendant due to injuries received from an electroconvulsive therapy treatment gone wrong.⁴⁶

The plaintiff claimed the injuries were caused by the lack of adequate restraints, lack of a relaxant drug and failing to warn the patient of possible risks that were associated with the form of treatment. They claimed the defendants were vicariously liable for negligence by allowing the doctor to operate in such a manner.⁴⁷

Mc Nair J gave the test of negligence and stated that they must infer that there was an act of negligence and that the negligence directly caused the injuries or that the defendant failed to conduct the treatment cautiously so as to minimise risks.⁴⁸ He then proceeded to offer the standard test for negligent action to be that which is contrary to the reasonable actions of a man claiming to have such skill.⁴⁹

The evidence relied on was the testimony of a fellow doctors treated , as expert opinions to inform the answer of the court to the question on what reasonable actions in the treatment of the defendant would be to which he stated that it would be common practice to inform the patient of the risks, and the lack of warning would constitute negligence.⁵⁰ The majority of doctors claimed that it was common practice to not use restraints and that there were possibly fatal risks of using relaxant drugs . They based their reasoning on the fact that in some cases restraints caused more injuries

⁴⁵ *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582, Paragraph 1.

⁴⁶ *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582, Paragraph 1.

⁴⁷ *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582, Paragraph 4.

⁴⁸ *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582, Paragraph 6.

⁴⁹ *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582, Paragraph 7.

⁵⁰ *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582, Paragraph 12-18.

and that the use of drugs was a fairly new concept introduced four years prior to the case and that the foreseeability of the risks was hardly possible due to the rarity of such instances where a patient could be badly injured from not being restrained.⁵¹

The court sided with the opinion on the doctors and held that defendants were not liable for negligence and therefore not supposed to pay damages.⁵²

The Bolam test then was formulated that negligence is drawn from a deviation of common practice by people of the same skill. Criticisms have been levelled against this practice, those of which shall be discussed in the next section.

2.3 CRITICISMS LEVELLED AGAINST THE BOLAM TEST

Firstly, the criticism levelled against it is the question of whether it is an evidentiary principle of a rule of law. It is unclear whether a deviation from majority opinion is automatically considered a breach of duty of care and raises the question to define the breach which Stauch M, attempts to answer what exactly constitutes a breach of duty of care in the medical profession.⁵³

The answer to that question is proposed to be that the test should be used as an evidentiary one however, caution should be exercised by courts due to the risk of shifting the responsibility the law gives the courts to the experts when really, they are meant to just assist the court in the interpretation of the evidence given to the court.⁵⁴

The second criticism is the unlikelihood of a judgment contradicting expert evidence for the fear of contradiction being taken to be the condemnation of an entire practice.⁵⁵ The possible reasoning behind this is that there is a unique doctor-patient relationship where the patient is unable to guarantee their own improvement in health and therefore it is unfair to place a burden that every possible risk be considered in the undertaking of their responsibility.⁵⁶ Although based on

⁵¹ *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582, Paragraph 20-35.

⁵² *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582, Paragraph 37.

⁵³ Stauch M, "Defining the Breach of Duty and the Use of the Bolam Test" Volume 9, Nottingham Law Journal, No.2,2000,90.

⁵⁴ Stauch M, "Defining the Breach of Duty and the Use of the Bolam Test"91.

⁵⁵ Stauch M, *The Law of Medical Negligence in England and Germany: A Comparative Analysis*, Hart Publishing, North America,2008,41.

⁵⁶ Wei J and Low K, 'Recognizing lost chances in Tort Law' July Issue, Singapore Medical Law Journal ,2014,105.

observation from an ethical perspective , common practice is not always necessarily right and it opens a door for erroneous interpretation of evidence and the law.

The third criticism is the misuse of freedom accorded to the medical profession through the use of the fault based approach which is embedded in this test. The freedom could be misuses in withholding information as to alternative treatment , the risks associated with the chosen treatment as well as the freedom to not take any action whatsoever in situations where in the practitioner’s opinion , there would have been no difference had they taken action or omitted to take action.⁵⁷

The final and most commonly shared criticism is the *Bolitho v City of Hackney* case and set the ball rolling on the move away from the Bolam test.⁵⁸ It highlighted the main weakness of the Bolam test being the lack of a unitary concept on what the acceptable standard of care is with the court unable to find a unitary concept causing a reliance on the opinion of medical practitioners.⁵⁹ The case was a redirection of how the test should be used and showed that the courts must operate on a matter of fact rather than the majority opinion of professionals.⁶⁰

2.4 THE MOVE AWAY FROM BOLAM

Following the risks associated with the Bolam test, courts in the Common Law jurisdictions have decided to take a broader series of tests in the determination of negligence, most of which are focused on the disclosure of information regarding the treatment of risk as well as determining causation in order to deduce liability for negligent actions. In this section, the purpose is to analyse how exactly the decision to depart from Bolam was reached as well as the implications of the departure.

2.4.1 Australia: *Rogers v Whitaker*

The case was heard at the High court of Australia after the appellant had been found liable for negligence after the respondent had sought medical care from the eye surgeon who conducted a procedure that rendered them almost totally blind.⁶¹ The main question raised to the court was what was the central action that amounted to breach of the duty of care to which the answer the court gave was the failure to warn of the risk of sympathetic ophthalmia (that her left eye would

⁵⁷ Stauch M, *The Law of Medical Negligence in England and Germany: A Comparative Analysis*,26.

⁵⁸ Maclean A, “Beyond Bolam and Bolitho “Volume 5, *Medical Law International*, No.3,2002,213

⁵⁹ Maclean A, “Beyond Bolam and Bolitho “,213.

⁶⁰ Maclean A, “Beyond Bolam and Bolitho “,213.

⁶¹*Rogers v Whitaker* (1992), High Court of Australia, Paragraph 1.

also lose sight) if the procedure was undertaken given the traumatic injury to her right eye that she was seeking treatment for.⁶²

The court noted that the Bolam test had been applied in a manner that lacked uniformity and that it is difficult to rely on a body of experts to determine whether or not a patient's questions should be answered and the extent of the answer which takes us back to therapeutic privilege and its abuse.⁶³

The court then makes a point to make it clear that Bolam has a place as a rule of thumb to inform the court's understanding of facts but is unable to aid in the detection of a lapse in the duty to inform and consequential abuse of therapeutic privilege which should apply in emergency cases where a doctor must take action with haste and may not have time to go over multiple risks and await the decision of a patient who may even be unable to determine what course of action should be taken .⁶⁴

Upon analysing this case, two things stand out. First there is an acknowledgement of the need for using the Bolam test, to establish a base line for what should be done to avoid negligence and then there is a point beyond which the Bolam test cannot be used. That point is finding the logic that informs the decision of the practitioner and that is where the informational responsibility comes in.

2.4.2 England: *Bolitho v City of Hackney Health Authority*

In this appeal the main matter of concern was as to the liability for negligence and the approach taken by the courts in applying the Bolam test.⁶⁵ The facts detail a two-year-old boy with breathing complications being placed under the care of the defendants after which he suffered two separate respiratory distress episodes of which only one was attended to and the other went unattended.⁶⁶ The boy went on to suffer cardiac arrest and subsequent brain damage as a result of lack of intubation and care.⁶⁷

⁶²*Rogers v Whitaker* (1992), Paragraph 4.

⁶³*Rogers v Whitaker* (1992), Paragraph 16.

⁶⁴*Rogers v Whitaker* (1992), Paragraph 37-39.

⁶⁵*Bolitho v City of Hackney Health Authority* (1997), House of Lords, Paragraph 1.

⁶⁶*Bolitho v City of Hackney Health Authority* (1997), Paragraph 2.

⁶⁷*Bolitho v City of Hackney Health Authority* (1997), Paragraph 2.

The main concern of the case for us is how the court determined negligence and it was simply by deducing a breach of duty of care by the lack of availability of the doctor on the second call and their failure to provide a substitute or a course of action if the child were to suffer another attack, this was done through the account of the sister in charge who reported the unreachability of the doctor through the beeper.⁶⁸

On the matter of causation, the court was of the opinion that the Bolam had no place in the determination of causation and that the trial court was misguided in using it in the first instance.⁶⁹ The court interpreted the test as a matter of what would have happened and not what logically should have been done or authorized to be done and therefore found it to have not been suitable.⁷⁰

Therefore the court went with the minority opinion that determined that the logical course of action would have not been to intubate because the presentation of symptoms did not bring forward a cause for it and had they opted to do it, they would have been placing an unnecessary risk on the life of the patient.⁷¹

It was then of their opinion that there was justified reason for the doctor not to have undertaken intubation as it comes with greater risk than not in cases that are not necessarily urgent.⁷²

This case criticizes the capacity of Bolam to determine causation from a logical perspective and calls for a recognition of balancing risks when choosing a treatment plan for a patient and the implications of either taking action or omitting to take action.

2.5 CONCLUSION

Upon following the origins of Bolam to the development of how courts have chosen to interpret it as seen in the cases, it is easy to deduce that through still a key part of determining negligence, the test falls short in the connection with causation and eventual proof of liability for negligence and there have been developments in the law of negligence which require to be adapted to ensure that

⁶⁸ *Bolitho v City of Hackney Health Authority* (1997), Paragraph 10.

⁶⁹ *Bolitho v City of Hackney Health Authority* (1997), Paragraph 21.

⁷⁰ *Bolitho v City of Hackney Health Authority* (1997), Paragraph 22-23.

⁷¹ *Bolitho v City of Hackney Health Authority* (1997), Paragraph 36-39.

⁷² *Bolitho v City of Hackney Health Authority* (1997), Paragraph 40.

there is proper carrying out of the responsibility of the court to ensure that the health care system retains its professionalism and breaches of duty of care are properly dealt with.



CHAPTER 3: THE APPLICATION OF BOLAM IN KENYA

3.1 INTRODUCTION

This chapter provides a detailed examination of how the Bolam test has been applied in real medical negligence cases in Kenya, offering insights into its practical impact on the Kenyan medical legal field. This is done by looking into the decisions of Kenyan courts on medical negligence.

3.2 JURISPRUDENCE FROM KENYAN COURTS

In this section, there is a case-by-case analysis of how medical negligence suits are handled in Kenya with summaries of key arguments as well as an analysis of what the courts took into consideration while determining the cases. Following this, there is a discussion on the common thread of the cases followed by the gaps created by the approach taken.

3.2.1 Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome (Suing as the Legal Representative of Rooney Mutharimi (Deceased))

The case was an appeal following a trial court judgment in favour of the respondent which held the appellant liable for the death of a six year old child after undergoing eye surgery following an injury they sustained at home.⁷³

The appellant claimed that the trial court did not properly interpret the evidence that was laid out before it and claimed that proper procedure was followed and the operation occurred after the recommended hours of no food being given to the patient as well as the anaesthetist having taken proper precautions to ensure choking on food was impossible and therefore claimed fault in the cause of death being choking on food.⁷⁴

The respondent relied on the evidence given by the doctor who conducted the post-mortem as well as their analysis of the possible happenings that led to the deceased's choking of which the witness highlighted a lack of precaution by inserting special tubes to stop food from being sucked up from the stomach.⁷⁵

⁷³ *Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome* (2020) eKLR, Paragraph 1.

⁷⁴ *Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome* (2020) eKLR, Paragraph 5.

⁷⁵ *Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome* (2020) eKLR, Paragraph 8.

The court stated the standard of reasonableness in medical negligence to be that of a person claiming to have skill in the medical field.⁷⁶ It further restated the Bolam test, that the professional must act within the boundaries of accepted medical practice as preferred by a body of medical and nursing opinion.⁷⁷ It then used the expert evidence of a doctor with a masters in clinical pathology and anatomic pathology who conducted the post mortem test who's opinion was that emergency precaution was not taken to prevent the food from being sucked out of the stomach during the operation and that emergency procedures do not allow starving while for normal operations, 6 hours of starving are recommended.⁷⁸

The court considered the evidence and came to the conclusion that reasonable care had not been taken and that it was not common practice for an emergency surgery to be conducted in the manner that it was.⁷⁹

3.2.2. *Dr. John Gachanja Mundia v Francis Murira and Tigania Mission Hospital*

This case was an appeal following a plaint by the 1st respondent for damages arising out of the death of his late wife following a caesarean section undertaken by the appellant and the 2nd respondent where the court had ruled in favour of the 1st respondent and awarded damages.⁸⁰

In this case the appellant claimed that the trial court was in error of finding him liable for negligent as the case had not been proven to the required standard.⁸¹ The evidence brought before the court was of a doctor who conducted the post mortem on the deceased and found that blood vessels had been severed in the uterus and that the blood in the chest cavity was as a result of death agony because the deceased was struggling to breathe and that the procedure of a C-section is simple enough to be done by basically trained medical officers.⁸²

The appellant mentioned to the court that he made the decision for the operation to be done as the deceased was in critical condition and there was an accidental tear when he pulled out the baby, however he noticed that even after repairing the incision, there was still significant bleeding and seeing as he was not qualified to take the necessary action of a by-pass surgery he did not do it and

⁷⁶ *Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome* (2020) eKLR, Paragraph 16.

⁷⁷ *Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome* (2020) eKLR, Paragraph 17.

⁷⁸ *Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome* (2020) eKLR, Paragraph 21.

⁷⁹ *Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome* (2020) eKLR, Paragraph 31-33.

⁸⁰ *Dr. John Gachanja Mundia v Francis Muriira and Tigania Mission Hospital* (2015) eKLR, Paragraph 1-2.

⁸¹ *Dr. John Gachanja Mundia v Francis Muriira and Tigania Mission Hospital* (2015) eKLR, Paragraph 5.

⁸² *Dr. John Gachanja Mundia v Francis Muriira and Tigania Mission Hospital* (2015) eKLR, Paragraph 7-8.

it was his opinion that the death was caused by a leakage of amniotic fluid to the bloodstream and not the severing of blood vessels as the expert had concluded.⁸³

To decide this case, the court applied the test requiring that the standard of care be of an ordinary skilled person in the field and that the standard of care not put the patient at risk.⁸⁴ They further emphasized that the burden is to prove that damage was not a question of misadventure but be linked to the evidence produced before the court.⁸⁵ Following this, the court applied the evidence that the severing of blood vessels was not a common occurrence and the lack of facilities to undertake the response to the emergency and correct the mistake that was made to avoid the death, it found that both the appellant and 2nd respondent failed in their duty to the deceased and consequently were liable for negligence.⁸⁶

3.2.3 Ricarda Njoki Wahome v The Attorney General, Dr. Ronald Kidiavai Lwegado and Dr. Geoffrey Muiruriki Ng'ang'a

In this case, the plaintiff claimed that the defendants were negligent in their treatment of the deceased and were negligent leading to his death and requested the court award damages. The deceased had a swelling on the base of his neck that was painless, upon getting diagnosed by a different doctor, he got an appointment for surgery by the 2nd and 3rd defendant, these events led to the deceased dying due to negligence and unprofessionalism.⁸⁷

The defendants argued that the passing of the deceased was an act of God and denied that they had perfect health prior to the surgery as they had a growth that only kept getting bigger.⁸⁸

In the plaintiff's statement, they said to have filed a formal complaint to the Kenya Medical Practitioners and Dentist's Board (KMPDB) which launched an inquiry into the death of the deceased and found that there were inadequate measures during the course of treatment and found two of three doctors innocent and the third was suspended and guilty of misconduct.⁸⁹

⁸³ *Dr. John Gachanja Mundia v Francis Muriira and Tigania Mission Hospital* (2015) eKLR, Paragraph 12-14.

⁸⁴ *Dr. John Gachanja Mundia v Francis Muriira and Tigania Mission Hospital* (2015) eKLR, Paragraph 28.

⁸⁵ *Dr. John Gachanja Mundia v Francis Muriira and Tigania Mission Hospital* (2015) eKLR, Paragraph 29.

⁸⁶ *Dr. John Gachanja Mundia v Francis Muriira and Tigania Mission Hospital* (2015) eKLR, Paragraph 32-36.

⁸⁷ *Ricarda Njoki Wahome v The Attorney General, Dr. Ronald Kidiavai Lwegado and Dr. Geoffrey Muiruriki Ng'ang'a* (2015) eKLR, Paragraph 1-2.

⁸⁸ *Ricarda Njoki Wahome v The Attorney General, Dr. Ronald Kidiavai Lwegado and Dr. Geoffrey Muiruriki Ng'ang'a* (2015) eKLR, Paragraph 8-10.

⁸⁹ *Ricarda Njoki Wahome v The Attorney General, Dr. Ronald Kidiavai Lwegado and Dr. Geoffrey Muiruriki Ng'ang'a* (2015) eKLR, Paragraph 12-13.

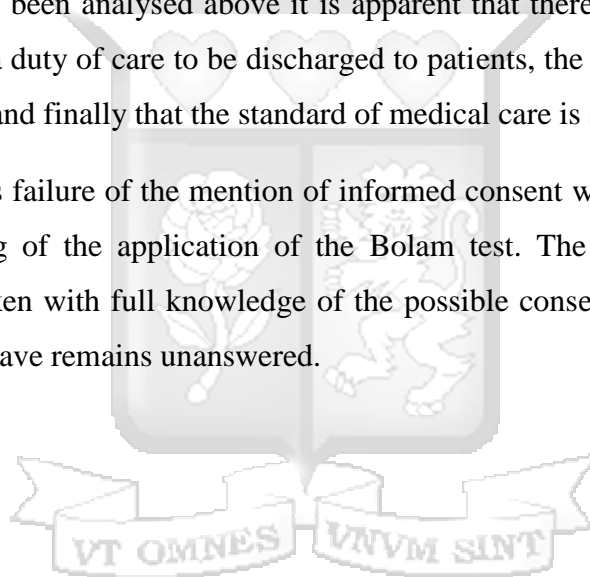
The court in their determination of negligence relied on the Bolam test which states the standard of care to be that which is set by other doctors and following this relied on the expert evidence of anaesthetist doctors to find the first and third doctors not in breach of the duty and standard of care.⁹⁰

The court also analysed the opinion by the Kenya Medical Practitioners and Dentists' Board which was of the opinion that whatever happened with the treatment of the deceased was unfortunate but negligence cannot be sufficiently linked to the cause of death and therefore none of the defendants were held liable for the death of the deceased.⁹¹

3.3 CONCLUSION

From the cases that have been analysed above it is apparent that there is a common thread, the recognition that there is a duty of care to be discharged to patients, the existence of a standard of reasonable medical care and finally that the standard of medical care is set by common practice.

In all three cases, there is failure of the mention of informed consent which according to the last chapter is a shortcoming of the application of the Bolam test. The question of whether the treatments were undertaken with full knowledge of the possible consequences and implications that their choices might have remains unanswered.



⁹⁰ *Ricarda Njoki Wahome v The Attorney General, Dr. Ronald Kidiavai Lwegado and Dr. Geoffrey Muiruriki Ng'ang'a* (2015) eKLR, Paragraph 39.

⁹¹ *Ricarda Njoki Wahome v The Attorney General, Dr. Ronald Kidiavai Lwegado and Dr. Geoffrey Muiruriki Ng'ang'a* (2015) eKLR, Paragraph 54-60.

CHAPTER 4: THE BEST APPROACH FOR NEGLIGENCE

4.1 INTRODUCTION

This chapter goes into making a case for the use of the Bolitho test and why it is the best approach by going into its compatibility with Medical Law, the advancements it offers for the determination of medical negligence suits and the implications on the determination of negligence

4.2 COMPATIBILITY OF THE BOLITHO TEST WITH KENYAN LAW

In Kenya, the medical practice is regulated by various laws from which duties of the medical practitioners in Kenya to their patients can be drawn. In Part II of the Health Act of Kenya, the rights and duties of medical practitioners and those seeking treatment are highlighted, among the duties are; unequivocal consent, the right to information, confidentiality and a duty to do no harm can be inferred from the reading of the various provisions.⁹²

The Bolitho test with a patient centred approach basically seeks to apply the concepts of informed consent as well as logically assessing the outcome of a procedure and informing the patient of the findings as it is a duty owed to them.

There are exceptions to the rule set out in Kenyan Law of informed consent as seen in Section 6 of the Health Act which would be during an emergency where the doctor has absolute power over the actions that they take in attending to the patient as they lack both time and the capacity of the patient may be reduced.⁹³

Kenyan courts have shown recognition to the test, that indeed a body of professional opinion, as relied on in Bolam, could have fault in its opinion and must be taken with caution, this is seen in the case of *J.O.O and 2 others v Praxedes P Mandu Okutoyi and 2 others*.⁹⁴ In this case, the respondents were sued for negligence leading to the vegetative state of the plaintiff following a surgery that was delayed and improperly carried out.⁹⁵ The respondents had argued before the court that the Kenya Medical Practitioners and Dentists Board had already determined the case

⁹² Part II, *Health Act* (No.21 of 2017)

⁹³ Section 6, *Health Act* (No.21 of 2017)

⁹⁴ *J.O.O and 2 others v Praxedes P Mandu Okutoyi and 2 others* (2011), eKLR, Paragraph 41.

⁹⁵ *J.O.O and 2 others v Praxedes P Mandu Okutoyi and 2 others* (2011), eKLR, Paragraph 12-19.

and requested a dismissal however, the court found that there were grounds to hear the case and moved to proceed.⁹⁶

In the subsequent suit, the court used the Bolitho case to determine loss, injury and damage where it stated that the claimant had a duty to prove that the negligence directly caused loss that they suffered.⁹⁷ The court determined that indeed the mismanagement of the 1st defendant did contribute to the conditions of the 1st defendant by assigning her to a doctor that did not know how to wean the patient off sedation leading to the brain damage they suffered from the lack of oxygen for five more than five minutes.⁹⁸ From this case, we see that courts are beginning to acknowledge the existence of the Bolitho test in the determination of breach of duty of care and with that, it is possible for future decisions to lean on it to determine negligence cases in terms of liability. It brings out the logical evaluation through the consideration of the effects of weaning off a patient from sedation and keeping them under sedation, a choice which eventually lead to the actions that were considered to be negligent.

4.3 THE BOLITHO TEST'S CONTRIBUTION TO THE STANDARD OF CARE ARGUMENT

Scholars have crowned the Bolitho test to be the end of Bolam test while some have stated it as a mere modification of the original test with only a few modifications made in the determination of breach of duty of care.⁹⁹ Khan M highlights exactly what the case means for breach. Firstly, is the logic behind a medical practice which the writer believes little guidance was given on the consideration of this therefore it is left open to interpretation what is exactly logical in the medical practice.¹⁰⁰ Using the understanding of what the doctor-patient relationship is built on, it is clear to determine that logical explanations would be founded on the best interest of the patient which is balancing risks and the outcome. Another possible way to look at it is through an ethical perspective where the action and outcome are weighed together to determine whether an action is morally right.

⁹⁶*J.O.O and 2 others v Praxedes P Mandu Okutoyi and 2 others* (2011), eKLR, Paragraph 57-65.

⁹⁷*J.O.O and 2 others v Praxedes P Mandu Okutoyi and 2 others* (2018), eKLR, Paragraph 711.

⁹⁸*J.O.O and 2 others v Praxedes P Mandu Okutoyi and 2 others* (2011), eKLR, Paragraph 712-716.

⁹⁹ Khan M, 'Bolitho-Claimant's Friend or Enemy' 486.

¹⁰⁰ Khan M, 'Bolitho-Claimant's Friend or Enemy' 487.

Secondly, Khan M notes that the court in this case finally made a statement urging the application of a more judicial and objective approach as opposed to the medical approach that was previously applied and noted that it may significantly increase the odds of success of claimants in negligence suits making a level playing field against the defendants that often will have the backing of a body of opinion that consists of their peers.¹⁰¹ The call for objectivity by the courts opens the door for intervention and possibly the evolution of a balanced set of guidelines which finally sets a clear line for what exactly in legal terms can be qualified as breach without setting an unattainable standard for the practitioners of medicine.

The Bolitho test encourages a patient centred approach by holding medical practitioners responsible for the decisions they make without weighing the risks and benefits of their actions in their carrying out of their duties. From the test, arises a responsibility to inform patients of the risks involved in their treatment to allow them to make an informed decision. This not only benefits the claimants but may also absolve defendants of blame in the event that their actions or lack thereof contradict with their peers and allow the courts to make their decision based on the logical weighing of the evidence of the case given that every medical case has its own unique markers as seen in the case from which the test arose.¹⁰²

The test is a modification of the Bolam test and encourages an ethical approach to negligence and the standard of care, pointing out that even common practice can be negligent in some cases and uncommon approaches can be reasonable and justifiable, this is through the assessment of the logic behind actions taken in the course of treatment.

4.4 IMPLICATIONS OF THE BOLITHO TEST ON THE DETERMINATION OF NEGLIGENCE

Essentially, the Bolitho test proposes the use of logic and a balancing of the risks concerned with the treatment.¹⁰³ The test also paves the way for the emphasis on a need for the provision of

¹⁰¹ Khan M, 'Bolitho-Claimant's Friend or Enemy'487.

¹⁰² *Bolitho v City of Hackney Health Authority* (1997), Paragraph 33-40.

¹⁰³ *Bolitho v City of Hackney Health Authority* (1997), Paragraph 40.

information to the court that may be of a differing opinion so as to reduce the finality of the opinion of a body that is more inclined to support the plaintiff in such cases.¹⁰⁴

In more recent times the case of *Montgomery v Lancashire Health Board* has furthered the development brought about by Bolitho in terms of questioning the opinion of the medical body and application of logic.

The case follows that of a baby born with disability as a result of complications during birth and the mother sought damages on behalf of her son as a result of injuries sustained due to alleged negligent action in the delivery process.¹⁰⁵

In this case the court pointed out the need to weigh the risks by taking into consideration the circumstances of the patient.¹⁰⁶ It also outlines the duty of the doctor to provide extensive information as a resource to provide a basis for the unequivocal consent.¹⁰⁷

The influence of Bolitho wears heavily on the judgement especially on the application of logic and the requirement of weighing the risks associated with a treatment or procedure.¹⁰⁸ As a matter of fact, this case answers the question on how far the application of the Bolitho test and provides an exception for the duty to inform.¹⁰⁹

The exception applies the pillar of the doctor-patient relationship earlier discussed as mutual participation. Though a duty to inform is imposed there are situations where an exception can be made which is only when a patient requests the doctor to not disclose the exact risk, in this case the duty to inform stretches only up to informing that there is a possibility that there is a risk involved.

This entry into medical negligence jurisprudence arising out of Bolitho therefore proves that the test has the ability to expound further on the duties of the medical practitioners within the bounds of their relationships with patients and could be the key to developing a stable and clear definition

¹⁰⁴ Epstein N, 'Legal and evidence-based definitions of standard of care: Implications for the code of ethics of professional medical societies' *Surgical Neurology International*, 2018, 3.

¹⁰⁵ *Montgomery v Lanarkshire Health Board* (2015), Scotland, Paragraph 1.

¹⁰⁶ *Montgomery v Lanarkshire Health Board* (2015), Paragraph 89.

¹⁰⁷ *Montgomery v Lanarkshire Health Board* (2015), Paragraph 87-89.

¹⁰⁸ *Montgomery v Lanarkshire Health Board* (2015), Paragraph 26.

¹⁰⁹ *Montgomery v Lanarkshire Health Board*, (2015), Paragraph 85.

of what breach of duty of care is in medical negligence terms and situations where exemptions are applicable in as far as finding medical practitioners liable for injury arising out of their actions.

4.5 CONCLUSION

On the best approach for negligence, the compatibility with already existing law and the Bolitho test allows it to be utilised in the determination of cases. It also opens up for a more claimant favoured approach than that of the Bolam test which hardly left room for contrary opinion to the medical professionals' that would be called to give expert evidence. It is also to be noted that it advances medical negligence jurisprudence in Kenya and paves the way for a more efficient way of evaluating these cases.



CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

In the pursuit of a reasonable standard of healthcare it is important that the justice system maintain the ability to address the shortfalls in the system such as negligence in order to maintain a standard of care within the profession.

The study conducted in this paper has pointed out the need for development of jurisprudence in medical negligence law and has shown how the Bolitho test is best fitted to replace the current Bolam test for negligence as well as its compatibility, it is my hope that this study contributes to the literature on medical negligence in Kenya and impacts how courts handle medical negligence cases.

In the first chapter there was an introduction to the research problem which was to investigate the best approach for courts in the determination of negligence. In the second chapter, the Bolam test currently utilized by the Kenyan courts was analysed with its origins, key arguments as well as criticisms explained further. Chapter three went on to look into the use of the Bolam test by the Kenyan courts. Chapter four assessed the compatibility of the Bolitho test as well as the implications the test could have on medical negligence law in Kenya.

In this concluding chapter, a summary of the findings shall be given as well as the recommendations for the implementation of the Bolitho test by Kenyan courts in the determination of negligence suits.

5.2 SUMMARY OF THE FINDINGS

The Bolitho test demands that doctors explain the logic behind the actions they take in the treatment of patients.¹¹⁰ This is to cater towards the patients' right to make an informed decision in order to give informed consent on the treatment that is given to them.

This research established that there is a better approach to negligence which allows the court to reduce the bias created by the body of medical experts' opinion by viewing medical negligence

¹¹⁰ Jackson E, *Medical Law: Text, cases and materials*, 4th Edition, Oxford University Press, United Kingdom, 2016, 138.

from a more logical perspective by weighing the balance of risks and benefits of the course of action.

Through the Bolitho test, negligence no longer becomes a question of what ought to be done but becomes a question of what should have been done in this specific case. It allows for deviation from standard practice to be logically assessed before final judgement is made by the court and not the peers of the defendants who may have a bias based on their procedural standards within their profession.

This research also found that the Bolitho test fits well into Kenyan law with a look into Part II of the Health Act that sets out the rights and duties of medical professionals which can be used to determine the standard of care from which deviation can be classified as breach.¹¹¹

5.3 RECOMMENDATIONS

5.3.1 Careful application of the test

The Bolitho approach is not meant to be taken as a one size fits all in cases and therefore courts should proceed with caution, using their own discretion and only using it to supplement other tests where possible and fitting. It is also important to note the exceptions to the rule like when a patient gives control to the doctor to make decisions on their behalf and during an emergency.

5.3.2 A patient centred approach

Based on the Health Act's details of the Rights and Duties owed to patients, the statute has created the environment for a patient centred approach to medical negligence and should be taken into consideration by courts in the determination of these cases. There is also a Patient's Rights Charter issued by the Ministry of Health (MOH) in 2013 that could guide the courts in using this approach in order to determine negligence when cases are presented before them.

A patient centred approach and the Bolitho test blend together in that in the analysis of logical decision making on the actions to be taken in treatment, it would allow the court to consider the circumstances under which the medical practitioner was required to act and objectively weigh the risks and benefits specific to the patient and not use the standard procedure on every case that would be approved by their peers.

¹¹¹ Part II, *Health Act* (No.21 of 2017)

BIBLIOGRAPHY

Legislation

1. The Constitution of Kenya (2010).
2. The Health Act (No.21 of 2017)
3. Medical Practitioners and Dentists Act (Cap 253) 2012.
4. Patient's rights Charter (2013).

International Instruments

1. United Nations Declaration of Human Rights, December 10 1948.

Books

1. Aristotle, *Nicomachean Ethics Book II-IV*, Batoche Books, 1999.
2. Jackson E, *Medical Law: Text, cases and materials*, 4th Edition, Oxford University Press, United Kingdom, 2016.
3. Kant I, *Groundwork on the Metaphysics of Morals*, Cambridge University Press, United Kingdom, 1997.
4. Stauch M, *The Law of Medical Negligence in England and Germany: A Comparative Analysis*, Hart Publishing, North America, 2008.

Journals

1. Fordham M, 'The Bolam Test Lives On', *Singapore Journal of Legal Studies*, Issue 1, 1998.
2. Harpwood V, 'Medical Negligence: A Chick in the Armour of the Bolam Test' *Medico Legal Journal*, Volume 64, Issue 4, 1996.
3. Keown J, 'Doctor Knows Best: The rise and rise of the Bolam Test' *Singapore Journal of Legal Studies*, Volume 2, Issue 2, 1995.
4. Khan M, 'Bolitho-Claimant's Friend or Enemy', *Medicine and Law*, Volume 20, Issue 4, 2001.
5. Maclean A, "Beyond Bolam and Bolitho" Volume 5, *Medical Law International*, No.3, 2002.
6. Stauch M, 'Defining the Breach of Duty and the Use of the Bolam Test' *Nottingham Law Journal*, Volume 9, Issue 2, 2000.
7. Tucker J, 'A novel Approach to Determining Best Medical Practices: Looking at The Evidence' *Houston Journal of Health Law and Policy* Volume 10, Number 1, 2010.
8. Wei J and Low K, 'Recognizing lost chances in Tort Law' July Issue, *Singapore Medical Law Journal*, 2014.

Research Papers

1. Epstein N, 'Legal and evidence-based definitions of standard of care: Implications for the code of ethics of professional medical societies' *Surgical Neurology International*, 2018.
2. Harland, W, and Jandoo S, 'The Medical Negligence Crisis.' *Medicine, Science and the Law*, vol. 24, no. 2, April 1984.
3. Julesz, Mate, 'Tendencies in Medical Negligence, with Special Reference to Hungary.' *Zbornik Radova*, vol. 53, no. 2, 2019.
4. Mason A, "Law and Morality," *Griffith Law Review*, Volume 4, Issue 2 (1995).
5. Muthaka D, Kimani D, Mwaura S and Manda D, "A review of the regulatory framework for private healthcare services in Kenya" Kenya Institute for Public Policy Research and Analysis, KIPPRA discussion paper No.35, 2004.
6. Owiti H and Fundi E, 'Assessing the Legal Mechanisms for Redressing Medical Malpractice in Kenya: Just How Effective Are They?' Social Science Research Network, 2014.
7. Samanta A, Samanta J, "Legal standard of care: a shift from the traditional Bolam test." *Clinical Medicine (London)* Volume 3 Number 5, 2003.

Newspapers

1. Were E, Jamah A, The shocking truth on 'killer doctors', Standard Media, 2011.

Online Sources

1. Norrie K, 'Medical Negligence: Who sets the standard?' *Journal of Medical Ethics*, 1985, <[Medical Negligence: Who Sets the Standard? on JSTOR](#)> on 5 March 2023.

Thesis

1. Wanjohi S, 'Appraising the Legal and Regulatory Framework on Medical Negligence in Kenya' Published, Strathmore University, Nairobi, 2020.

