

SONIA VANCELL  
FRANCO VASSALLO

# NEGLIGENCE AND CIVIL LIABILITY IN THE MEDICAL PROFESSION - PART II

...THE 'BOLAM TEST' [IS] THE BEST KNOWN AND OFTEN QUOTED DEFINITION OF STANDARD OF CARE REQUIRED FROM DOCTORS

As referred to in the first part of this article, for an aggrieved party to succeed in his claim he must prove to the satisfaction of the court the three elements of negligence, that is:

- i. the physician had a duty of care in that particular situation,
- ii. the physician failed to discharge the standard of care required by that duty, and
- iii. he has suffered damages in consequence of a breach of that duty.

Reference to the first element, that is, that the medical professional has a duty to provide the patient with care in accordance with an accepted standard, has already been made in the first part of this article.

## C.ii.b Breach of Duty

Once the duty of care has been demonstrated, a claimant must then prove that the doctor failed to meet this duty; in other words, that the care provided (or lack of it) has fallen below the minimum acceptable standard. An area that has been extensively debated in the courts is how this standard is to be quantified. Although this is a topic of ongoing debate, the basic test remains the 'Bolam test', the best known and often quoted definition of standard of care required from doctors. In the English case 'Bolam vs Friern Hospital Management Committee'<sup>1</sup> which was decided by Mr Justice McNair, the applicant contended that the doctor was negligent in the manner the therapy was administered and it was alleged that as a consequence he had a lot of complications. The patient brought an action against the doctor in negligence. The judge declared that a doctor is not guilty of negligence "if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art." In other words a doctor is not negligent if his actions are supported by a responsible body of medical opinion; the judgement meant that the act of the doctor had to be examined in the light of the practice followed by a responsible body of medical opinion practicing in a similar field of medicine. In this case, Mr Justice McNair delivered a verdict in favour of the defendant hospital.

To determine whether there has been negligence in medical treatment, courts usually follow the same line of enquiry as they pursue in any other claim based on negligence. Courts usually analyse whether the conduct of the defendant amount to a breach of duty of care which he owed to the injured party. As has been stated above, the 'Bolam test' is the standard of the ordinary skilled man professing to have that skill.

There are many cases both in Common Law and Civil Law jurisdictions in which actions for medical negligence have been dismissed on the basis that the doctor conformed to an accepted practice of the profession. It is extremely rare for a commonly accepted practice to be condemned as negligence.

It goes without saying that medicine is not static and is continually evolving. A doctor is expected to keep abreast with the new practices and new treatments and departing from an accepted practice does not, in itself, constitute negligence. Thus, if a doctor can justify why he departed from accepted practice, his actions will not be held to be negligent. The rationale behind this is that the medical profession should not be discouraged from trying new techniques and that there should be the least possible interference with the development of medical science.

## C.ii.c Error in Judgment

It is pertinent to note that the Maltese courts have held that an error of judgment does not in itself amount to negligence. In the *Asphar* case<sup>2</sup> the court held that the medical professional cannot be found liable for an error of judgment as long as the error was not the result of negligence or lack of prudence, diligence, and attention of a *bonus paterfamilias*.

"Il-Professjonista ma hux tenut għad-danni riżultanti minn żball professjonali, ammenokke' dan l-iżball ma jkunx grossolan, u ammenokke' l-htija ma tkunx tista' tigi attributa lilu minhabba nuqqas ta' prudenza, diligenza u attenzjoni ta' bonus paterfamilias."

When faced with such a claim, Courts still looked at whether the action taken by the medical professional was in accordance with standard accepted practices.

# ...THE MALTESE COURTS HAVE HELD THAT AN ERROR OF JUDGMENT DOES NOT IN ITSELF AMOUNT TO NEGLIGENCE



## C.III LINK OF CAUSALITY

For a person to be held liable for negligence the aggrieved party must also establish a link of cause and effect, that is, that he suffered damage and that damage was a result of the doctor's negligence. Our courts have continuously upheld this necessity and in the Ellul case<sup>3</sup> the Court of Appeal held that:

*"Illi hu elementari li 'per dare luogo a responsabilita' e necessario che esista un rapport di causa ed effetto tra il fatto illecito ed il danno".*

The burden of proof lies on the claimant, that is, the person alleging the lack of responsibility of the medical professional.

## D. DAMAGES

### D.I CRITERIA FOR THE IMPOSITION OF RESPONSIBILITY - 'CULPA' AND 'DOLUS'

*Culpa* has been defined as 'consisting in the omission of due diligence on account of which one is not aware that one's act is contrary to a provision of the law or that one's omission constitutes the breach of a duty imposed by law.'<sup>4</sup> More often than not, *culpa* arises out of lack of foresight of the harmful consequences of one's act, consequences which would be readily foreseeable by the reasonable man.

When a person acts with a high degree of negligence and/or imprudence then such a high degree of *culpa* approximates to *dolus*. *Dolus* consists in the knowledge that one's act is contrary to a provision of the law or that one's omission constitutes the breach of a duty imposed by law, and that such an act or omission will cause damage.

### D.II AWARD OF DAMAGES

An award of damages is the normal remedy sought by the patient for a breach of duty by a medical practitioner whether the claim is brought in contract or in tort. The central purpose of claims for medical malpractice is to compensate the patient, or his heirs for any loss.

#### D.ii.a Tortious Responsibility

The Civil Code establishes that the quantum of damages recoverable as a result of tortious responsibility

*'shall be assessed by the court having regard to the circumstances of the case, and particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.'*

Under tort, the damages recoverable, consist in *'the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings'*.

These are commonly referred to as the *'damnum emergens'* which are the actual expenses incurred directly as a result of the injury sustained.

The Civil Code also provides for damages recoverable as a result from *'the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused'*. These damages are commonly referred to as the *'lucrum cessans'*.

Both *damnum emergens* and *lucrum cessans* can be recoverable irrespective of whether the damage was caused through *culpa* or *dolus*.

#### D.ii.b Contractual Responsibility

In a breach of contract, there is a difference between the damages recoverable when the obligation is breached due to negligence and the damages recoverable when the breach is due to fraud. In the former case the damages are limited to such damages which 'as were or could have been foreseen at the time of the agreement'. This limitation is non-existent when the breach is due to fraud.

## CONCLUSION

This article has focused on important principles in the field of negligence and a very important conclusion of this study is that as a general rule, a doctor who acts in accordance with the general or commonly accepted practice of other professionals in similar circumstances will not be held to have been negligent. A doctor is under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class which he belongs, acting in the same and similar circumstances. ❄️

### REFERENCES

1. Bolam v Friern Hospital Management Committee (1957) 2 All ER 118; (1957) 1 WLR 582 pg 586-588.
2. Collection of civil cases. Vol XXXV Pt I pg 55. University of Malta.
3. Collection of civil cases. Vol XLI Pt I pg 80. University of Malta.
4. Professor Victor Caruana Galizia Law notes. University of Malta.

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