

SPECIAL ARTICLES

ANATOMY OF THE MEDICAL NEGLIGENCE CLAIM

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Introduction

When doctors are summoned to court for medical negligence litigation they often, feel stressed, demoralized, and a sense of ingratitude from their patient. Often they do not know what to expect. On the other side of the litigation will be patients who often feel devastated and aggrieved by an injury that they think they should not have suffered. A patient may see a lawsuit as a way to seek retribution against a doctor whom he believes needs to be punished for perceived wrongdoing or as an avenue by which the doctor is held accountable for his conduct. Others may see the fact that doctors can be liable for negligence as an incentive for doctors to maintain or achieve higher standards of care. However one sees it, medical negligence litigations often are destructive of the doctor-patient relationship and distort the practice of medicine in an over-cautious direction. The role of the courts is to consider both the allegations made by the patient who has suffered an injury and the response of the doctor by way of rebuttal and come up with a judgment which is fair to both patient and doctor.

Although the proportion of successful medical negligence claims worldwide is relatively small, the stress that accused doctors go through can be immense whether or not the claim is successful¹. The teaching that doctors receive of medical ethics and law in medical schools including medical schools in Ghana, has lagged behind the teaching of other aspects of medicine². This has resulted in a situation where many doctors do not fully understand when and how a successful medical negligence claim can be made against them. Society is generally increasingly becoming intolerant of errors and accidents³. This is more the case in developed countries, but increasingly becoming so in developing countries such as Ghana⁴. When things go wrong, people increasingly look for someone to blame. Medical litigation, as a result, is likely to increase and not decrease. Understanding how a successful medical negligence claim can be made

against a doctor will hopefully not only help the doctor deal with the stresses of a medical negligent proceeding initiated by a patient in court and avoid the waste of his precious time and expense defending the claim in the court, but also help him improve in the way he relates to his patients, and help him prevent complaints against himself by his patients.

The aim of this article is to explain in a brief overview that is easily understood by the doctor, how the court determines medical negligence. A number of the cases cited in this article to illustrate the principles that the courts apply are cases from English courts. These cases have been used for a number of reasons. They are easily accessible. They illustrate the principles very well and are cases that could also happen in Ghana. The 'reported' cases on medical negligence in Ghana are limited. The legal jurisdictions in England and Ghana are both common law jurisdictions and similar in many respects⁵.

Two reported successful medical negligence claims in Ghana

One of the reported cases of successful medical negligence claims in Ghana is *Kumah v Attorney-General*⁶, famously known as Asantekramo. In this case a 19 year old woman was referred to OkomfoAnokye Hospital in Kumasi, Ghana, with a ruptured ectopic pregnancy. She was successfully operated on but subsequently developed a gangrenous arm resulting from infection that started from an intravenous infusion site. The arm could not be saved and was amputated. She sued the hospital for medical negligence and won.

In another case⁷, a severely ill six week old baby who was admitted to the Apam Catholic Hospital in the Central Region for treatment went missing and the hospital could not tell the whereabouts of the child nor explain to the parents why the child had disappeared. The parents sued the hospital for negligence at the High Court in Cape Coast and won.

What constitutes medical negligence?

Negligence is a failure on the part of one person to take reasonable care which causes foreseeable damage to another⁸. In law, not every act of carelessness that causes harm will give rise to a successful claim in negligence. For a patient to establish to a court that a

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Conflict of interest: None declared

doctor has been negligent in the care provided to him by the doctor, he must establish at least three things. By the same token, to successfully defend himself, the doctor must refute at least one of these three.

Once the patient has successfully established these three things he is entitled by law to monetary compensation which is supposed to place him as far as is possible back to the position that he would have been in if the negligence had not occurred^{9,10}. The courts often rely on medical experts and their reports to guide them in reaching a judgment, as judges are not qualified to make professional judgments about the practices of other learned professions¹¹.

The three things that the patient needs to establish are:

1. That the doctor owed him a duty of care
2. That the duty of care owed him was breached by the doctor
3. That he suffered harm as a result of the breach of the duty of care by the doctor. This is also referred to as 'causation'.

Duty of care

A duty of care is often easy to establish. Legally, a duty of care arises when the doctor accepts to treat the patient^{12,13}. In *Asantekramo*, the fact that the Okomfo Anokye hospital and its doctors accepted to, and proceeded to treat the patient established that the hospital and the treating doctors accepted and owed a duty of care to the patient. This is also the case in *Asafo*, where the Catholic Hospital of Apam and its doctors, by accepting to treat and admitting the six week old baby into their care established a duty of care.

Breach of duty of care

The duty of care is said to have been breached if the standard of care provided by the doctor falls below that expected of the doctor by law¹³. It is important to note that the occurrence of an adverse outcome alone does not establish that the duty of care has been breached¹⁴.

To establish that a breach of duty of care has occurred, most courts in the world, including those in Ghana, use a principle established in a case brought by Mr. Bolam against the Friern Hospital Management Committee in the United Kingdom in 1957¹³. This principle has become known as the 'Bolam principle' or 'Bolam test'.

The Bolam test is used to distinguish those situations where an adverse outcome is simply the chance materialization of an existing risk, from those situations where the adverse outcome occurs as a result of the doctor not deploying due skill and attention.

Mr. Bolam, a claimant, who was a voluntary patient at a mental health institution run by Friern Hospital Management Committee, had undergone Electro-Convulsive Therapy (ECT) at the Friern Hospital and sustained a fracture to one of his hip bones; the acetabulum. During the procedure, no muscle relaxant drugs were administered to him, nor

were any restraints used to control the convulsive movements which happen during ECT. He sued for compensation. He argued that the hospital was negligent for; not issuing muscle relaxants; not restraining him; and not warning him about the risks involved. At that time professional practice varied widely about the use of drugs and physical restraint, and in relation to whether patients should be warned of the risk of fractures. *McNair J*, the judge, summed up the case to the jury who then found in favour of the defendant (the hospital). In his summary he noted that expert witnesses had confirmed that much medical opinion was opposed to the use of muscle relaxant drugs, and that manual restraints could sometimes increase the risk of fracture. Moreover, it was common practice of the profession to not warn patients of the risk of treatment (when it is small) unless they are asked. He held that what was common practice in a particular profession was relevant to the standard of care required, and that a person falls below the appropriate standard, and is negligent, if he fails to do what a reasonable person would in the circumstances. *McNair J* then said:

*"...it is just a question of expression. 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 reasonable 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 a 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"*¹³.

In essence, the Bolam principle, is that; 'A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by other responsible or reasonable body of doctors'. That is, as long as a doctor's practice is endorsed by other responsible doctors he will not breach his duty of care.

The courts have been very particular about upholding this principle. A deviation from it may result in the court's judgment being overturned by a higher court on appeal. In a case where a judge decided that he 'preferred' one group of responsible doctors' opinion and practice to another group of responsible doctors' opinion, the judge was rebuked when the case was appealed to a higher court, the House of Lords (the then highest court in the United Kingdom)¹⁵.

In the case in question, a patient presented with symptoms of tuberculosis to hospital. The consultant

physician and surgeon considered Hodgkin's disease, carcinoma and sarcoidosis as differential diagnoses. They went ahead and did a mediastinoscopy on the patient to look for lymph nodes to biopsy for histology after they had sent a sputum sample from the patient for Acid fast Baccilli (AFB) to the laboratory, but before the report on that was ready. During the mediastinoscopy the left recurrent laryngeal nerve was damaged, a known risk of mediastinoscopy which on its own will not be negligent, and the patient suffered paralysis of the left vocal cord. The sputum report later came back as positive for tuberculosis. The patient sued for negligence by arguing that the doctors breached their duty of care to him by not waiting for the sputum test report, which led to the mediastinoscopy and thus damage to his vocal cord. The doctors argued that since Hodgkin's disease was a differential diagnosis, they wanted to diagnose or rule it out early, which is why they did not wait for the sputum report. Although experts testified that it was reasonable for the doctors to go ahead and take biopsies before they have seen the sputum report, the judge said he 'preferred' the claimant's expert's evidence that they should have seen the sputum report before deciding whether or not to do a mediastinoscopy, and therefore ruled in favour of the claimant. The defendants appealed eventually to the House of Lords who upheld their appeal and stated that a judge cannot prefer one professional opinion over another:

"...I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinion, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judge's finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment, negligence is not established by preferring one respectable body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate specialty, if he is a specialist), is necessary"¹⁵.

It is also important to note that, as is often the case, medical negligence cases are brought against a doctor several months or years after the actual incident. It is also the case that science and technology and in particular medical technology is advancing all the time. The practice of the doctor is judged in light of the medical practice at the time of the incident for which a claim is being made and not the current practice at the time when the negligence claim is brought if the two happen to be different¹⁶. I need to point out at this stage that in the court's assessment of duty of care inexperience is no excuse in the eyes of the law¹⁷. Doctors are judged by the standard of the competent average doctor in a similar specialty or post. A doctor should therefore always be mindful of what his

limitations are, as performance beyond one's capability may be a breach in the duty of care.

Fairness

Although when a doctor is accused of medical negligence he may feel that he will not get a fair hearing from the court because the court may place sympathy for an injured patient over justice, the court's role is to ensure justice. Patients also think the courts are biased in favour of doctors¹¹. Some patient advocate groups and commentators think that the Bolam test is often misapplied by some courts, and some doctors have passed the Bolam test when they should not have passed by simply calling on colleagues to testify in court that they would do things the same as the accused doctor did, even if the practice was not logical nor able to stand up to logical scrutiny. In fact a commentator once said that the Bolam test has become just a requirement to field a medical expert who would declare that they would have done as the defendant did¹⁸. This commentator went on to imply that the Bolam test has been applied so badly in favour of doctors such that if a medical expert could be identified by a defendant and if that expert were patently honest and stood by his testimony vigorously then neither the expert nor his/her defendants would be asked to justify their practice.

If indeed a doctor could pass the test of breach of duty of care just by another doctor saying that he would practise in the same way without justifying why that way of practice is a good way to practise, it becomes easy to see why the public will think that the test is biased in favour of doctors.

The Bolam test has since been clarified in a case brought on behalf of a young boy called Bolitho against the City of Hackney Health Authority in the England¹⁹.

Patrick Bolitho was a 2 year old boy admitted to St. Bartholomew's Hospital in England suffering from the upper respiratory tract infection croup. The following day he suffered three separate episodes of acute respiratory difficulties, tragically developed a cardiac arrest and severe brain damage during the third episode and subsequently died. The boy, it was said in evidence, seemed quite well in between the episodes of respiratory distress. The doctors responsible for Patrick's care failed to attend at any of these incidents despite being called by nursing staff. The boy's estate sued the hospital for negligence resulting in the death of the boy. The hospital accepted that the doctor was in breach of her duty of care by failing to attend any of the respiratory distress episodes. It was also accepted by both parties that to prevent the cardiac arrest that occurred on the third episode of respiratory distress, Patrick would have had to be intubated before then. The doctor testified that although she may have made preparations for intubation, she would not have intubated Patrick had she been to see him earlier because he recovered from the episodes. The hospital

therefore denied liability on the basis of the fact that even if the doctor had gone to see the patient earlier she would not have intubated him because he was well in between the episodes and therefore her failure to see him did not cause the patient's death. The court accepted the doctor's evidence that she would not have intubated the boy and went on to consider whether failure to intubate the boy was negligent. The claimant's experts thought the evidence of respiratory distress was such that a respiratory collapse should have been anticipated and the boy intubated to avoid it. The defendant's experts however testified that since the boy was quite well in between episodes, intubation itself was not such a risk free procedure in such a young child and therefore it was reasonable to decide not to intubate the patient prior to the third episode of respiratory distress. The trial judge although not sounding particularly convinced by the logical force of the evidence of the defendant's experts, decided that since both the claimant's and defendant's experts represented bodies of reasonable medical opinion, although they were opposed to each other, he could not prefer one opinion to another and therefore the doctor's failure to intubate was not negligent and therefore her admitted breach of duty of care from failure to attend the previous episodes of respiratory distress did not result in the cardiac arrest of the boy.

The claimants took their case to the Court of Appeal, which also found in favour of the defendant, and subsequently to the House of Lords. At the House of Lords, the claimant submitted that the trial judge had wrongly applied the Bolam test by treating the Bolam test as a requirement to accept one truthful professional expert advice without question even though he was not persuaded of its logical force. The House of Lords denied the claimants appeal in this particular case after considering the case in its totality, but highlighted that the court could reject an expert's advice if it cannot stand up to logical scrutiny:

"...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"¹⁹.

The House of Lords emphasised that the use of the terms reasonable responsible or respectable medical opinion usually indicates that the opinion that is expressed has a logical basis. In other words, an opinion cannot be described as reasonable, responsible or respectable unless it has a logical basis:

"The use of these adjectives...all show that the court has to be satisfied that 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 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"¹⁹.

The House went on to point out that it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable.

The lesson from the principles in Bolam and Bolitho, therefore, is that a court will not necessarily accept a doctor's practice as good just because another doctor testifies that it is, although very rarely will the honest opinion of a competent medical expert be considered unreasonable. The courts cannot prefer one competent medical opinion to another.

What can the doctor take away from this? To ensure that he always passes the test of breach of duty of care, were he to be sued, a doctor's practice must be in line with current medical evidence and consistent with a practice that could be considered reasonable, responsible or respectable. A way to do this, among other things, is for the doctor to embark on a lifelong continuous professional development.

In Asantekramo, the court was satisfied, in spite of the defence that the hospital put up, that the siting and management of the intravenous line and the management of the subsequent infection and gangrene was done in a manner that could not be endorsed by any reasonable or responsible group of doctors. The hospital's duty of care to this 19 year old woman was therefore judged to have been breached.

The discussion will be incomplete without bringing up an example of a case where the court rejected an expert's evidence as not being reasonable. In Marriot v West Midlands Health Authority²⁰; a claimant fell and suffered a head injury. He became unconscious for half an hour, was admitted to hospital for X-rays and observation and discharged the next day. At home he remained ill. He was lethargic, had a headache and loss of appetite. Eight days after the fall the wife called the family doctor who went over to see the patient at home, did a cursory examination and told the wife to call him again if the husband got worse. Four days later the patient collapsed. He was readmitted to hospital, was found to have a large extradural haematoma which was evacuated. It was found at surgery that he had a skull fracture with extradural bleeding. He became paralysed and developed a speech disorder. In the claim against the family doctor the claimant's expert testified that the defendant doctor should have appreciated how potentially serious the claimant's condition might have been and referred him back to hospital immediately for a full neurological examination. The defendant's expert accepted the seriousness of the claimant's condition but testified that it was nonetheless not negligent to leave the claimant at home because the risk of him having a haematoma causing sudden collapse was very small. The trial judge rejected the defendant expert's argument on the basis that although the risk was statistically very small, the consequences if things go wrong are

disastrous. As a result the only reasonably prudent thing to do was to re-admit the patient for further observation and investigation. The doctor was therefore held in breach of his duty of care.

Causation

For a patient to establish legal causation, he has to establish that as a result of the sub-standard care provided by the doctor, he suffered a legally recognised harm. This harm can range from physical injury to psychiatric illness²¹⁻²⁵. Even if the doctor's practice is judged sub-standard and therefore a breach of his duty of care, the patient will still not prove negligence until he proves that the breach resulted in the damage that he suffered. This is very difficult for most patients to prove, as often there is more than one possible cause for the patient's condition. As we saw in the Bolitho case, although the doctor failed to attend the respiratory distress call, which was a breach of her duty of care to Bolitho, the claimant failed to prove that her failure to do so resulted in the death of the patient, as she would not have intubated the patient even if she had attended. In another case²⁶ a man presented to a hospital casualty unit feeling unwell but the casualty doctor failed to attend to examine him. He later died and was found to have suffered from arsenic poisoning. In court it was determined that the doctor breached his duty of care by not examining the patient. However the doctor was not found negligent because it was determined that his breach of duty of care did not cause the death of the patient. Even if he had examined the patient, the patient would have died anyway, as there was no treatment for arsenic poisoning.

In Asantekramo, causation was established because the court was satisfied that the mismanagement of the intravenous access resulted in the infection and gangrene and subsequent amputation of the 19 year old woman's arm.

Rather than a claimant having to prove 'causation', the defendant may be called upon sometimes to explain why his actions should not be considered as having caused the harm that the patient has suffered.

Res ipsa loquitur

Occasionally 'causation' is particularly difficult to prove; especially when the defendant is in complete control of the relevant events and an accident happens which does not ordinarily happen if proper care is taken. In such cases the claimants and the court may resort to a general principle in the law of negligence referred to as '*Res ipsa Loquitur*' which basically means 'the thing speaks for itself'²⁷. In such a situation there is an inference of negligence and the defendant will be held liable unless he can explain the incident in a manner consistent with the exercise of proper care. This was the principle that was applied in the Asafo v Catholic Hospital of Apam case referred to above. As the six week old baby had been handed to the care of the hospital for treatment and had disappeared, the

court decided that it was incumbent on the hospital to explain why that was the case, failing which the hospital would be found negligent. The hospital as it turned out could not provide good reasons why the child disappeared and was as a result found negligent.

The courts, it is thought, are often reluctant to apply this principle except on rare occasions²⁸. One of the reasons for this may be because they are mindful of the fact that knowledge in medical science is limited and events may be inexplicable because there is not enough knowledge available to explain them^{28,29}. However when there is a sense of lack of communication and openness on the part of the defendant the court may resort to this principle.

Conclusion

Medical negligence claims are bound to increase in Ghana and not decrease. This is because the more the country develops and the literacy rate in the country rises, and people interact more with others in developed countries, the more patients' expectations of the quality of care from doctors will increase and their tolerance of medical accidents and errors will decrease. Although the period after a medical negligent complaint has been made against the doctor up to such time that a resolution is achieved and probably for a long time after that can be very stressful for the doctor, a medical negligence claim is defensible if the doctor has exercised due diligence in his duty towards the patient. A doctor will not be found guilty of medical negligence unless his patient can prove that the doctor owed him a duty of care, and that the doctor breached his duty of care and the breach of duty of care resulted in the injury that was sustained.

There are no guarantees that a hard working doctor will never experience a complaint or a medical negligence claim from one of his patients in his career, however the risk of that happening can be minimised, in my view, by things like active engagement in continuous professional development, the exercise of diligence at work, good communication and openness with patients, and respect for the patients' right to self-determination (respect for patient autonomy).

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