Commentary

Medical Negligence; The Case of the Gambia and Ghana: A Legal Commentary

Abstract

Aim: This legal opinion aims to examine the prevalence and evaluate medical negligence cases in the Gambia and Ghana.

Methods: This is done using a non-systematic approach in conducting literature searches on media reports on alleged medical negligence, decided cases in Ghana and the Gambia, common law perspectives, and statutory provisions for the award of damages in both countries using search engines.

Result: We found that medical negligence is on the rise in both countries. In the case of Ghana, patients are suing medical facilities daily unlike in the Gambia. Recently, the rapid rising in suits against medical facilities has become a subject of comment by the health minister of Ghana. Also, measures are being in put in Ghana to address the rising cases of medical negligence. In the Gambia, no measures are being put in place to address the rising cases of medical negligence.

Conclusion: The rising cases of medical negligence in the Gambia and Ghana have become a public health threat and policymakers need to take measures to address this to improve the healthcare sector.

Keywords: Medical negligence, Ghana, The Gambia, common law, cases

Introduction

As students of the law, we are saddened by the high rise of reported media cases of alleged medical negligence in the Ghanaian and Gambian healthcare systems. Some of the cases ended up in the court with interesting decisions. This legal commentary aims to examine the prevalence and evaluation of medical negligence cases in the Gambia and Ghana using a non-systematic approach in conducting literature searches on media reports on alleged medical negligence, decided cases in Ghana and the Gambia, common law perspectives and statutory provisions for award of damages in both countries using search engines.

In the Gambia, the first case was reported by ***What's on the Gambia*** [1]. In this case, a nurse was jailed for medical negligence.

The story held that a pregnant woman, Isatou Bah visited Brikama Health Centre, in November 2013 to seek help. She was heavily pregnant and in pain, but the nurse decided to send her away.

Isatou pleaded and pleaded for help until she was allowed to stay in the labour ward. But that was not the end. The nurse asked for D1,800 from her husband, who later gave her D400 and promised to pay the rest. Despite paying D400, Isatou was left unattended. She delivered on her own, and sadly the baby fell on the floor and later died.

The second reported case of alleged medical negligence was reported by the same online portal [2] on 11th September 2021. In this case, Fatoumatta Bah was 7 months pregnant when she died at the Edward Francis Small Teaching Hospital.

The third reported[3] case of alleged medical negligence was attributed to a story published by the Voice Newspaper on October 13, 2022. This refers to some children who died taking some cough syrups in the Country.

The fourth case[4] of reported medical negligence was also attributed to one Dr. Mbowe, accused of endorsing and taking part in Jammeh's bogus treatment causing loss of life by the Standard Newspaper(2022).

The fifth case, is alleged medical negligence [5] was directed to The Gambia's main hospital, Edward Francis Small Teaching Hospital (EFSTH) in Banjul.

Finally, a recent alleged case was reported on ***What's on Gambia, [6]*** where a heavily pregnant woman and her unborn baby died at the Medicare Clinic in Brusubi.

In the case of Ghana***[7,8, 55]***, there have been several reported cases of medical negligence in the media as well as case law. Despite the numerous cases of reported medical negligence in the Gambia and Ghana, as students of the law, it is refreshing that a report by a patient-centered non-governmental group leading a campaign to bring justice to victims of medical negligence in Ghana has recorded 60% success in medical negligence suits brought against health facilities and medical staff***[8]***.

The group, Advocacy for Medical Malpractice Victims, has been championing justice for medical malpractice victims through the payment of compensation, and promotion of high competence among healthcare givers, among others. It receives and investigates between 25 and 30 cases of alleged medical negligence nationwide every week.

The 60% success in medical negligence suits brought against health facilities and medical staff means that the adage "Doctors knowing everything is a thing of the past"***[8]***.

Medical Negligence

A simple definition of the subject was espoused in the Ghanaian case of ***The State v Tsiba [9] at p.111***, per Akufo Addo J.S.C (as he then was) as: "the omission to take care where there is a duty to take care".

In ***Frimpong V Nyarko [10],*** where the Supreme Court of Ghana was confronted with the issue as to whether applying the law would have severe consequences on the party, Wiredu JSC (as he then was) said on page 742 that:

" The justice to be dispensed is justice within the law and not one of sympathy. Judicial sympathy, however plausible can never be elevated to become a principle of law. The appellants are out of court, and their case would deservedly be put out of court in accordance with law. Again taking a cue, in my respectful opinion, no matter how strong the sympathies I may feel for the Plaintiffs that cannot override the principles of law that I have applied".

It is important to note that not every allegation by a patient amounts to medical negligence. For this paper, we will examine three important elements to constitute medical negligence:

i. Whether there was a duty of care?
ii. Whether the duty of care was breached?
iii. Whether the negligent act led to resultant damage-the death of the baby?

The Duty of Care

Medical negligence case is grounded on civil litigation but there are occasions where criminal aspect could arise. However, most cases are cemented on civil litigation. The Evidence Act [11], of Ghana, 1975 (NRCD 323) Section 14 asserts that:

"Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non existence of which is essential to the claim or defence he is asserting."

Since whoever alleges must prove, it is the duty of the plaintiff or the patient to prove that the doctors or staff of the hospital were negligent. Hence, the plaintiff has more of the burden and responsibility to prove the facts they assert against the Defendant. The burden of producing evidence as well as the burden of persuasion is on the Plaintiffs and the standard of proof required to discharge that burden of persuasion is one on the "preponderance of the probabilities" by virtue of section 12(1) of the Evidence Act [11], "Preponderance of Probabilities" according to section 12 (2) of the Act means.

"…that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non existence"

Under section 11(4) of the Act, the burden of producing evidence is discharged when a party produces "…. sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence".

In the case of *Ababio V. Akwasi Iii* [12], the Supreme Court reiterated the point of a party proving an issue asserted in his pleadings. On page 777, Aikins, JSC delivering the lead opinion of the court held thus:

"The general principle of law is that it is the duty of a Plaintiff to prove his case i.e. he must prove what he alleges. In other words, it is the party who raises in his pleadings an issue essential to the success of his case who assumes the burden of proving it. The burden only shifts to the defence to lead sufficient evidence to tip the scales in his favour when on a particular issue the Plaintiff leads some evidence to prove his claim. If the Defendant succeeds in doing this, he wins, if not he loses on that particular issue".

This position of the Supreme Court supra, affirms the position of Kpegah J.A. (as he then was) in the case of *Zabrama Vrs. Segbedzi* [13] at 224 where he said.

"……. a person who makes an averment or assertion which is denied by his opponent, has a burden to establish that his averment or assertion is true. And he does not discharge this burden, unless he leads admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred. The nature of each averment or assertion determines the degree and nature of the burden"

Finally, in *Ackah V. Pergah Transport* [14], the Supreme Court per Adinyira JSC. Stated that:

"It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence."

In examining and evaluating the evidence adduced by the Plaintiffs in support of their case and the Defendant's defence within the context of their respective burdens as I have elaborated *supra, we* believe that the ultimate issues are (1) whether the Medical staff- owed a duty of care to the plaintiff, (2) if there is, did they breached that duty of care, and (3) whether negligence has been established on the evidence.

The duty of care, in both the Gambia and Ghanaian jurisprudence, is grounded on the Common law, the law of negligence- that is whether a Defendant owes a duty of care to

a Plaintiff begins with the famous good neighbour principle, articulated by Lord Atkin in *Donoghue v. Stevenson, [15]* wherein it was stated that:

…The rule that you are to love your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In ***Edward Nasser & Co Ltd V. Mcvroom And Another [16],*** Acquah JSC reviewed the evolution of the law of negligence since Donoghue v. Stevenson and established that duty of care depends on the circumstances of each case. The Supreme Court stated that in proving negligence in tort, the Plaintiff must establish a duty of care owed by the Defendant towards the Plaintiff, which duty must arise from the nature of the relationship between them. The court further stated that although proximity must exist before a duty of care could arise, the duty must depend on all the circumstances of the case and it must be considered whether it was just and reasonable to impose a duty.

This legal duty of care is different from the biblical perspective: Jesus's command to "love your neighbor as yourself" (Mark 12:31), which leads to the core question: who is my neighbor? In Luke 10:25-37, Jesus is "put to the test" by a lawyer seeking to inherit eternal life. Jesus asks him how he reads the Law, which was, after all, his profession. The answer is to love God with one's whole heart, soul, strength, and mind; this means a strong and sincere love that is not only evident in outward actions but also through an internal devotion focused on nothing but the Lord. There was, however, one last part; that is, to love "your neighbor as yourself." Desiring to justify himself, the lawyer asks the same question: then, who is my neighbor?

The parable describes a man, probably presumed to be a Jew by the Jewish audience, on a dangerous 18-mile stretch of road leaving Jerusalem. He falls among robbers, is stripped, beaten, and left on the road. Passing by soon after, a priest, one of the descendants of Aaron and given high status in Jewish culture, encounters the man. Since the traveling man was stripped and half beaten, his identity is not clear. So touching him, or even coming within six feet of a dead body, would risk a defilement requiring a lengthy purification process, and so the priest passes by on the other side of the road.

Next, a Levite, a "son of Levi" who is also of significant religious status in the Jewish community, encounters the beaten man and does the same. In proximity, religion, and ethnicity, both of these men would be considered a neighbor to the man who was robbed.

The focus of the parable is on the Samaritan, a man of mixed descent and considered an enemy of the Jews. Though not Gentile and still under the Law, Samaritans customarily

did not have dealings with Jews (John 4:9). Being a neighbor is not restricted to relation or proximity. It is merely the demonstration of the love and mercy of God to all in need, whomever and wherever they may be, regardless of race, denomination, or belief. Jesus teaches us that love is an action, not just a feeling or a theory and that it sometimes requires the shouldering of others' burdens, an often uncomfortable process.

From the pleadings, the tort of negligence constitutes these three elements-

i. the existence of a duty of care;
ii. breach of that duty of care, and
iii. injury to the claimant, or in this case the Plaintiffs, caused by the breach

These elements were also dealt with extensively by Edusei J in the Ghanaian case of Alhassan Kotokoli v Morro Hausa where the learned judge explained the elements in extensor.

Therefore, the duty of care for lawyers can be found in the pleadings and the evidence presented. Once the pleadings can establish, this would be *prima facie evidence* that the defendant owed the plaintiff a duty of care.

For patients to prove that a doctor owed a legal duty of care to a patient, the existence of a doctor-patient relationship at the time of malpractice must be evident. This relationship is usually voluntary and entered into by agreement. Documents and testimonies that can be used as evidence to support a doctor-patient relationship should show:

- The patient elected to be treated by this particular doctor
- The patient agreed to and was provided examinations for the purpose of treatment for a certain condition or health issue
- Treatment by the doctor was ongoing at the time of the malpractice

Maintaining copies of medical records that provide proof of a completed course of treatment is essential as evidence for the injured patient. A doctor may be able to claim that the doctor-patient relationship ended before the date of malpractice if there is no evidence otherwise.

It's important to understand that outside a hospital or doctor's surgery, a doctor would not typically owe a duty of care if he did not attempt to help. This means doctors are not legally obligated to act as "good Samaritans." However, once a doctor announces his or herself and starts to act as a doctor, a duty of care has been taken toward that patient. Under this circumstance, the doctor can be potentially liable for negligence.

Breach of the duty

Once it is established that the defendant owns the plaintiff a duty of care, the question is whether that duty was breached and if the breach led to the patient's death or suffering from any casualties. This can be done through effective cross-examination as well. This is very important in establishing what constitutes medical negligence. The medical facility can owe a patient a duty of care without breaching the duty of care. This is the

case for most medical facilities justifying this with the Bolam principle. Doctors think they know the best for patients and not the opposite for patients to tell them what to do in healthcare.

This was a shield under the Bolam principle. This principle, which saves the medical profession held that when a doctor engages in a negligent act and it goes to court, once a colleague doctor testifies that the doctor's practice or act is accepted by a reasonable body of medical opinion in that act the doctor could not be held as negligent.

The '*Bolam*' principle has long been the traditional test governing how much information is necessary to avoid liability in negligence. Doctors would rely on their professional judgment to determine the amount of information to be disclosed. For instance, the respondent's witness statement- can provide an expert to provide a witness statement to allude to the fact that the standard of care the hospital adopted is the standard practice by medical men in the medical profession; hence, no negligence was admitted.

Let us take a cursory look at the case of ***Bolam v Friern Hospital Management Committee [17]. In*** this case, the defendant was the body that employed a doctor who had not given a mentally ill patient (the claimant) muscle-relaxant drugs nor restrained them before giving them electro-convulsive therapy. The claimant suffered injuries during the procedure. The claimant sued the defendant, claiming the doctor was negligent for not restraining them or giving them the drug.

The issue which the court was confronted with, was whether establishing the tort of negligence involves establishing that the defendant breached their duty of care to the claimant. To establish the breach of duty, the claimant must establish that the defendant failed to act as a reasonable person would in their position. This standard is higher in the case of professionals: they must act as a reasonable professional would. The issue in this case was how to assess the standard of care imposed on a professional defendant where a substantial portion of professionals opposed a particular practice, while others did not. The High Court held that the doctor had not breached his duty to the patient, and so the defendant was not liable.

McNair J set out the test for determining the standard of care owed by medical professionals to their patients (sometimes referred to as the 'Bolam test'). The professional will not be in breach of their duty of care if they acted in a manner that was in accordance with practices accepted as proper by a responsible body of other medical professionals with expertise in that particular area. If this is established, it does not matter that others with expertise would disagree with the practice.

This test is what doctors use as expert evidence to rely on. Before that, ***Hunter v Hanley*** **[21]** also permitted the medical profession to decide what information a patient could receive about options for treatment and the risks and benefits of those options. Information delivery to patients was filtered by the practice of the profession.

During this period, the courts in the UK were content to permit the medical profession through the evidence of expert witnesses on professional practice to dictate what information patients were entitled to receive.
The focus was not on the rights of the patient and the disclosure of risks inherent in a proposed treatment was seen as a product of the doctor's duty of care rather than as a product of the patient's right to self-determination.
This was the principle adopted in a Plethora of Ghanaian cases including ***Gyan v. Ashanti Goldfields Corporation[18].*** In this case, the Court of Appeal, however, held that the nurse was negligent in playing the role of the doctor. The hospital was also held vicariously liable.
In this case, some interesting legal principles were found: Bolam's test; practicing out of scope; res ipsa loquitur. This means that any health worker must practice within their scope of practice and therefore if one assumes a position that his qualification cannot allow him, prima facie, he can be deemed to be negligent.
Also, in ***Darko v Korle-bu Teaching Hospital, [19],*** a young male reported for treatment at the defendant hospital with a history of pain in his right knee, which on assessment was diagnosed as torn patella ligament. He was requested to sign a consent form to allow a surgical repair of that ligament. Instead of the right knee being operated on, the surgeons operated on the left knee of a patient. The hospital refused to further attend to the patient as a protest over a medical negligence suit the patient had initiated against them.
The court adopted the Bolam principle and found that the hospital had not been negligent when the left knee was rather operated on. It was observed by the court that the patient had signed a broad consent form that empowered the surgical team to take any necessary measures for the operation. Accordingly, if there was a medically justifiable indication for the operation of the left knee, the hospital could not be found negligent in treating it. The court also pointed out the failure of the plaintiff's lawyer to advance arguments on the scope of the consent given vis-à-vis the medical complaint reported by the boy. However, the hospital was found in breach of its duty to provide the boy care when it refused to honor his review and physiotherapy appointments during the pendency of the suit as a protest to his legal action.
The court did not find the doctors or the hospital liable for negligence in operating on the left knee instead of the right but did find that the hospital was liable for refusing the claimant further treatment after the legal action had been initiated. The legal principle, in this case, is that a medical personnel's refusal to treat the patient may be a ground for negligence though Bolam was acknowledged.
In a recent case titled *Dr. Sandys Abraham Arthur V. The Ghana Medical & Dental Council Civil [20]* – Coram: Kanyoke, Ofoe & Irene Charity Danquah Delivered 31 July 2012. Ofoe JA agreed that:

"I will agree with the appellant when he contended that in diagnoses and treatments, there are differences of opinion between medical officers. A medical officer is not negligent merely because his conclusion differed from the other professional or because he displayed less skill or knowledge than the other. As stated in the case of *Hunter v. Hanley [21] and Whitehouse v Jordan[22]* cited by the appellant, the true test in establishing negligence in diagnosis or treatment on the part of a doctor is whether he had been proven to be guilty of such failure as no doctor of ordinary skill would be guilty of acting with ordinary care. A fair and reasonable standard of care and competence are required…. The facts of each case should be the sole determinant whether a medical man should be found negligent for the wrong diagnosis or not".

It is therefore established in law the Bolam test shield medical men from negligence. For instance, suppose in the defense pleadings in a case of alleged negligence in maternal mortality, and the hospital accused pleaded to take care of the pregnant woman, the hospital represented to her and the husband that they possessed the requisite skill to perform that duty. It will not be in the contention that the Hospital owed the plaintiffs a duty of care and they owed them a duty to exercise the requisite skill in performing that duty; anything apart from this is a breach of duty of care.

Hence, determining the duty of care breached by the hospital can be explored also effectively at the cross-examination stage. The law of medical negligence has been transformed and is not only based on the Bolam test. It has also been widened to include patients' rights.

In Re: Agyire-Tetteh [56], the Appeal Court applied the Bolam principle and dismissed the plaintiff's case. Hence, the medical standard of care depends on the doctor's skill, expertise, and care which can ultimately be summed up as "do no harm." In court, these standards are determined by assessing the degree of skill, care, and diligence *expected* by a reasonably competent physician under the same or similar circumstances.

Circumstances include:

- The area of medicine in which the doctor practices
- The customary or accepted practices of other doctors in the area
- The level of equipment and facilities available at the time and in the local area

As individuals responsible for people's lives and handling life or death choices, doctors are held to especially high standards. Each doctor pledges to live up to these standards as they enter their *specific area* of the profession and colleague group. This means a doctor is not expected to adequately diagnose and treat serious health conditions irrelevant to their specialized field of medicine.

The degree of skill and expertise under the circumstances are proven in court with expert testimonies from other doctors who share similar skills, training, certification, and experience as the allegedly negligent doctor. If a doctor does not perform as

expected of someone in his or her field, the doctor may be held liable for any harm that results from not adhering to the standards.

Roger v Whitaker (1992): A patient's right

There came ***Roger v Whitaker[23],*** an Australian case, that was celebrated for departing from doctors know it all in *Bolam and Sidaway.* Roger's case reasoned that instead of cementing medical opinion, even on patients' decision-making, the court is willing to re-examine the appropriateness and the propriety of the standard adopted by doctors.

In the Ghanaian case of ***Somi v Tema General Hospital, [24]*** a 36-year pregnant woman was rushed to the hospital with an antepartum hemorrhage. The doctor on night duty had finished earlier than expected at 4.00 a.m. instead of 8.00 a.m. and the morning doctor on day duty did not report until 10.00 a.m. The nurses tried to keep the patient alive, but they could not hear the heartbeat of the unborn child. Neither the mother nor the baby survived the operation.

CHRAJ found the defendant hospital to have unjustly caused a patient's death in violation of Article 218(a) of the Constitution. It was held that the failure of a public hospital to ensure that an emergency cesarean section operation was carried out on a patient, thus leading to her death, constituted a violation of her human right to life.

As students of the law, the legal principle we found here is that where a medical person abuse official time or is absent from work or lateness to duty without justification is a ground for negligence, and would be held liable.

Also in ***Elizabeth Vaah v Lister Hospital and Fertility Centre, [25],*** A client who was under the care of the defendant hospital sued the hospital, relying on the right to information guaranteed under Article 21(1)(f) of the 1992 Constitution of Ghana [26] (the Constitution), when she sought to recover her medical record to clarify the cause of death of her stillborn baby.

The applicant's case is that her fundamental human rights have been violated by the respondent when the latter refused to release her medical records to her. The respondent argued that it was justified in refusing the applicant's request for medical records because by speaking to the press about the circumstances in which she gave birth at the respondent's hospital, she had evinced an intention to abuse the records. It was held that the plaintiff was entitled to a copy of her medical record from Lister Hospital. The legal principle we also found, in this case, is that a medical facility cannot violate or prevent a patient from accessing their records.

Finally, in ***Jehu Appiah v Nyaho Healthcare Limited [27],*** the plaintiff accused the facility of allegedly damaging her fallopian tube, which nearly led to her death. According to the case, the plaintiff, upon conception utilized antenatal care services at the respondent hospital. But at a point, she claimed she had to undergo life-saving surgery at a different health facility due to the "actions and inactions" of the Nyaho hospital. After the life-saving surgery, she made a formal complaint to Nyaho Healthcare Limited, after which she was promised investigations into the matter and

the results communicated to her. The plaintiff noted that all efforts to compel the respondent hospital to release her medical documents (including scans, tests, diagnosis, and treatment) proved futile. The court held that the complete medical records be released to the patient.

This means that Judges have the power to think for medical people. In the Ghanaian case of the ***State V K. Nkyi [28],*** a student nurse mistakenly injected a baby with arsenic instead of mepacrine. The child's condition immediately deteriorated and died within a few hours. A post-mortem examination revealed that the death of the sick child was caused by arsenic poisoning.

The court found that the student nurse was practicing without possessing the requisite registration as a nurse or under the supervision of a qualified practitioner when he administered a drug to the sick child. The court held the student nurse liable for the charge of manslaughter pursuant to Section 51 of the Criminal and Offences Act, 1960 (Act 29). The provision says a person cannot be guilty of manslaughter unless the act of the person constitutes negligence that amounts to a reckless disregard for human life. The legal principle, in this case, is that, since the law proscribed the practice of medicine without a license, then any health worker practicing without a license will constitute a crime.

Bolitho v City and Hackney HA[29], helped to clarify what was meant by "a responsible body," defining it as one whose opinion had a "logical basis in the medical profession."

This means that the Bolam Test and the Bolitho Test are used in combination in medical negligence. Bolitho test is saying that the doctor's decision, though appears sound in the medical community has to be logical. Combining the two cases means that a doctor is not negligent if he or she acts in accordance with a responsible body of medical opinion, *provided that the Court finds such an opinion to be logical*.

For instance, the Evidence Act[30] of the Gambia, Section 75 which is in pari materia with section 112 of the Evidence Act of Ghana,1975 (NRCD 323) permits expert opinion to be given in evidence before the court in matters relating to medical, science, pathologist's report, and many others. There are instances where the court is confronted with a conflict in what is regarded as expert opinions.

For instance, in the Gambian case *of* ***Babourcarr Touray v MRC Evidence Act[31],*** where medical experts presented diverse explanations as to the cause of *gangrene*(death of body tissue due to a lack of blood flow or a serious bacterial infection) which led to the loss of the plaintiff's two hands. When this happens, the court is not bound to accept the opinion of an expert or anybody else. It is the duty of the court to describe what is logical, not the medical profession. The court has to examine all the issues that are put before it.

In other Ghanaian cases such as *Conney V Bemtum Willaims*, [32], the court held that the report of an expert being a handwriting expert was merely to assist the court in concluding and the court can choose to ignore same.
Additionally, in *Tetteh V Hayford, [33]*, the court is not bound by the evidence of the expert report but if the court rejects the evidence of the expert, the court would have to give reasons for the rejection.
In *Feneku V John Teye,[34]* the court also stated that the testimony of an expert is only to guide the court and the judge is not bound by it.
Finally, in *Manu @Kabonya V The Rep,* **[35]**, the court rejected the medical evidence which was to be used to prove the cause of death because the cause of death was not beyond common experience. Therefore, if the issue of contention is so obvious and the ordinary man can understand, there is no need for an expert opinion.
Thus, Bolitho questioned the authenticity of expert knowledge given the Bolam test to the extent that opinion among expert groups may not be based on sound current knowledge. But where the opinion is sound, the case listens.
Another case worth discussing is the Ghanaian case of ***Asantekramo, alias Kumah v. Attorney–General [36],*** where a nineteen-year-old woman who was diagnosed with ruptured ectopic pregnancy underwent an urgent surgical operation at the Komfo Anokye Government Hospital. While the surgery was successful, her right arm became swollen and gangrenous after being transfused an amount of blood by the nursing staff through a vein in that arm. To save her life, her arm was amputated. Two years later, the woman sued the State, seeking damages for negligence on the part of the hospital staff.
The defense raised by the testifying surgeon that the occurrence was a 'mystery' was rejected by the court. The expert evidence showed that the bacteria that caused the gangrene was either transmitted through the blood transfusion needle or a dextrose infusion administered to the woman. The Court held the State liable for the negligence of the hospital and awarded damages to the plaintiff.
In ***Pearce v. United Bristol Healthcare NHS Trust Evidence Act[37] ,*** *the* Court of Appeal established that the standard adopted in *Bolitho* was equally applicable to cases dealing with the duty to inform.
In Chester v Afshar[38], Lord Hope said "*The function of the law is to protect the patient's right to choose. If it is to fulfill that function, it must ensure that the duty to inform is respected by the doctor*." Based on this statement, some commentators held that the courts have been lenient on doctors and have not been robust enough to hit the nail on the head to protect the rights of patients. Probably, those affected by alleged medical negligence in the Gambia are not testing the law.
In this Malaysia case, Foo ***Fio Na v Soo Fook Mun and Anor [39],*** the Court viewed the *Bolam*'s as being "over protective and deferential" to the medical profession. The judges reasoned that the law is indeed in their bosom, and they can disagree with

medical opinion. The court determines the reasoning behind doctors' conduct and not the profession. The Federal Court opined that "the *Rogers v Whitaker* test would be a more appropriate and viable test of this millennium.

Even before the development in Montgomery in the modern era, in 1985 the House of Lords in ***Sidaway v Board of Governors of the Bethlem Royal Hospital*** [40] adopted the test to be employed in case a doctor fails to advise a patient of the risks involved in a particular treatment. *Sidaway* became the first test for information disclosure to patients that recognized their right to self-determination in the context of decisions about their medical treatment. The case was recognized in Montgomery.

In ***Montgomery v Lanarkshire Health Board, [41]*** has raised the standard of a reasonable test as the focus is now on 'reasonable patient' rather than 'reasonable doctor'. The law defines material risk as either a risk to which a reasonable person in the patient's position would be likely to attach significance or a risk that a doctor knows or should reasonably know is perceived to be of significance by this particular patient.

In '***Canterbury v Spencer' [42]*** in the District of Columbia Court of Appeal, the court rejected the traditional approach of '*what reasonable practitioner would do*' to a patient-centered standard: '*what would a reasonable person want to know*?'

'*Montgomery*', '*Pearce*' and '*Roger v Whitaker*' concerning a doctor's duty to take reasonable care to ensure patients are aware of any material risks involved in recommended treatment and the alternatives were applied in *Dr. E.L.A. Chinbuah and Attorney General case, [43]* when the deceased was due to deliver, she opted for a Cesarean Section, but her request was turned down. Instead, the doctors decided to take her through normal delivery. This caused her to bleed profusely and died in the process. The Ghanaian court adopted a more patient-centered approach here.

Damage

The third issue for determination is whether the negligent act of the hospital prejudiced the patient. For instance, if a doctor refused to treat patients and caused the death of the patient; is that negligent? Yes, this was the exposition in the *Somi case.* This third element is vital in medical negligence and must be proved by the plaintiff. So many issues in medical practice such as patient rights in decision making should be sought by the doctor. Failure to listen to the patient could be suicidal to the doctor. In addition to proving that the doctor has failed to meet the relevant standard of care, the claimant also has to establish that this failure either directly caused the injuries alleged or materially contributed to them. This element of the claim is very often difficult to prove; it may be easy to prove that the doctor did something wrong but this failure does not necessarily mean that it caused the patient's injuries.

For example, a patient may be able to show that a psychiatrist's diagnosis was wrong but then fails to prove that this has contributed to his or her existing mental distress. In some cases, there has been a clear breach of duty, but no damage has resulted at all. Again, in such cases, no compensation would be payable.

It may sometimes be the case that the treating medical professional or their employer will admit that there has been negligence. However, this does not automatically mean that that person or employer is liable to pay damages. To establish liability it must be shown that the negligence/breach of duty caused the damage.

Damage includes physical injury and psychiatric injury, as well as financial loss (such as loss of earnings and future healthcare provision). Psychiatric injury is the legal term used by the court. It must be a recognized psychiatric injury, such as post-traumatic stress disorder (nervous shock), anxiety disorder, or adjustment disorder. Grief or emotional upset are not injuries for which damages can be awarded.

The court will endeavor to put the claimant into the position he or she would have been in if the negligent act had not occurred. Where physical injury or psychiatric injury has occurred, the court will determine the monetary value to be given to the injuries in accordance with previously decided cases.

However, not all losses are recoverable. A court will only award damages for losses that are not too "remote", in other words, which are reasonably foreseeable. For example, if someone is wrongly diagnosed as suffering from schizophrenia and, as a result, is refused a visa for a particular country, he may not be allowed to claim damages for the loss of any business he was hoping to do in that country.

Compensation for any psychiatric or physical injury will include an award for the pain and suffering and "loss of amenity" (or the benefit and enjoyment of life which the claimant has lost). These are known as "general damages". The court will also award a sum for any past and future financial losses that have been caused by the negligence. This will include lost earnings and the costs of care, aids, and equipment ("special damages").

The following are examples of types of legal claims regarding medical negligence and breach of duty:

- Prescribing a patient incorrect medication
- Failing to review a patient's current medications
- Prescribing incorrect dose of medication
- Administering incorrect drugs
- Failing to analyze or diagnose a health condition accurately
- Failing to diagnose a health condition entirely
- Ignoring or misreading laboratory results
- Failure to order adequate tests
- Prematurely discharging a patient from care
- Failing to warn a patient of known risks of surgery, procedure, or treatment
- Making a severe mistake during surgery, such as performing surgery on the wrong part of the patient's body or carelessly leaving foreign objects/surgical tools inside the body

In the Gambia, the injured patients must file medical malpractice claims within a certain period of 3years based on the statute of limitations. The statute of limitations places a limit on the time you have to file a lawsuit after experiencing an injury. If you do not file a lawsuit before the statute of limitations expires, you lose the right to do so.

Are Doctors in Danger?

Some commentators believe the new law appears to be harsh on doctors as the courts have decided to tell doctors how to practice medicine instead of doctors making changes in their profession. Another school of thought is also of the belief that the new law will help doctors to sit up instead of believing that they are superior and know it all in the medical profession. However, the 'unlettered' man in the street will think that the new law is the way to go judging from recent allegations of incessant medical negligence.

The law even went further to state that when a doctor knows there is another doctor who is more experienced to take a certain case and failed to do so could be held to be negligent. This was manifested in an Australian case, '***Chappel v Hart***' **[44].** The attending doctor failed to disclose the availability of a more experienced surgeon for a particular procedure, the factual causation must be followed by a second aspect of causation, the scope of liability that the patient would only claim if the risk materializes, as in '***Wallace v Kam***' **[45].**

Other commentators assert that Wallace could pose a great challenge as some patients could demand highly expensive treatment, disregarding the cost-effectiveness issue or opting for alternative medicine without strong scientific evidence. However, in modern health care, responsible bodies of medical opinion mean judicious use of the best current evidence in making decisions about the care of patients, and also a strong emphasis on patient-centered care. This would bridge the gap between the two different standards (*professional vs reasonable person*) and also the legal and medical perspectives regarding disclosure and consent.

Conclusion

In both the Gambia and Ghana jurisdictions, there are many media as well as judicial reported cases of medical negligence. This is worrying and a threat to public health. Whilst in Ghana, measures are being put in place to address this canker[46, 47], nothing is being done in the Gambia to address it. Also, whilst in Ghana, patients are suing doctors; the case is different in the Gambia.

In summation, there are two typical situations where a medical person might be held liable for negligence: the first is negligence in the performance of a medical procedure (*The old Mantra*-Bolam Test); and the second is failure to disclose the risk of a medical procedure to the patient to get consent (The *new mantra*- Montgomery test). Finally, the negligent act alleged should cause damage; it is insufficient to say a doctor is negligent based on the duty of care and breach of that duty.

If the negligent act is caused to the plaintiff and is established, then, the principle is that at common law, an employer is liable for the torts of an employee committed in the ordinary course of the employment.

In this case, the staff could be negligent and thus breached the duty of care owed to the Plaintiff. But as with lawyers, knowing that staff does not have the financial means to pay for the damages from the legal proceedings, the hospital will be vicariously liable for the negligent acts of its staff. See *Aboaku V. Tetteh [48]* . See also the statement of the venerable Taylor J (as he then was) in the case of Re: *Asante Kramo* wherein he also quoted Lord Denning in the case of Gold v. Essex County Council [49] that:

"…A local authority carrying on a public hospital owes to a patient the duty to nurse and treat him properly, and is liable for the negligence of its servants even though the negligence arises while a servant is engaged on work which involves the exercise of professional skill on his part. Where, therefore, a patient being treated in such a hospital was injured by the negligence of a competent radiographer, who was a whole-time employee of the hospital, the local authority was liable for his negligence…

The next stage is damages for the plaintiff if the negligent act is established. In the determination of damages, many factors ought to be taken into consideration. The factors include pain and suffering; that is physical and psychological pain suffered; loss of amenities of life etc. The list is not exhaustive but depends on the circumstance of each case. See *Opoku-Darkwa V. Akyea [50]*. The plaintiffs' lawyers should also take into consideration the award of General damages for pain, mental shock, and distress. Under section 18(1) (b) of the Civil Liability Act [51], provision was made for mental distress.

In the case of *Agbedor & Another V. Yeboah [52]*, a case where a young woman of about twenty years old was killed in a motor traffic accident. The Plaintiffs as administrators of the estate of the deceased, instituted action against the Defendant for negligence and claimed damages for the loss of expectation of life and the loss of prospective dependency. The trial court found for the Plaintiffs the expectation of life but dismissed Plaintiff's claim for prospective dependency.

On appeal to the Court of Appeal, the court held as follows:- Under section 18(10) of the Civil Liability Act, *supra*, damages could be awarded for prospective dependency in a fatal accident suit. The principle to be applied in deciding whether or not a party to such a suit was entitled to damages for prospective dependency, was to consider whether the party had lost reasonable probability of pecuniary advantage. And in dealing with such questions of dependency, sight ought not to be lost of the prevailing social conditions such as the family structure, relationships that normally existed between sons and fathers, and between daughters and mothers. On the facts of the instant case, there was sufficient evidence upon which to base an assessment of a reasonable expectation of pecuniary advantage. The Plaintiffs were therefore entitled to succeed in their claim for loss of prospective dependency. In the case of the Gambia,

the Law of England (Application) Act [53] and the Workmen Compensation Act are administered to award damages[54].

We recommend that the healthcare industry should start looking at how to avert negligence in their practices. We propose Medico-legal training for healthcare staff in the area of duty of care. It will drastically reduce, if not eliminate, the persistent recurring medical negligence in our healthcare system.

CONSENT AND ETHICAL APPROVAL

It is not applicable.

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