LIABILITY OF A MEDICAL SERVICE PROVIDER IN A MALPRACTICE SUIT IN MOHAMMEDAN LAW VIS-À-VIS ENGLISH LAW: A SOCIO LEGAL REVIEW

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ABSTRACT

While ensuing a malpractice suit in a case of supposed medical negligence the most important aspect is fixing liability upon the medical service provider , which should not only rest upon the facts as supposedly evident but more importantly this should rest upon fixed and solid Scientific foundation. The most commonly relied upon principle is that which has been applied in the Bolam Case[1]. However on perusing through the Mohammedan Law, it can be also be considered to have well founded scientific edifice on which the pillory of liability issues can be fixated. The current paper tends to study these very underlying facts which can be envisaged while fixing liability as ensconced in the Mohammedan Law.

Keywords: Liability, Stratification, Islamic Law.

[1] Bolam v.Friern Hospital Management Committee [1957] 1 WLR 582.

INTRODUCTION

Under the Mohammedan Law, the approach to liability issues in a malpractice suit takes a scientific course. Firstly the law stratifies the doctors and thereafter interjects liability on the various stratums accordingly. On the very first strata are pedestalled those qualified medical practitioners who are doing their duty according to the settled professional methods. Then comes, the level of practitioners, who are qualified in all standard terms but their action got besotted with either mistake or error ,at most a qualified misadventure. The third level is that of an inveterate negligent person and the last comprises of a criminally negligent practitioner. While deciding and segregating the above four level of persons, the law takes into considerations a wide variety of ideas based solidly upon academic practices, which are also morally and ethically sound. The principle of 'no fault' is based upon the 'first no harm' doctrine which is inherent in a strategically sound medical practice. So to purport a common law practice, all the above elements have to be brought under a concordant cohort.

COMPARISON WITH ENGLISH COMMON LAW

If we compare this practice with English Common Law we may intercede the similarities and the Scientific Stratification in the Muslim Law, giving law a chance to percolate in a more subtle manner. If we take the Bolam[2] principle which is a hallmark English doctrine and compare it with the stratification doctrine of the Muslim Law we can safely presume that the first level approach of the Mohammedan law coincides with the basic Bolam[3] Theorem. Rather it can be further assumed that in the Mohammedan Law , the principle justification of a liability test rests upon the solid scientific ground of the fact that a qualified person, following all the said rules, in accordance with a settled principle of practice followed by a group of similarly qualified persons, can not be held liable, even if the act does not yield a desired result as encountered in a similarly based practice.

[2] *Supra* note 1.
[3] *Supra* note 1.

CONCURRENCE OF BOLAM THEORY[4] WITH LEVEL OF STRATIFICATION

The 'is' theory of Bolam[5] concurs with the level of stratification rather than the 'ought to be 'theory of the Bolitho's approach[6]. As per the Muslim Fuqaha[7], when in the course of a treatment, a patient is harmed or even death occurs, no liability can be attached if the same is being performed by a qualified doctor, having had training for the said procedure under consideration and that he has executed his duty in a manner dictated by standard operating procedures and provided he has not overstepped his authorized position. This appears to be a very calculated scientific approach and there is no doubt, even on the part of the law to ponder. Islamic statement of the fact that mere executing one's bound by the limits assigned and not transgressed neither guarantees safety nor success. In fact while ascribing to the limits of liability any cogent court must ascribe to this fact of Islamic law also. According to Islamic law[8], if a person is not competent and on top of it, he deviates from an accepted mode of treatment thereby causing harm to an individual, he is liable under negligence law.

ISLAMIC LAW AND THE CONCEPT OF CONSENT

Another important aspect of Islamic law[9] is the consent of an individual in carrying out a clinical examination or undertaking a procedure. If the consent has not been taken in a proper manner, after proper explanation of the procedure in detail, and even if no harm befalls the person, the medical service provider is liable for battery and assault.

[4] *Supra* note 1.
[5] *Supra* note 1.
[6] Bolitho v. City & Hackney Health Authority [1997] 4 All ER 771.
[7] Qadri, Islamic Jurisprudence in the Modern World, 2nd ed., Lahore: Muhammad Ashrof, 1973: 290-291.
[8] *Supra* note 7.
[9] *Supra* note 7.

SEQUENCE OF EVENTS AS A FOUNDATION OF LIABILITY[10]

It has been explained in Mohammedan Law that, in case of a living object an intervention in any form opens up a gate of unpredictability which is not seen in other professions. Therefore if a surgeon is treating a patient for an abscess and some untoward incidence occurs, the surgeon will not be held liable as the procedure unfolds the sequence of events which may not be completely under the control of the conductor. Comparing this with a carpenter who spoils an embroidery design on the wooden closet and he is hence held liable because such an act is completely within the limits of human competence. This in Islamic Law has been proclaimed as the 'doctrine of transgression' and liability has to be affixed after duly attesting the boundaries of transgression. So, Islamic law does not accept strict liability and the action for compensation arises in non-physical injuries. It is prudent here to interject that, the unforeseeable reactions, are given enough importance under the Islamic fuqaha[11] as physical and biological entities are structurally different, and howsoever procedural texts be theorized ,no two persons can react to a similar procedure in the same manner. The underlying thought is, when a doctor acts under due diligence, he is competent in carrying out a procedure and has acted within the limits surmounted to him. He has followed all the principles in letter and spirit and therefore if the results are not conducible he is not to be held liable. So in unforeseen circumstances since there is no liability so there is no compensation also. Art 7(e) of the EC Product Liability Directive[12] clearly concurs with the above paradigm of Islamic Law, wherein it states that ' in case of a human being whose safety is being discussed with regards to any adverse reaction, one has to go by the fact that human body is the most complex structure and is under extreme pathological duress already at the time of treatment and hence rendering an unpredictable outcome of the treatment procedure.'

DEVELOPMENT RISKS IN ISLAMIC LAW AND BRITISH LAW

[10] C.G. Weeramantry, Islamic Jurisprudence: An International Perspective, St. Martin's Press Inc., 1988: 40-49.

[11] *Supra* note 7.

[12] Art 7(e), EC Product Liability Directive.

According to the United Kingdom Consumer Protection Act, 1987[13] the defense of 'development risks' sits on the scientific theorem that no product in use at that time has that specific scientific knowhow to discover the defect occurring at the time of execution. This is in tandem with the theory of progression and the theory of unforeseeability of the Islamic Law[14]. It can be safely averred that quality control in medical practice depends upon two important factors i.e., competence of the person in question and consent of the patient to carry out the intervention. It has been explained by an author in Islamic Law[15] that if a doctor acts in accordance with a practice carried out by a group of similarly disposed practitioners in the same way and that those actions have benefitted a large number of persons ,than not withstanding an uncalled for outcome with regards to the practitioner in question, no liability can be assigned to him. This in essence is the working principle of Bolam[16] doctrine also. It is proposed that a nearby thought of the Bolam/Bolitho system[17], of the sort attempted in this article, is convenient and essential for three reasons. In the first place, "names" might be signposts for attorneys, however without legitimate outline, they are not especially lighting up (on that point, Lord Bridge's reference to the "helpful names") the nearness and decency[18], with regards to demonstrating an obligation of care, which additionally springs to mind. How oft-referred to names really apply in verifiable circumstances is essential for lawful clearness, especially where these marks have been set up now for over 10 years, enabling a sensible assemblage of statute to create regarding the matter. Surely, Bolitho[19] itself does not give much direction, and no case since has embraced that expository exercise either. Also, categorization of the Bolitho[20] factors is imperative to keep the feeling that courts may essentially incline toward the patient's expert to the specialist's , however in conditions where some unexpressed Bolitho[21] factor has apparently been in charge of that inclination. In a few cases since Bolitho[22] was passed on, that case has not been expressly alluded to, but rather the important Bolam[23]

[13] United Kingdom Consumer Protection Act, 1987.

[14] Ian Edge, The Development of Decennial Liability in Egypt, Islamic Law and Jurisprudence, (ed.), Heer, Nicholas, 1990: 173.

[15] *Supra* note 14.
[16] *Supra* note 1.
[17] *Supra* note 1 and 6.
[18] Lewis, Medical Negligence, 1998: 423-424.

[19] *Supra* note 6.
[20] *Supra* note 6.
[21] *Supra* note 6.
[22] *Supra* note 6.
[23] *Supra* note 1.

doctrine has been marked down, for reasons which recommend that the specialist's master conclusion was not adjudged to be solid. In such manner, implied Bolitho[24] factors don't improve the straightforwardness of the law. Thirdly, given the updates issued by the Court of Appeal that reasons are to be given for a court's expressing that only one side's expert sentiment ought not be taken after, where a distinction of supposition crops up. The law must be much clearer in depicting the right ambit of the Bolam/Bolitho[25] structure than is by and by the case. In any question including clinical expert judgment to which Bolam[26] appropriately applies, and in which the court all things considered lean towards the patient's master proof to that of the doctor's, there must be an unmistakable enunciation concerning why that was passable. In the system administering Bolitho v. City and Hackney H.A.[27],these various concerns were expressly tended to. Justice Browne-Wilkinson (with whom alternate individuals from the House concurred) expressed that: in instances of analysis and treatment there are situations where, regardless of a collection of expert sentiment endorsing the respondent's lead, the litigant can legitimately be held at risk for carelessness … that is on the grounds that, now and again, it can't be shown to the judge's fulfillment that the assemblage of feeling depended upon is sensible or mindful. In by far most of cases the way that recognized specialists in the field are of a specific standing it becomes evidently clear that it will exhibit the sensibility of that conclusion. Specifically, where there are inquiries of evaluation of the relative dangers and advantages of embracing a specific restorative practice, a sensible view essentially assumes that the relative dangers and advantages have been weighed by the specialists educating their conclusions. Be that as it may, if, in an uncommon case, it can be exhibited that the expert feeling is not equipped for withstanding sensible investigation, the judge is qualified to hold that the assemblage of conclusion is not sensible or dependable.

TWO ADVANCE SYSTEMS IN ENGLISH LAW VIS-À-VIS ISLAMIC LAW

[24] *Supra* note 6.
[25] *Supra* note 1 and 6.
[26] *Supra* note 1.
[27] *Supra* note 6.

Because of this profession, a two-advance system came to be perceived in English law as being important to decide the topic of claimed restorative rupture: in the first place, regardless of whether the specialist acted as per a training acknowledged as appropriate for a customarily skilled specialist by a mindful collection of medicinal conclusion; and furthermore, if "yes", whether the training survived Bolitho[28] legal investigation as being "dependable" or "legitimate". That two-advance examination was unequivocally affirmed just like the suitable one, for instance, in French v. Thames Valley[29] Strategic H.A. ; and has been portrayed in other English therapeutic cases, as well, as "uncontroversial" and as the "right approach". It has likewise been said to have "significant power" in the non-medicinal expert setting. Justice Browne-Wilkinson's judgment in Bolitho[30] itself that the primary path in which the respondent specialist's companion restorative conclusion will be rejected is the place that associate supposition neglected to consider the dangers and advantages of the specialist's lead and of the direct which the patient affirms should have been honed.

DANGERS VERSUS BENEFITS

In cases including, as they so regularly do, the weighing of dangers against benefits, the judge before tolerating a collection of supposition as being capable, sensible or respectable, should be fulfilled that, in framing their perspectives, the specialists have guided their brains to the topic of similar dangers and benefits and have achieved a solid conclusion on the issue and cogency and consistency .This Bolitho[31] factor has a vital admonition, to endure in light of the fact that in a normal case , Bolam[32] is normally and altogether supported yet to surmise the Bolitho[33] factor trial of sensibility as well as fitting use of psyche is likewise fundamental.. Normally, the associate assessment cited by the patient, with respect to what the specialist should have done by acknowledged restorative practice, looks to advocate a strategy that would have limited or disposed of the hazard through and through. It is not, in any case, the standard of flawlessness, but rather of sensibility, which is required by law. Henceforth, if the patient's contention is that the specialist ought to have done x, with little to nil hazard to the patient, yet

[28] *Supra* note 6.
[29] French v. Thames Valley **[2005] EWHC 459 (QB).**
[30] *Supra* note 6.
[31] *Supra* note 6.
[32] *Supra* note 1.
[33] *Supra* note 6.

such practice would prompt unworkable frameworks of medicinal practice, at that point that is not a Bolitho[34] situation. It won't be nonsensical or counter-intuitive for the specialist to have declined to hone what the patient supported, in light of the fact that the sensible exercise of clinical judgment does not require lessening danger to zero or near it (Garcia's case)[35].It is likewise critical to welcome that there is an unpretentious distinction between what Bolam[36] expects of the respondent specialist, and what Bolitho[37] expects of the master "capable collection of therapeutic conclusion". Unquestionably, the master assessment won't be authorized as being capable and faultless unless that feeling has measured the relative dangers and advantages of the specialist's lead and what choices may have been accessible to stay away from the unfavorable therapeutic result. By differentiate, be that as it may, it is not required, under the Bolam[38] test, that a specialist ought to expressly consider, ponder, and afterward dismiss, all to outline this factor, the Bolitho[39] exemption will be conjured to overrule Bolam[40] proven where the litigant specialist's expert confirm did not attempt a similar hazard/advantage analysis of that specialist's direct and of any option course that would likely have maintained a strategic distance from the antagonistic result. Be that as it may, the law won't demand a course of lead (by means of Bolitho[41]) that totally wipes out the dangers of an antagonistic result; and nor does the law require the specialist himself to have considered, and dismissed, every single option determination or medicines, keeping in mind the end goal to depend progressively. In any case, as observed by the previous examination in this Section, the categorisation of Bolitho[42] factors covers a scope of situations in which the expert testimonial was not faultless, and keeping in mind that some of those components (e.g. , where the master supports a training that he or she by and by would "never rehearse") do relate to believability, others require a nearby examination of the reasons in the matter of why specialists (however prominent they may be) upheld certain restorative conclusion or treatment for that patient which have nothing at all to do with validity (e.g. , the near weighing of dangers and It has regularly been said that the compulsion to treat an intolerably harmed understanding with sensitivity and knowledge of

[34] *Supra* note 6.
[35] United States v. Garcia, 2009.
[36] *Supra* note 1.
[37] *Supra* note 6.
[38] *Supra* note 1.
[39] *Supra* note 6.
[40] *Supra* note 1.
[41] *Supra* note 6.
[42] *Supra* note 6.

the past must be sternly opposed - thus as well, these must not trump a reliable piece of legitimate rule[43]. In such manner, the exact importance to be ascribed to Bolitho's[44] names – in conditions where there is a contention of expert medicinal sentiments, and the court is being solicited to incline toward that from the patient's - requires close investigation, if the law's appraisal of restorative rupture is to hold cogency and clarity)successfully upon Bolam[45] then different roads of medicinal treatment are open to the patient.

SCOPE OF ERROR IN ENGLISH VIS-À-VIS ISLAMIC LAW

Now considering the category of error, wherein in case of a person otherwise qualified and competent and thereupon if we take into account Salmond's[46] dictation then it can be averred that mistakes cannot be sited as a valid defense in civil law. However as per Islamic Law, mistake by a competent person is segregated in a different bracket than negligence, however with the rider that the patient is eligible for a due compensation without harming the practitioner. This can be concurred with Taylor's[47] statement wherein he specifies that judges have time and again cautioned from confusing error of judgment with negligence and it is high time that the fine line be defined thoroughly. Lord Denning (Hatcher v. black, 1954)[48] has stated that 'medicine is riddled with uncertainties inherently and if due to this draconian law if the doctor were to watch his back constantly for being pierced by this dagger while treating than indeed this would be a sad time.'

ERROR VERSUS NEGLIGENCE IN ISLAMIC LAW

Muslim law also makes a conscious effort to explain this thin line of difference between error and negligence and grants the doctor the benefit of good intention however in the same go also leaves a ground for compensating the patient. In view of crimes, Islamic law punishes it by

[43] Lewis, Medical Negligence, 4th ed., 1998: v.

[44] *Supra* note 6.
[45] *Supra* note 1.
[46] John W. Salmond, Jurisprudence, 1924:429.
[47] Taylor, Doctors and the Law, 1976: 80.

[48] Hatcher v. Black, [1954] 4 All ER 771.

Hadd, ta'zir or qisas (Qadri)[49]. According to Islamic view, gross or criminal negligence is considered an intentional crime and mostly it is punished accordingly. According to one school of thought if death of a patient occurs due to gross negligence of the medical service provider than the punishment can be retributive unless the relatives forgive the doctor. But according to one school of thought, a medical practitioner can never be accused of a charge of murder.

CONCLUSION

The various schools actually concur on one point that an intentional act of crime by a medical person is punishable by an equitable punishment but it is almost impossible to impute intention in such cases. However, in all the cases the intention should be free from malicious content. However if the intention is fortified by malicious content, then the punishment has to be of an equal nature. The standard of gross negligence as stipulated by ash-shafi'i (Davies[50]) can be concurred with that of the Lord Denning[51] which is interpolated as "An authorized physician who commits an error, the like of which can be committed by another of his peers is only liable for damages; but, should the error be gross and is not expected form one in his position then it is considered as an intentional crime." The punishment may be equitable or forgiveness[52] if the aggrieved party is on board.

[49] *Supra* note 7.
[50] Davies, Medical Law, 1996:87.

[51] *Supra* note 48.
[52] Kridelbaugh, W. William, Palmisano, J. Donald, Compensation caps for medical malpractice, American College of Surgeons Bulletin, vol. 78, 1993: 27-30.