

**MEDICAL NEGLIGENCE IN ZAMBIA: A CRITICAL ANALYSIS OF THE CASE OF
KOPA v UNIVERSITY TEACHING HOSPITAL BOARD OF MANAGEMENT, SCZ No.
8 OF 2007**

**BY
KANGWA BENNY
(10052275)**

**A DISSERTATION SUBMITTED TO THE UNIVERSITY OF ZAMBIA FOR PARTIAL
FULFILMENT OF THE REQUIREMENTS OF BACHELOR OF LAWS**

UNZA

2015

COPYRIGHT DECLARATION

I, KANGWA BENNY, computer number 10052275 do hereby declare that this dissertation presents my own work and that to the best of my knowledge, no similar piece of work has been previously submitted for the award at this University or another University. Where work of another scholar has been used, it has been duly acknowledged.

All rights reserved. No part of this paper shall be reproduced or reprinted without the author's prior authorisation.

.....

Student's Signature

.....

Date

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

I recommend that the obligatory essay under my supervision

By:

KANGWA BENNY

Entitled:

**MEDICAL NEGLIGENCE IN ZAMBIA: A CRITICAL ANALYSIS OF THE CASE OF
KOPA v UNIVERSITY TEACHING HOSPITAL BOARD OF MANAGEMENT, SCZ
No 8 OF 2007**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirement pertaining to the format as laid down in regulations governing obligatory essays

.....

Supervisor

.....

Date

DEDICATION

For my mother,

A woman of unbreakable nerves and

Whose obstinate perseverance in tough times is incredible.

And the rest of my family,

Without whom I cannot do because each one of them greatly

Contributes to making me who I am.

ACKNOWLEDGEMENT

A special thanks to the Lord Almighty for the countless blessings in my life.

I wish to thank my supervisor Mr. Landilani Banda and the entire Law School staff for the direction, advice and support rendered to me throughout the writing of this research paper. You are all an inspiration.

I thank my mother, my grandmother and my siblings Patricia, Natasha, Vanessa, Tikwiza, David and Jonathan and the rest of my family for the love shown to me.

I also thank Dr Chomba Sinyangwe for the encouragement and support I received; you have not only been a brother to me but a great mentor.

Finally I wish to thank Benny Mambwe for being the best brother on earth; Francis Mulenga for being a friend and a mentor; Kasonde F Lwanga for the times shared together both good and bad; Chongo Grant Chipampe, Mwenya Mulenga, Justin Chilufya, Evans Kunda, Raymond M’Kala, Kennedy Chansa, Aaron Siwale, Edwin Mbewe, Paul Chiteta, Jackson Mambwe, Phoebe Sichilima, Osiya Lengwe, Lisa Nambeye and Kaweme Banda for being such great influences in my life. To you all I say:

“If I have seen any further, it is by standing on ye shoulders of giants.”

ABSTRACT

This paper critically analyses the decision of the Supreme Court of Zambia in the case of *Kopa v University teaching Hospital*, SCZ Number 8 of 2007. The paper sets out to discuss the tort of negligence (in general), elucidating the elements that constitute this tort. It then discusses professional negligence, showing how it is a branch of the tort of general negligence. The paper further goes on to discuss and show that medical negligence is a form of professional negligence, among other forms. It thus demonstrates the nexus between general negligence, professional negligence and medical negligence. It is medical negligence that was the central issue in the *Kopa Case*. The paper then proceeds to critically analyse the decision that was reached in the case itself by the Supreme Court of Zambia.

The paper is written with the major objective of providing a clear understanding of the law on medical negligence in Zambia because there has been uncertainty as to what the law in this sphere is, especially with the seemingly shifting trends in the application of the Bolam Test in other Common Law jurisdictions. The lack of defined literature on the subject in Zambia further motivated the research undertaken.

The research itself is conducted chiefly through desktop research—that is, reading of various materials on the subject of medical negligence. In addition, unstructured interviews with medical practitioners are conducted.

After critically analysing the decision of the Supreme Court, the paper makes a finding that the legal framework and jurisprudence of medical negligence in Zambia is essentially the Bolam Test and that the courts in Zambia have consistently applied this test in all the cases of medical negligence presented before them.

The paper further argues that decision of the Supreme Court is sound at law, and that it enhances the legal framework and jurisprudence in Zambia, and that the same is sufficient and effective in protecting victims of medical negligence, especially with the existence of the Health Professions Act, Number 24 of 2009.

The paper makes recommendations that while the courts in Zambia have consistently applied the Bolam Test in medical negligence claims, upcoming decisions should endeavour to explain with certainty that the law on medical negligence in Zambia remains the Bolam Test, despite the seeming shift and complete disregard of the test in other Common Law jurisdictions. This robust approach will ensure certainty of the law in the country, which in itself will operate to protect both medical practitioners and persons who may have fallen victim to medical negligence.

TABLE OF CASES

Anns v Merton London Borough [1978] AC 728
Barnett v Chelsea and Kensington Management Committee [1969] 1 QB 428
Birch v University College London [2008] EWHC 2237 (QB)
Blyth v Birmingham Waterworks Company (1856) 11 Exch 781
Bolitho v City and Hackney Health Authority [1997] 4 All ER 771
Bourhill v Young 1943 AC 92
Bull v Devon Area Health Authority [1993] 4 MLR 117
Burne v A [2006] EWCA Civ 24
Caparo Industries PLC v Dickman [1990] AC 605
Cassidy v Ministry of Health [1951] 2 KB 343
Cicuto v Davidson and Oliver (1968) ZR 149 (HC)
Collins v Hertfordshire Health County Council [1947] 1 All ER 633
Defreitas v O'Brien [1995] 6 Med LR 108
Donoghue v Stevenson [1932] AC 562
Duff Kopa Kopa v University Teaching Hospital Board of Management, SCZ Number 8 of 2007
Edna Nyasulu v Attorney General (1983) ZR 105 (HC)
Glasgow Corporation v Muir [1943] AC 448
M (a Child by his Mother) v Blackpool Victoria Hospital NHS Trust [2003] EWHC 1744
Matenda v ZCCM (1998) Unreported
Naxakis v Western General Hospital (1999) 73 ALJR 782
Nettleship v Weston [1971] All ER 581
Pippin v Sheppard (1822) 11 Price 400
R v Bateman [1925] 19 Cr App R 18
Re Polemis & Furness Withy & Company [1921] 3 KB 560
Rogers v Whitaker (1992) 175 CLR 479
Rosemary Bwalya v ZCCM, Malcom Watson Hospital and Dr Malik, (2005) ZR 1 (SC)
Thake v Maurice [1986] QB, 644
The Wagon Mound Case [1961] AC 388
Wang v Health Professionals Council of Zambia 2012/HK/339
Wells v Cooper [1958] 2 All ER 527

CONTENTS

MEDICAL NEGLIGENCE IN ZAMBIA: A CRITICAL ANALYSIS OF THE CASE OF KOPA v UNIVERSITY TEACHING HOSPITAL BOARD OF MANAGEMENT, SCZ No. 8 OF 2007 i	
COPYRIGHT DECLARATION	ii
APPROVAL PAGE	iii
DEDICATION.....	iv
ACKNOWLEDGEMENT.....	v
ABSTRACT	vi
TABLE OF CASES	vii
CHAPTER ONE.....	1
INTRODUCTION.....	1
1.1 INTRODUCTION.....	1
1.2 BACKGROUND.....	1
1.3 STATEMENT OF THE PROBLEM.....	3
1.4 RESEARCH QUESTIONS.....	4
1.5 RESEARCH OBJECTIVES	4
1.6 SIGNIFICANCE OF THE STUDY	5
1.7 LITERATURE REVIEW.....	5
1.8 METHODOLOGY	8
1.9 CHAPTER LAYOUT.....	8
1.10 CONCLUSION	9
CHAPTER 2.....	10
THE NATURE OF GENERAL NEGLIGENCE AND THE CONCEPT OF PROFESSIONAL NEGLIGENCE.....	10
2.1. INTRODUCTION	10
2.2 NEGLIGENCE IN GENERAL: THE ELEMENTS	11
2.2.1 DUTY OF CARE	11
2.2.2 BREACH OF DUTY	13
2.2.3 CAUSATION	14

2.3 PROFESSIONAL NEGLIGENCE.....	17
2.4 CONCLUSION	20
CHAPTER THREE.....	21
MEDICAL NEGLIGENCE: THE BOLAM TEST.....	21
3.1 INTRODUCTION	21
3.2 THE CONCEPT OF MEDICAL NEGLIGENCE.....	22
3.3 DEVELOPMENT AND APPLICATION OF THE BOLAM TEST	26
3.4 A SHIFT IN THE APPLICATION OF THE BOLAM TEST?	27
3.5 LIABILITY FOR MEDICAL NEGLIGENCE.....	30
3.6 CONCLUSION	31
CHAPTER 4	32
CRITIQUE OF THE CASE OF KOPA v UNIVERSITY TEACHING HOSPITAL BOARD OF MANAGEMNET, SCZ No 8 OF 2007 CASE	32
4.1 INTRODUCTION	32
4.2 BRIEF FACTS OF THE CASE	33
4.3 THE DECISION OF THE COURT	35
4.4 A CRITIQUE OF THE DECISION	35
4.5 CONCLUSION	40
CHAPTER 5	42
CONCLUSIONS AND RECOMMENDATIONS.....	42
5.1 INTRODUCTION	42
5.2 CONCLUSION	42
5.3 RECOMMENDATIONS	43
BIBLIOGRAPHY.....	45

CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

This aim of this paper is to critically analyse the decision of the Supreme Court of Zambia in the case of *Kopa v University Teaching Hospital Board of Management, SCZ No. 8 of 2007* (hereinafter referred to as the “Kopa Case”). To achieve the intended goal, the paper will delve into a discussion of what negligence in general is and then discuss professional negligence in particular. Thereafter, the paper will narrow the focus to medical negligence (which was the central issue in the Kopa Case). In doing this, the paper will explain what medical negligence is, the test applicable in determining whether there indeed is a case of medical negligence, the changes that have been developed and applied to the test in various Commonwealth jurisdictions, liability of individual medical practitioners and health institutions and finally a critical analysis of the case at hand. In the end, a conclusion will be drawn.

1.2 BACKGROUND

The practice of medicine has been part of human civilisation from a time immemorial. Throughout history, the advancements that this noble field has made cannot be overstated. The benefits that have come along with those advancements cannot be overemphasized, either. But the practice of medicine, like most other professional occupations, has had its own share of dark moments. Injuries to patients have occurred, incorrect drugs have been administered and wrong surgeries have been performed. All these misfortunes have occurred and clearly, this is because “medicine [or medical practice], though a highly skilled profession, is not, and is not generally

regarded as being, an exact science¹.” This entails that sometimes harm to patients can and does in fact occur. It is at this instance where medical negligence comes in.

Medical practitioners are required to perform their duties in accordance with a certain standard of professionalism. When their performance falls below this requirement, it is said to be negligent² and the law comes in to remedy this situation which has caused injury—or death—to a patient. The remedy usually given to the victim (or his estate where the victim is deceased) is monetary compensation deemed to be equivalent to the resultant damage suffered.

The essence of the law governing medical negligence is thus to not only regulate conduct of medical practitioners in their performance of their professional duty, but also to protect patients by providing compensation to persons who have fallen victim to acts of medical practitioners which the law—usually through court process—determines to be negligent.

There have however not been many instances in the courts in Zambia where medical practitioners have been sued by patients for medical negligence. In fact, at the time of writing this paper, there have not been more than three reported clear-cut cases of alleged medical negligence which have reached the Supreme Court. The reasons can only be speculated upon. Perhaps it could be the lack of knowledge on the part of the victims that indeed they could sue practitioners. Another reason could be due to unwillingness (or reluctance) on the part of the victims of medical negligence to sue a practitioner as he is perceived to be performing a highly noble service. Even then, cases of medical negligence have been on the rise in other

¹ Thake v Maurice [1986] QB, 644.

² Kerry J Breen et al., *Good Medical Practice: Professionalism, Ethics & the Law*, (Cambridge: Cambridge University Press, 2010), p105.

Commonwealth jurisdictions³, especially in First World countries such as Australia and Canada. The United Kingdom and the United States of America have shown the highest number of medical negligence cases.

With the continuous increase in the number of medical practitioners, the consequential development and setting up of health institutions and the rise of education levels in the country, it can safely be argued that medical negligence cases will begin to ensue and be on the rise in Zambia. The Kopa Case—a Supreme Court decision which will be critically analysed in this paper—is certainly a good example of a medical negligence case that has been decided before the Zambian courts. This case resulted from an alleged erroneous oesophagoscopy that medical practitioners from the University Teaching Hospital performed on a four year-old boy who eventually died days after the surgery.

1.3 STATEMENT OF THE PROBLEM

The concept of medical negligence has its own principles and peculiarities which the courts recognise and apply in order to reach a decision as to whether the alleged negligent act did in fact occur or not. However, considering the fact that this field of law is an extension of the law governing negligent acts in general tort law, there is a constant mix up and confusion in the application of the principles governing medical negligence and the liability thereof.

This paper will in the long run provide a clear understanding and distinction of the principles governing general negligence and professional negligence in tort law, and the principles of law governing medical negligence. This will be done in the light of the Kopa Case which will be critically analysed, bringing out all the aspects of the principles governing medical negligence

³ Andrew Fulton Phillips, *“Medical Liability and the Law of Negligence”* (PhD Thesis, University of Edinburgh, England, 1992), p7.

today. The analysis of the case will not only provide a clear understanding of the law on medical negligence in Zambia, but it will also provide a critical examination of the Supreme Court's decision.

1.4 RESEARCH QUESTIONS

This paper will focus on answering the following questions:

1. What is the legal framework and jurisprudence regarding medical negligence in Zambia?
2. Is the legal framework and jurisprudence sufficient and effective in protecting victims of medical negligence?
3. Does the decision of the Supreme Court of Zambia in the case of Kopa v University Teaching Hospital Board of Management enhance the legal framework and jurisprudence of medical negligence in Zambia?

1.5 RESEARCH OBJECTIVES

The aim of this paper, as clearly stated in the introduction above, is to critically analyse the decision of the Supreme Court in the Kopa Case. This aim will be achieved through the following set objectives:

- To understand the concept of general negligence, how it is linked to professional negligence and eventually to the tort of medical negligence.
- To understand the principles underlying medical negligence and the test applied by courts in determining whether medical negligence has occurred, called the Bolam Test.
- To understand the significance of the apparent shift in the application of the Bolam Test that has taken place in other Commonwealth jurisdictions.

- To understand the stance taken by the courts in Zambia in light of the apparent shift in the application of the Bolam Test in other Commonwealth jurisdictions.

1.6 SIGNIFICANCE OF THE STUDY

Certainty of the law and its requirements is a vital and indispensable feature of any sound legal system. The significance of the research thus undertaken here in writing this paper is that it will help not only law students (and other keen readers) but also legal practitioners and medical practitioners alike to determine—with certainty—the position of the law in the country with regard to medical negligence. The paper is also significant in that it shows the apparent shift that the courts in other Commonwealth jurisdictions have taken in the application of the principles governing negligence on the part of medical practitioners.

1.7 LITERATURE REVIEW

The tort of negligence, as a separate and defined tort, developed after the decision of the Appeals Court in *Donoghue v Stevenson*⁴, and after that, it became the “tort of all torts, arriving on the scene...late in [the] legal development, immediately threatening to take a stronghold on the law of civil obligations.⁵” This undoubtedly points out that as soon as negligence was defined and stated as a tort on its own, there were numerous claims that instantly began to reach the courts in various forms.

Like every other civil wrong (and criminal wrong indeed), the tort of negligence requires certain elements that have to be satisfied in order for the claimant to succeed, and they include an existence of a duty of care, a breach of that duty and resultant damage⁶. These elements, with necessary modifications depending on the circumstances of the case, give rise to professional

⁴ [1932] AC 562

⁵ Graham Stephenson, *Source Book on Torts 2nd Edition*, (London: Cavendish Publishing Limited, 2000), p13

⁶ Catherine Elliot and Frances Quinn, *Tort Law 7th edition*, (Harlow: Pearson Education Limited, 2009), p18

negligence. Professional negligence itself is essentially a negligent act committed by a defendant belonging to a particular profession during the performance of his or her professional activity. One such area where professional negligence may arise is in the practice of medicine. This type of negligence is referred to as medical negligence⁷.

There undoubtedly have been numerous writers and other academics who have attempted to provide an adequate and satisfactory definition and explanation of what amounts to medical negligence. Unlike other terminologies of law that prove to be difficult to define satisfactorily, the term medical negligence has been explained in a rather similar manner by different writers with insignificant or no inconsistencies at all. For example, Stauch writes that medical negligence refers to “an unjustified act or failure to act upon the part of a doctor or health care which results in harm to the patient.”⁸ It will be noted from the quotation that medical negligence may include not only an action but failure to act as well, although almost all the cases involve a positive step on the part of a medical practitioner.

The definition cited above is not only clear and concise, but also brings out the key elements that are required as the ingredients or the necessary constituents of the tort of medical negligence. Deveraux⁹ writes that the elements constituting a negligent action on the part of a medical practitioner are essentially a duty of care owed to a patient, a breach of that duty, and resultant damage that is reasonably foreseeable. It is clear that the general principles governing general negligence in tort law are at the very heart of what constitutes medical negligence. And this fact

⁷ Mayamba Mwanawasa, “*Professional Negligence in Zambia: an Appraisal of the Medical Profession*” (Bachelor’s Degree Dissertation, University of Zambia, Zambia, 2005), p19.

⁸ Marc Stauch et al., *Sourcebook on Medical Law 2nd edition*, (London: Cavendish Publishing Limited, 2002), p295.

⁹ John Deveraux, *Medical Law 2nd edition*, (New South Wales: Cavendish Publishing (Australia), 2002), p111.

Chibwe recognizes in a dissertation written on how damages are awarded in cases of negligence¹⁰.

Nonetheless, while the principles of general negligence and medical negligence are essentially the same, it is the standard of care required of a medical practitioner that takes the realm of medical negligence from the acclaimed requirement of a “reasonable man” to that of “a reasonably competent medical man”. On this Studdert rightly points out that the standard traditionally used to evaluate whether the breach in question rises to negligence is medical custom—the quality of care that would be expected of a reasonable practitioner¹¹.

There thus are not many difficulties in providing a fairly all-constitutive definition of medical negligence and the standard of care therein applied by the courts. Indeed, the Supreme Court in Zambia has endeavoured to apply these very principles, particularly in the case which forms the core of this paper—that is the Kopa Case.

Over the years, since the development of what is referred to as the Bolam Test (upon which medical practitioners are adjudged on whether they have met the required standard of care), there have been developments and rather a shift on the application of this test. Other Common Law jurisdictions have further taken a decisive step by refusing to apply altogether the principles laid down in the Bolam Test¹². The shift has caused different jurisdictions to apply the test differently, thereby making it dependent on a particular jurisdiction on whether there indeed has been a case of medical negligence. The uncertainty brought about by the shifting trends has not

¹⁰ Fanwell Chibwe, “*Damages in Negligence Cases in Zambia*” (Bachelor’s Degree Dissertation, University of Zambia, Zambia, 2010), p41.

¹¹ David M Studdert, “Medical Malpractice”, *New England Journal of Medicine* (2004): p1.

¹² Carolyn Sappideen, “Bolam in Australia—More Bark than Bite?” *UNSW Law Journal* 33, no. 2 (2010): p5.

left Zambia untouched. It is this uncertainty that this paper addresses, thereby providing an understanding on the law governing medical negligence in Zambia.

There has been no literature published by scholars on what really is the status of the Bolam Test in Zambian jurisprudence, bearing in mind that other Commonwealth jurisdictions have been taking a shifting approach. This perhaps could be linked to the fact that medical law as a separate area is fairly new in the country. The position of the law currently as it stands in Zambia will thus be examined in this paper, with a focused critique being on the latest available decision of the Supreme Court on medical negligence; the Kopa Case.

1.8 METHODOLOGY

The research undertaken in writing this paper is done mainly through desk top research where reading of different literature relating to the research questions will be done. These materials include case law not only from Zambia but also from other jurisdictions, especially those in the Common Law systems. Other materials include books by various authors, journal articles, dissertations by other students (undergraduate, master's and PhD), and other materials relevant to paper.

In addition, unstructured interviews with medical practitioners from different health institutions will be conducted.

1.9 CHAPTER LAYOUT

Chapter two will begin by defining and explaining what general negligence is. Thereafter a discussion on what amounts to professional negligence will be provided, pointing out the nexus between general negligence and professional negligence.

Chapter three will consider the legal tests that the courts have developed to determine whether an action by a medical practitioner has fallen below the required standard. This chapter will include a discussion on the development of the Bolam Test, how the courts have applied it over the years and finally the shift that has been made by courts from other Common Law jurisdictions in applying the test. The chapter will also briefly discuss how and when individual liability of medical practitioners and liability of health institutions may arise in medical negligence cases.

Chapter four will then state whether the legal framework and jurisprudence on medical negligence in Zambia is sufficient and effective in protecting victims of medical negligence, and whether the decision of the Supreme Court enhances the legal framework and jurisprudence.

Chapter five will provide a conclusion of the paper and also make recommendations that may help to overcome the shortfalls identified in the current position and application of the law on medical negligence by the courts in Zambia.

1.10 CONCLUSION

This chapter has served as an introduction to the paper whose aim is to critically analyse the decision of the Supreme Court of Zambia in the case of *Kopa v University Teaching Hospital Board of Management, SCZ Number 8 of 2007*. The chapter has provided an outline of the contents of the paper ranging from this very chapter to the final chapter of the paper.

CHAPTER 2

THE NATURE OF GENERAL NEGLIGENCE AND THE CONCEPT OF PROFESSIONAL NEGLIGENCE

2.1. INTRODUCTION

The aim of this chapter is to discuss the nature of negligence in general and how it is linked with the concept of professional negligence. This chapter focuses on the elements that constitute negligence in general and professional negligence in particular.

The nature of human beings is such that they engage in various interactions between and among themselves as they live together in society. The law is the tool by which this interaction is regulated. The conduct of people as they interact in everyday life is such that it should fall within the required and acceptable parameters designated by the law. Nonetheless, individual conduct every now and then fails to meet this requirement, thereby falling outside the acceptable requirements. One such example is when one person creates a legal obligation with another through an agreement, and, if one fails to fulfill such an agreed upon obligation, the laws regulating agreements between people—otherwise known as contract law—will come in to remedy the situation for the aggrieved person.

But people do not always have to enter into contracts to create a legal relationship between themselves. The mere fact that individuals are living together entails that one person should not engage in conduct that may cause harm to the other—regardless of the lack of an agreement between them. When such harm occurs to one person as a result of another's conduct, it is the law of negligence that comes in to provide relief for the injured person. The question that emerges then is this: is it for every conduct by one person which results in injury to another for which the law of negligence will come in to remedy?

2.2 NEGLIGENCE IN GENERAL: THE ELEMENTS

2.2.1 DUTY OF CARE

The first consideration in determining whether the tort of negligence has occurred is whether there exists a duty of care between the injured person, usually the claimant, and the person alleged to have caused that injury, called the defendant. A duty of care is simply a legal obligation common amongst everyone not to engage in activities or conduct that may result in harm to another person. Thus, “It is not for every careless act that a person may be held responsible... he will only be liable in negligence if he is under a legal duty to take care”¹. However, one does not owe a duty of care to the whole world, or the entire world at once; one owes a duty of care only to persons who may be affected by his or her actions. The Court of Appeal in the landmark case of *Donoghue v Stevenson*² called this person who may likely be harmed by another’s conduct as one’s “neighbour”. Lord Atkin, in formulating what is commonly known as the “neighbour principle”, stated:

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 into question.

What the Court of Appeal simply meant in the words above is that a neighbour at law is that person who may be affected by another’s conduct; that person who may suffer damage or harm due to another’s actions.

¹ W V H Rogers, *Winfield & Jolowicz on Tort 18th edition*, (London: Sweet & Maxwell Publishers, 2010) p151.

² [1932] AC 562.

The Court of Appeal in *Bourhill v Young*³ simplified what amounts to a duty by categorically stating that a duty to take care is the duty to avoid doing or omitting to do anything which if done or is omitted to be done “may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated” if at all the duty is not observed.

It thus follows that where one person owes no duty of care to another person to whom they have caused injury, then there is no case for negligence. The proper course of action may lie in battery or assault.

A noteworthy point to mention with regard to the duty of care is that while it is hardly a difficult task to determine whether a duty exists between two people, there are times when it becomes problematic to out-rightly establish that indeed a duty exists. This is due to the fact that situations in which a duty of care may exist is not a closed and exhausted list⁴. Therefore, in instances when it is difficult to discern the existence of a duty at first glance, the courts have developed certain principles over the years. Initially the test that was applied in deciding whether a duty of care should be imposed in a novel situation was two-staged, developed in *Anns v Merton London Borough Council*⁵ but it was highly criticized for creating an extension to the tort of negligence. This resulted in the formulation of a new test. In the case of *Caparo Industries PLC v Dickman*⁶, the court stated that in a novel situation, the considerations to be made or the questions to be asked before a duty of care could be imposed are:

- i. Was the damage reasonably foreseeable?
- ii. Was the relationship between the parties sufficiently proximate?

³ [1943] AC 92.

⁴ Catherine Elliot and Frances Quinn, *Tort Law 8th edition*, (Harlow: Pearson Education Limited, 2011) p17.

⁵ [1978] AC 728.

⁶ [1990] AC 605.

iii. Is it fair, just and reasonable to impose a duty?

It can be seen that the test formulated in the case above is a three-staged test, and it remains the law today.

2.2.2 BREACH OF DUTY

The second element that a claimant must establish in a claim of negligence is that the defendant was in breach of duty—a duty owed to the claimant himself (and in rare instances to a third party)⁷. It will be remembered that determining the existence of a duty of care is hardly a difficult task; the difficulty is often faced when determining whether that duty has actually been breached. In the law of negligence, the test for determining whether there has been a breach of duty may be said to be twofold:

- i. What is the standard of care required of the defendant in law, and;
- ii. Has the defendant fallen below the standard required of him?⁸

The first limb of the twofold question is a legal determination while the second limb is a matter of fact⁹. The standard of care, which is the first limb of the two-fold test, is basically a test of what a reasonable person would do in a given circumstance. It is an objective test which requires that:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do¹⁰.

It is important to note that what is stated above is a test for determining whether an individual met the standard of care in a given situation and not a summation of all the elements that constitute liability for the tort of negligence. It is to be remembered and emphasized that for

⁷ John Cooke, *Law of Tort 10th edition*, (Harlow: Pearson Publishing Limited, 2011) p148.

⁸ Graham Stephenson, *Sourcebook on Torts 2nd edition*, (London: Cavendish Publishing, 2000) p91.

⁹ John Cooke, *Law of Tort 10th edition*, (Harlow: Pearson Publishing Limited, 2011) p180.

¹⁰ *Blyth v Birmingham Waterworks Company* (1856) 11 Exch 781.

there to be the tort of negligence, in addition to the existence of a duty of care and the breach of such a duty (what is being discussed in this section) there is need for an occurrence of damage caused by the breach.

The standard of care applies to everyone, regardless of their peculiarities and idiosyncracies; the only exceptions are the skilled defendants, the mentally unsound, children and the physically ill¹¹. This is to say that what is regarded as 'reasonable' behaviour varies according to the circumstances of each case, and the standard of care usually relates to the activity being carried out by the defendant, rather than to his or her personal characteristics.

Thus the Court of Appeal in *Glasgow Corporation v Muir*¹² observed that: "...the degree of care for which the law requires human beings to observe in the conduct of their affairs varies according to circumstances. There is no absolute standard..."

The second limb of the two-fold test deals with whether the defendant has in fact fallen below the required standard. It focuses on whether the defendant did in fact act in a manner which is not consistent with what a reasonable person would have done; it is a question of fact, to be determined solely by considering the factual occurrences of a given situation. A defendant will thus be judged on the conduct he exhibited at the time in question. Whether it does indeed fall below the standard is a matter for the court to decide.

2.2.3 CAUSATION

Once the existence of a duty of care has been established and the breach of that duty has actually occurred, there is still need for another element to be present. This third element required for the tort of negligence to be proven is causation. This entails that there has been provable damage which has resulted to the claimant from the action of the defendant. This provable damage could

¹¹ Richard Owen, *Essential Tort Law 3rd edition*, (London: Cavendish Publishing Limited,2000) p31.

¹² [1943] AC 448.

be physical or psychological, or it can be both. Thus, the defendant's careless act must cause or materially contribute to the damage suffered by the claimant¹³.

The question of causation itself, like that of breach of duty, comprises two limbs. The first one is a factual matter, which requires that the claimant must show that the breach physically caused or contributed to the claimant's damage. This is commonly referred to as causation in fact¹⁴. Once the first limb is established, the second one comes into play. The second limb requires that the claimant must show that the damage caused was not too remote, or that it can be reasonably traced to the action of the defendant. In other words, the damage should not be too remote. This limb is sometimes referred to as causation in law, or more commonly, remoteness of damage¹⁵.

In determining the first limb the courts use what is referred to as the "but for" test. This test basically requires that the claimant should show that had it not been for the action of the defendant, the resultant damage to the claimant would not have occurred. In the case of *Barnett v Chelsea and Kensington Management Committee*¹⁶, a doctor who could not attend to three night watchmen was found not to be liable in negligence for the resultant damage because, while he clearly owed the watchmen a duty of care which he actually breached, it was not the breach which caused the death of one of the watchmen. The watchmen had ingested a poisoned drink, and that is what caused the resultant death, and the death would still have occurred even if the doctor had attended to the deceased.

In essence, the "but for test" acts as a sieve for sifting away claims against a defendant who may have owed the claimant a duty of care which he breached, but whose action (the breach) wasn't the cause of the injury or damage suffered by the claimant.

¹³ Anita Stuhmcke, *Essential Tort Law 2nd edition*, (Sydney: Cavendish Publishing (Australia), 2001) p47.

¹⁴ Graham Stephenson, *Sourcebook on Torts 2nd edition*, (London: Cavendish Publishing, 2000)p137.

¹⁵ Graham Stephenson, *Sourcebook on Torts 2nd edition*, (London: Cavendish Publishing, 2000) p137.

¹⁶ [1969] 1 QB 428.

Once factual causal connection has been established by the defendant as discussed above, the defendant must then show that the resultant damage itself is not too remote. This is a matter of law, and legal rules have been formulated to determine the question of remoteness of damage¹⁷.

Initially in the law of negligence, a person was considered liable for all the resultant damage for as long as this damage could be traced to his action¹⁸. This formula was severely criticised and consequentially it was stated in *The Wagon Mound Case*¹⁹ that a defendant would only be liable for those consequences which he could have reasonably foreseen. The court in that case stated: “It is a principle of civil liability...that a man must be considered to be responsible [only] for the probable consequences of his act. To demand more of him is too harsh a rule...”

In essence, the court was stating that a defendant will be liable to the claimant only for those results which he could reasonably have foreseen; those results which are a probable consequence of his action, and not for every single consequence that is a direct result of his one action.

It is important to note that although the rules regarding causation of damage seem fairly straight forward as discussed above, there are a lot of other factors that affect both factual causation and the remoteness of damage. These factors include the existence of multiple causes, intervening natural events, deliberate intervention by third parties, and what is referred to as the “thin skull rule”, which essentially states that a defendant will be liable for foreseeable damage that he has caused to a particular defendant regardless of the fact that a different person in the position of the claimant would not have so been injured. All these factors may affect the determination of causation in negligence.

¹⁷ Vivienne Harpwood, *Principles of Tort Law 4th edition*, (London: Cavendish Publishing Limited, 2000) p158.

¹⁸ See *Re Polemis & Furness Withy & Company*, [1921] 3 KB 560.

¹⁹ [1961] AC 388.

2.3 PROFESSIONAL NEGLIGENCE

General negligence as shown above deals with the conduct of an ordinary man towards his fellow ordinary persons, described as his or her neighbours. This occurs on an everyday life basis. There are however circumstances in which a person who has a certain level of expertise in a given trade or profession is said to be negligent. This is what is referred to as professional negligence.

Professional negligence occurs where a person who is in possession of a particular skill or expertise—in the exercise of that skill—acts in a manner that a reasonable person possessing his skill would not have acted²⁰. Whether there has actually been a case of professional negligence is a matter to be determined by the court, but suffice to mention that professional negligence is governed by the principles of general negligence which are the existence of a duty, a breach of that duty and damage resulting from such a breach.

An important point to note though is that professional negligence differs from general negligence on one salient point; the required standard of care. It will be noted that the standard of care is a test applied under the breach of duty—the second element—of the tort of negligence.

Professional negligence is not restricted to any one particular profession. It is a tort for which any professional, expert or a person possessing or professing to possess a special skill may be liable for in the performance of that skill. Professionals include lawyers, bankers, accountants, engineers, drivers, carpenters as well as medical practitioners. All these people are required to act in a manner which is reasonable and which does not cause harm to the person to whom they owe a duty of care.

²⁰ Ubaldus de Vries, *“Professional Negligence Reconsidered”* (PhD Thesis, Dublin City University Business School, Republic of Ireland, 1996) p153.

Determining whether a duty of care exists between a professional and his client, just like in general negligence, is hardly a difficult task. It is clear that a driver owes a duty of care to his passengers²¹, a banker to people who deposit their money in his bank, a lawyer to a person whom he takes up as his client and an accountant to a person whose books of business he is handling. What amounts to damage in a professional-client relationship is also a fairly easy and incontestable matter as it depends on the type of profession in question. The critical part with regard to professional negligence is the breach of duty. The question that arises is this: has the professional in question breached the duty he owes to his client?

In determining this question, the court considers two questions which are derived from the same test applied under the breach of duty element in general negligence. The two questions are:

- i. What is the standard of care required of the professional, and
- ii. Did the professional fall below the standard required of him?

It is important to note that with regard to the breach of duty by a professional, the question is not whether the professional acted in a manner in which an ordinary reasonable man would have acted, but rather whether the professional acted in a manner in which an ordinary person possessing or professing to possess his skill would have acted²². One realises that the standard of care for professionals is raised from that of a mere ordinary man to that of a man possessing or professing to possess a certain skill.

The Supreme Court of Zambia had occasion to discuss the test of the standard of care for professional or skilled defendants in the case of *Rosemary Bwalya v ZCCM Malcom Watson Hospital and Dr Malik*²³. The Court stated:

²¹ *Nettleship v Weston* [1971] All ER 581.

²² Mayamba Mwanawasa, *Professional Negligence in Zambia: an Appraisal of the Medical Profession* (Bachelor's Degree Dissertation, University of Zambia, Zambia, 2005) p18.

²³ (2005) ZR 1 (SC).

The test is the standard of the ordinary skilled man exercising and professing to have that particular skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

This means that a professional does not need to show or act with the highest expert skill possible. He needs only to exercise his skill in a manner in which an ordinary skilled profession in his position would have acted. The important thing is that his conduct does not fall below what an ordinary competent profession exercising that skill would have done.

In *Wells v Cooper*²⁴, the court observed that “the degree of skill was not to be measured by the skill the defendant actually possessed but by the skill which a reasonably competent carpenter would have.”

The standard of care required of a professional, like that required of an ordinary man under general negligence is set by law. But in answering whether the professional in question acted in accordance with the standard required of him is a matter of fact. The court will consider how a particular professional performed his duty in a given situation. If he meets the standard required of him, he is not negligent but if his conduct falls below what a reasonably competent professional would have done when put in a similar position, he is said to have been negligent, and liable for professional negligence²⁵.

Causation in professional negligence is also determined in the same manner causation in general negligence is determined. The two tier test of factual causation and legal causation (remoteness of damage) applies in the same manner as in causation under general negligence.

An example of professional negligence is medical negligence, which is that type of negligence committed by medical practitioners. This was the central issue in the Kopa Case, which is the

²⁴ [1958] 2 All ER 527.

²⁵ Richard Owen, *Essential Tort Law 3rd edition*, (London: Cavendish Publishing Limited, 2000), p3.

subject of this paper. Therefore, the concept of medical negligence will be discussed in the next chapter in order to provide an understanding of the issue that was in contention in the Kopa Case.

2.4 CONCLUSION

This chapter has discussed the constituent elements of the tort of general negligence, and that a claimant needs to prove all three elements for a claim of negligence to succeed. The three inseparable elements are a duty of care, the breach of that duty and resultant damage which is reasonably foreseeable.

The chapter has observed that the existence of a duty of care is hardly a difficult matter to determine. Every person owes a duty of care to a person who is likely to be affected by his actions; this person is referred to as the neighbour at law. A breach of duty occurs when a person acts in a manner in which an ordinary man in his position would have refrained from acting. Thus, actions or behavior that falls below the standard of an ordinary man is negligent. Causation occurs where provable and reasonably foreseeable harm or damage occurs to a person by virtue of actions by another person who owes him a duty of care. Once all these elements are present, then a claim for negligence will succeed.

The chapter has also discussed that professional negligence is that type of negligence which is committed by a person possessing or professing to possess a special skill. Once such a person's conduct falls below the standard required of professionals in his field, he may be liable for professional negligence. The standard of care in professional negligence is raised from that of a mere ordinary man to that of an ordinary man possessing the skill in question.

The chapter has also stated that medical negligence is one such type of professional negligence. It is the issue of medical negligence that was in contention in the Kopa Case. Hence, medical negligence will be discussed in the next chapter.

CHAPTER THREE

MEDICAL NEGLIGENCE: THE BOLAM TEST

3.1 INTRODUCTION

The aim of this chapter is to discuss the concept of medical negligence, the development and application of the Bolam Test (which is the standard of care in medical negligence), the shift that has seemingly taken place in the application of the test and ultimately where liability for medical negligence lies.

The practice of medicine can be traced to the very beginnings of human civilisation. The Code of Hammurabi of 1727 BCE in Babylonia is said to have been the first attempt to regulate the practice of medicine¹. From its very inception, medicine has been considered, and justifiably so, as a highly noble field, and a profession worthy of great reverence. Medical practitioners have been, by the very nature of their profession, endowed with a colossal duty of ensuring that the life of a human being under their care is safeguarded. This duty entails that medical practitioners are under a moral obligation to promote the well being of a patient².

Nonetheless, while it cannot be contested that the practice of medicine is a noble field, and that whenever medical practitioners perform their duties, ideally, they always consider the interest of the patient as cardinal, it also is incontestable that errors and mistakes do happen. As a matter of fact, errors and mistakes have taken place not only in the surgical room but even before a patient has been taken to the operating theatre. These errors range from a faulty diagnosis to a wrong prescription of drugs.

¹ Erich Loewy, *Textbook of Medical Ethics*, (New York: Plenum Publishing Corporation, 1989) p4.

² John Deveraux, *Medical Law 2nd edition*, (New South Wales: Cavendish Publishing (Australia), 2002), p5.

Anyone or all of the instances mentioned above—that is, an erroneous surgery, a faulty diagnosis and a wrong prescription of drugs—may give rise to the tort of medical negligence, which is the focus of the discussion in this chapter.

It will be remembered from the previous chapter that negligence in general is a tort that one person who owes a duty to his neighbour (as defined in the case of *Donoghue v Stevenson*) breaches with resultant damage to that neighbour. Professional negligence, it also can be remembered, is negligence that is caused by an individual who possesses or who professes to possess a particular skill, and this is done during the performance of his expertise. It is from the principles governing general negligence where professional negligence stems from, and in the sphere of professional negligence, the tort of medical negligence lies beside other types of professional negligence. It will further be remembered that the standard of care applied in determining whether a breach of duty in a claim of general negligence has occurred is that of a reasonable man. When applied to a professional, the standard of care is that of an ordinary skilled man or professional. When, however, there is a claim for medical negligence, the standard of care applied is what is called the Bolam Test.

3.2 THE CONCEPT OF MEDICAL NEGLIGENCE

The elements that are at the heart of general negligence form the basis for professional negligence in the field of medicine, called medical negligence. The three elements are:

- (i) The existence of a duty of care,
- (ii) A breach of that duty, and
- (iii) Reasonably foreseeable damage caused by the breach³.

³ Claudia Carr, *Unlocking Medical Law and Ethics*, (London: Hodder Publishers, 2012) p1

The first element, the duty of care, exists between the medical practitioner and every person he accepts as his patient; that is to say, a duty of care arises by the very existence of a doctor-patient relationship⁴. This is a well settled position, and it has been recognized by the courts in a plethora of cases. For example, in the case of *R v Bateman*⁵, it was stated that:

If a doctor holds himself out as possessing special skill and knowledge, and he is consulted as possessing such skill and knowledge, by and on behalf of the patient, he owes a duty to the patient to use caution in undertaking the treatment.

This statement means that a duty of care arises between a practitioner and any person on whom he chooses to exercise his acquired professional skills and expertise. It could then be said that in the context of the principles of general negligence, a patient is the “neighbour” the court in *Donoghue v Stevenson*⁶ was referring to, and the medical practitioner should take reasonable care so as not to do anything which he can reasonably foresee that it may result in harm to the patient.

It is therefore the position of the law that once a medical practitioner undertakes to treat someone, he is under a duty to take reasonable care because by the very fact that he has accepted a person as his patient, there has emerged a duty of care. This is a position of law that has been in existence for quite a long time, and an example would be the case of *Pippin v Sheppard*⁷ in which a medical practitioner undertook to treat injuries sustained by the plaintiff’s wife but instead made them worse. It was held in that case that a medical practitioner was under a duty to take “due care” to his patients.

It is a rare instance, if not altogether impossible, for a court to decide that there is no existence of a duty of care between a practitioner and any person he accepts as his patient. Indeed, whether a

⁴ Marc Stauch et al., *Sourcebook on Medical Law 2nd edition*, (London: Cavendish Publishing Limited, 2002), p296.

⁵ [1925] 19 Cr App R 18. Although this was a case involving criminal liability, the principle with regard to the duty of care is essentially the same with that in civil liability under the tort of medical negligence.

⁶ [1932] AC 562.

⁷ (1822) 11 Price 400.

practitioner has actually accepted a person as his patient is a matter of fact which hardly poses any difficulties. It should however be mentioned that in the rare instance that there existed a situation so novel and unique that it was uncertain whether there was a duty of care between a medical practitioner and a person he had treated, the court should apply the three-staged test stated in the case of *Caparo Industries PLC v Dickman*⁸. In the course of this paper, nonetheless, the author has been unable to find an instance in which it was held that there existed no duty between a practitioner and a patient he undertook to treat. The mere relationship itself of doctor-patient is the basis for the existence of the duty of care, as already noted above.

A point worth mentioning is that there are instances in which a medical practitioner could owe a duty of care to a third party. What this means is that a medical practitioner could be liable in negligence in instances where, while the negligent act was performed on his patient, harm is caused to a person other than the patient. To illustrate this point better, the facts in the case of *Thake v Maurice*⁹ will be considered.

In that case, the plaintiff underwent a vasectomy but prior to that, the defendant had failed to warn the plaintiff that there was a certain percentage of risk that the operation might fail. Consequently, the plaintiff's wife conceived. It was held in that case that the surgeon did not only owe a duty of care to the plaintiff (his patient), but also to the plaintiff's wife (the person who physically suffered the damage). The court reasoned that a medical practitioner can be said to owe a duty to a third party who is not his patient—the key factor is that the injury (or damage) should have been reasonably foreseeable. Thus, where damage to a third party for treatment

⁸ [1990] AC 605. The three-staged test is discussed in Chapter 2.

⁹ [1986] QB 644.

exercised on a practitioner's patient is reasonably foreseeable, a medical practitioner owes a duty of care to that third party.

In concluding the duty of care element, it is worth mentioning that the medical practitioner's duty of care extends from diagnosis to advice and eventually to treatment¹⁰. On all three aspects, the practitioner owes a duty to his patient.

The second element in the tort of medical negligence is the breach of duty. Under this element, two inseparable questions are asked. The first question relates to the standard of care required of a medical practitioner. The second question relates to whether the medical practitioner has actually fallen below the standard required or not. The first consideration is a matter of law while the second is a matter of fact. These two considerations are the basis of the Bolam Test whose development and application shall be discussed in more detail in the next section. The author opts to take this approach because it is the standard of care (the Bolam Test) required of a medical practitioner that essentially differentiates the tort of medical negligence from other professional negligence torts. This is to say that the Bolam Test is peculiar only to the tort of medical negligence¹¹; hence the author opines that it would be prudent to discuss it separately in the next section, which is section 3.3.

The third element that a claimant needs to show in order for a claim of negligence against a medical practitioner to be upheld is that foreseeable damage resulted from the latter's conduct. The test applicable here, as already stated in Chapter 2, is the "but for" test. The essence of this test is to show that had it not been for the defendant's action, the damaged occasioned on the victim (usually the claimant) would not have happened. In the Case of *Barnett v Chelsea and*

¹⁰ John Deveraux, *Medical Law 2nd edition*, (New South Wales: Cavendish Publishing (Australia), 2002)p111.

¹¹ Jonathan Herring, *Medical Law 2nd edition*, (Harlow: Pearson Education Limited, 2010), p41.

*Kensington Hospital Management Committee*¹², it was held that the death of one of the night watchmen would still have occurred regardless of the fact that the medical practitioner had breached his duty of care when he refused to attend to the deceased and two other watchmen after they had taken a poisoned liquid. The deceased, it was held, would have died in any case. Hence the practitioner's breach of duty did not cause the death.

The principles governing remoteness of damage apply in determining causation under medical negligence, and the rule is that a medical practitioner will only be liable for those consequences of his action which he could have reasonably foreseen¹³.

3.3 DEVELOPMENT AND APPLICATION OF THE BOLAM TEST

The tort of negligence in general can be traced back to a number of decisions the courts in England handed down over the years. Although the elements of general negligence apply forthwith to medical negligence, it is the second element—the breach of duty—which differentiates medical negligence from other forms of professional negligence. This section thus discusses the development and application of the Bolam Test.

Under medical negligence, the standard is whether the practitioner has acted in accordance with what a reasonably skilled medical practitioner would have done in his position¹⁴. This test was developed in the case of *Bolam v Friern Hospital Management Committee*¹⁵ (hereinafter referred to as the “Bolam Case”) in which a practitioner conducted an electro-convulsive therapy without administering a laxative to the patient, who then suffered a fractured hip bone due to the therapy.

¹² [1969] 1 QB 428.

¹³ Marc Stauch et al., *Texts, Cases and Materials on Medical Law and Ethics 4th edition*, (New York: Routledge Publishers, 2012), p276.

¹⁴ Alasdai Maclean, *Briefcase on Medical Law 2nd edition*, (London: Cavendish Publishing, 2004), p156.

¹⁵ [1957] 1 WLR 582.

In that case, it was held that “A doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art...”

Therefore, once a practitioner accused of medical negligence leads evidence that in fact what he did is something that a group of responsible medical men would have done because it is accepted practice, then he satisfies the standard of care. It does not matter whether there is another group of medical men who think that the practice in question is not acceptable¹⁶.

The court, in accordance with the decision in the Bolam Case, will not engage in choosing between two different camps of medical opinions. All that is needed is a responsible group of medical men to support, as acceptable at the time, the practice of a fellow practitioner cited for negligence. This position was aptly put by Dr Kassim¹⁷ in his article when he stated that: “In short, the law imposes the duty of care; but the standard of care is a matter of medical judgment”.

The Bolam Test remained the accepted standard and the starting point for determining the standard of care required of a medical practitioner. Forty years later, however, there was a new dimension of this view and its application was seemingly shifted by the courts.

3.4 A SHIFT IN THE APPLICATION OF THE BOLAM TEST?

Since the time the decision in the Bolam Case was handed down in 1957, there had been some criticism leveled against the test by different academics and writers, and even some judges, notably in the Australian courts¹⁸. Eventually, in 1997, the courts in England consequentially passed a decision that seemingly shifted the application of the Bolam Test, a decision which proponents of the school of thought that the Bolam Test was significantly changed often cite.

¹⁶ Alasdai Maclean, *Briefcase on Medical Law 2nd edition*, (London: Cavendish Publishing, 2004), p156.

¹⁷ P N J Kassim, “Does the Bolam Test Still Reign in Malaysia?” *Faculty of Laws IIUM Gombak*, p16.

¹⁸ Carolyn Sappideen, “Bolam in Australia-More Bark than Bite?” *UNSW Law Journal* 33, no. 2 (2010): p5.

Although the 1997 decision did not overrule the 1957 one, the apparent shift made is one worth considering. The “shifting” decision came in the form of *Bolitho v City and Hackney Health Authority*¹⁹ (hereinafter referred to as the “Bolitho Case”). In that case, a four year old boy suffered severe brain damage while he was in the care of the defendant hospital. The boy had been admitted due to a respiratory problem that he was suffering from. The brain damage came as a result of a cardiac arrest, and it was contended that the medical practitioner who was supposed to attend to the boy failed to do so on more than one occasion. Although the case itself failed on issues of causation, it is the court’s view (on how a determination of negligence should be made despite the defendant’s case being supported by expert evidence) that is worth considering.

In passing judgment, it was stated, “...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,” and further that “...the court has to be satisfied that the exponents of the body relied upon can demonstrate that such opinion has a logical basis.”

In reading this judgment, most writers and academics have expressed the view that the court was merely interpreting the meaning of the decision in the Bolam Case. The author shares this view. This is because the court itself made reference to the Bolam Case, and further opined that the opinion of the “responsible body” mentioned in the Bolam Case needed to have a logical basis for its opinion. This statement, clearly, is not an overruling or a shifting of the Bolam Test but merely an interpretation.

¹⁹ [1997] 4 All ER 771.

In addition, decisions that followed the Bolitho Case in fact took a restrictive view of the decision in the Bolitho Case itself. A perfect example is the case of *Birch v University College London Hospital*²⁰ in which the court took the view that the defendant expert's opinion (that is, evidence led by an accused medical practitioner) will only be rejected if it cannot withstand logical analysis. This in fact is an affirmation of the Bolam Test which requires that a doctor is not negligent if his conduct is in conformity with and acceptable as proper by a "responsible body of medical men".

Many other writers and academics in fact take the view that the Bolitho Case "had little to no impact on how the courts subsequently set the standard of clinical negligence claims²¹." Clearly, this shows that contrary to what some writers and academics argue, the Bolitho Case did not make any significant change to the Bolam Test.

It is however worth mentioning that other Common Law jurisdictions have in fact taken a more drastic step by completely rejecting the Bolam Test and solely reserving for the court the determination of whether a practice is acceptable and proper, as well as logical. Most notably is the decision in *Rogers v Whitaker*²² in the High Court of Australia in which the court refused to apply the Bolam Test to a doctor's duty to warn a patient of possible outcomes of a certain treatment. Later on, in *Naxakis v Western General Hospital*²³, the Australian courts completely rejected the Bolam Test. Since that decision, the Bolam Test is no longer followed in Australia²⁴.

²⁰ [2008] EWHC 2237 (QB).

²¹ Claudia Carr, *Unlocking Medical Law and Ethics*, (London: Hodder Publishers, 2012), p20.

²² (1992) 175 CLR 479.

²³ (1999) 73 ALJR 782 .

²⁴ John Deveraux, *Medical Law 2nd edition*, (New South Wales: Cavendish Publishing (Australia), 2002), p112.

The author nonetheless takes the view that completely disregarding the Bolam Test is rather a step too drastic, and that the Bolam Test is a sound principle of law and it remains the accepted standard in England and other Common Law jurisdictions such as Malaysia and India.

3.5 LIABILITY FOR MEDICAL NEGLIGENCE

The concept of liability entails that a person takes responsibility for the damage occasioned to another. This is usually for purposes of providing compensation to offset the damage done²⁵. In terms of liability for medical negligence, the general rules applied in determining liability in an employer-employee relationship apply. Individual medical practitioners will be liable for damages only where they are operating a surgery or clinic or medical centre in their name (as a form of business) or where they were offering their services as a consultant.

In any other situation, it is the hospital that will be vicariously liable for the negligence of an employee doctor or medical practitioner. In the case of *Collins v Hertfordshire Health County Council*²⁶, it was held that the hospital was liable for the actions of the house surgeon as its employee, but it was not liable for those of the visiting surgeon. Further, in *Cassidy v Ministry of Health*²⁷, it was held that:

...hospital authorities cannot [perform treatments and surgeries] by themselves: they have no ears to listen through the stethoscope, and no hands to hold the surgeon's knife. They must do it by the staff which they employ; and if their staff are negligent in performing the treatment, they are just as liable as anyone else who employs others to do his duties for him.

The general rule is that, as can be seen from the quotation, liability for negligence of medical practitioners falls on the hospitals they are employed with, while consultants and visiting surgeons are themselves liable for any negligence they may cause. The only instance where a

²⁵ Claudia Carr, *Unlocking Medical Law and Ethics*, (London: Hodder Publishers, 2012), p11.

²⁶ [1947] 1 All ER 633.

²⁷ [1951] 2 KB 343.

consultant will not be liable is where the hospital fails to provide a reasonable system of care. This was the decision of the court in *Bull v Devon Area Health Authority*²⁸.

3.6 CONCLUSION

This chapter has discussed the concept of medical negligence, pointing out that for there to be the tort of medical negligence the elements required for general negligence have to be present. The three elements are the existence of a duty of care, a breach of that duty, and resultant foreseeable damage. The chapter has however pointed out that the tort of medical negligence differs with other professional negligence torts on one point—the standard of care required of medical practitioners. This standard is the Bolam Test. The chapter has discussed the development and application of the Bolam Test as well as the apparent shift in its application, arguing that the shift made is in fact not a significant one and that the Bolam Test as originally expounded in the Bolam Case remains the accepted legal standard in modern day medical practice in most Common Law jurisdictions, with the exception of Australia. This chapter has further discussed what liability is and on whom it falls in a claim of medical negligence.

The discussions in this chapter inform the discussion in the next chapter, which will focus on critiquing the decision of the Supreme Court in the Kopa Case. The standard of care discussed here will be applied in critically analysing the said case. The next chapter is thus a critique of that decision.

²⁸ [1993] 4 Med LR 117.

CHAPTER 4

CRITIQUE OF THE CASE OF KOPA v UNIVERSITY TEACHING HOSPITAL BOARD OF MANAGEMNET, SCZ No 8 OF 2007 CASE

4.1 INTRODUCTION

The aim of this chapter is to critique the decision of the Supreme Court of Zambia in the Kopa Case. This will be done in the light of the principles underlying the concept of medical negligence discussed in chapter three.

The concept of medical negligence has been fully discussed in the preceding chapter. Both chapters two and three have discussed the basis for medical negligence, showing how it traces its roots to the concept of professional negligence, which in turn is a branch of the tort of general negligence.

Since the emergence of the tort of negligence as a separate tort, there have been a plethora of court decisions on the subject not only in England but in all other Common Law jurisdictions, Zambia being among them. It is from this general tort that medical negligence developed.

The field of medical negligence, although a well recognised and developed area of law in other Common Law jurisdictions (especially First World countries such as England, The United States and Australia), has not seen much litigation in Zambia. At the time of writing this paper, the author was only able to find five cases of medical negligence reported in the Zambia Law Reports. The author is however of the view that there have been a lot more instances of medical negligence that have not seen the confines of the court structures. This view is based on an interview the author had with a medical practitioner from the University Teaching Hospital who wished to remain anonymous. The said practitioner stated that instances do in fact occur where

harm is done to patients by practitioners attending to them but that most of these instances are either pursued in a lackluster manner by the victims or never pursued at all. In other instances, the matter is amicably settled outside court.

This chapter is concerned with the latest decision of the Supreme Court of Zambia on a medical negligence claim; the case being *Kopa v The University Teaching Hospital Board of Management*, SCZ Number 8 of 2007.

The brief facts of the case and the decision of the Court will be discussed and that will be followed by a critique of the judgment. The critique will be made in the context of the apparent shift in the application of the Bolam Test, as discussed in the preceding chapter. On this basis, the author will provide his view as to whether the Supreme Court's decision meets the principles governing the tort of medical negligence today, and whether the decision is sound at law.

In addition to the above, this chapter will discuss whether the decision of the Supreme Court in the Kopa Case enhances the legal framework and jurisprudence on medical negligence in Zambia. This chapter will further consider whether the legal framework is sufficient and efficient in protecting victims of medical negligence.

4.2 BRIEF FACTS OF THE CASE

In the year 1998, on the 25th of December—on Christmas Day—the plaintiff's son swallowed a bottle cap which lodged itself somewhere in the gullet of the eight year old boy. The young boy, whose name was Chuubo, was rushed to the University Teaching Hospital by his mother. There, an x-ray was taken and it revealed that the bottle cap had located itself at the top of the young boy's oesophagus (also called the gullet or food pipe).

The first doctor to attend to Chuubo decided to perform a procedure called an oesophagoscopy. This procedure requires a medical practitioner to use an instrument called an oesophagoscope which has a light and a tube. The tube is designed to be inserted into the oesophagus to locate the stuck object and either hook it and pull it out through the mouth, or to push it down into the stomach.

The first doctor, upon performing this procedure, was not successful. The next doctor to attend to the embattled young boy was a consultant surgeon. This was a day later, on the 26th of December. The consultant surgeon opted to perform an oesophagoscopy—the same procedure which the first doctor had performed—and not only was he also unsuccessful, but he only pushed the bottle cap further down the oesophagus of the child.

Two days later, on the 28th of December, the consultant surgeon performed the same procedure again. This time, he could not do much but abandon the whole procedure because the young boy, whose oesophagus arteries had been severely damaged, was experiencing massive bleeding. He subsequently had to undergo blood transfusion. It wasn't until a thoracotomy—an operation involving the opening of the chest—was performed that the bottle cap was removed from the oesophagus of the young boy. Despite all these efforts, on the 4th of January, 1999, Chuubo died.

The deceased's mother, through counsel, commenced legal proceedings against the hospital. In the statement of claim, the plaintiff mother contested that there had been a “loss of expectation of life and consequential loss” caused by the “negligent conduct” of the servants or agents of the respondent, which resulted in the death of the plaintiff's son. The plaintiff claimed for damages.

4.3 THE DECISION OF THE COURT

The Supreme Court, upon consideration of all the evidence presented by both parties, applied the Bolam Test to determine whether the actions of the medical practitioners had fallen below the standard of care required of medical practitioners. In the course of the judgment, the Court stated that the Bolam Test can be divided into two parts, that the first part requires that the standard of care required a professional such as a medical practitioner is that of an ordinary skilled man exercising and professing to have that skill. The court went on to state that the second part of the Bolam Test is concerned with determining whether a medical practitioner has in fact fallen below the standard required by the first part of the test. The Court stated that a practitioner who acts in conformity with an accepted, approved, current practice is not negligent.

Consequently, the defendant hospital was found not liable for negligence, based on the application of the Bolam Test to the conduct and procedures undertaken by the medical practitioners who had attended to the deceased in the defendant hospital.

4.4 A CRITIQUE OF THE DECISION

The Supreme Court cannot be faulted in as far as it applied the Bolam Test. As a matter of fact, the author holds the view that the Bolam Test is the accepted test to be applied in determining whether a medical practitioner breached his duty of care. The Court correctly stated that "...the Bolam test in medical negligence cases has gained wide acceptance as the proper approach in such cases." The Court here was essentially showing that the Bolam Test is the standard for determining whether a practitioner has breached his duty or not.

The author is of the view that, as already stated earlier, the apparent shift made in the Bolitho Case is in fact not significant, as it merely re-affirmed and re-interpreted what the court had said

in the Bolam Case. This can be seen from the decisions made by the courts in the subsequent cases—that is, after the decision in Bolitho. In the case of *M (a Child by his Mother) v Blackpool Victoria Hospital NHS Trust*¹ it was observed that it would very seldom be right for the court to reject a medical expert’s views on the ground that the court considered it to be unreasonable. In *Burne v A*² the court took the view that it was not entitled to rely on common sense and thereby reject evidence from medical experts because the court itself thought the evidence was unreasonable.

What the above cases show is that indeed, even after the decision in the Bolitho case, the Bolam Test remains the accepted standard for determining whether an accused medical practitioner has fallen below the standard required of him, and the Supreme Court in the Kopa Case correctly made this observation. This is not to say that the court has no say where an accused medical practitioner leads evidence from fellow medical practitioners that his actions conforms to accepted medical practice. This is to simply state that medical practitioners are experts in their fields and opinion rendered by them should not be disregarded by the courts, whose opinion in this case would be mere common sense in the face of medical expertise. The Bolam Test thus is not only an acceptable standard, but the right standard as well.

The court in the Bolam Case stated that a doctor is not guilty if has acted in accordance with a practice accepted as proper by a “responsible body of medical men”. The court in the Bolitho Case used the words “responsible, reasonable, and respectable” in reference to evidence which the court should accept before it found an accused practitioner not to be liable. Clearly, there is no difference in meaning between the phrases used by the two courts besides mere semantics.

¹ [2003] EWHC 1744.

² [2006] EWCA Civ 24.

The responsible body of medical men mentioned in the Bolam Case was intended to be “reasonable and respectable”, as stated in the Bolitho Case. The apparent shift made to the application of the Bolam Test by the Bolitho Case is thus not so significant that the test should be regarded to have been changed by the Bolitho decision. The test remains the same, and the Supreme Court of Zambia correctly applied it in the Kopa case.

For all intents and purposes, the Bolam Test was originally intended to be such that the body of responsible medical men giving evidence to support a certain medical practice to be logical, as correctly interpreted in Bolitho. Thus, the Bolam Test remains a sufficient test for the standard of care, and the apparent shift in Bolitho was in fact a mere interpretation of the Bolam decision.

The Supreme Court of Zambia went on to hold that “In this case, the ‘responsible medical opinion’ would be the testimony of PW6 who was called ...as an expert witness.” Here, the Supreme Court was basically pointing out the fact that there in fact had been evidence from a responsible medical practitioner to the effect that the procedures carried out by the first doctor and the consultant surgeon—that is the oesophagoscopy—was in fact an acceptable procedure. The author does not wish to state whether the procedure itself is acceptable or not; that is properly for the medical practitioners to know.

The author however is of the view that the Supreme Court correctly stated the law because the decision in the Bolam Case did not limit the number of medical practitioners acting as experts to any number. In *Defreitas v O’Brien*³, it was stated that the size of the supporting body of medical opinion was not relevant, merely that “there was a responsible body”.

³ [1995] 6 Med LR 108.

It has been stated that there are writers and academics who take the view that the decision in Bolitho in fact made a significant change to the law in Bolam, and that the later decision was not merely interpreting the earlier decision but that it was stating a new standard. Even if this were the case, the Supreme Court of Zambia would still be on firm ground by following the decision in Bolam, even if the Bolitho Case made significant changes to the Bolam Test. This is because the courts in Zambia are not bound by decisions made by the English courts. The decisions of the courts in England form part of the common law which indeed applies to Zambia through Section 2(a) of the English Law (Extent of Application) Act⁴, but the same are not automatically binding but merely form a body of laws to which the courts in Zambia may make reference in arriving at their own decisions. The fact that decisions made by English courts and courts from other Common Law jurisdictions are merely persuasive is trite law in Zambia. This position has been reaffirmed by a plethora of cases.

The above position in fact is what prevails in other Common Law jurisdictions around the world. This can be seen from the practice different Common Law jurisdictions engage in. Australia, which has completely rejected the Bolam Test, is not bound by decisions made by English courts. If it was, it would not have had the liberty to completely disregard the Bolam Test. Malaysia is another example. The courts in Malaysia have taken a reserved state with regard to completely abandoning the Bolam Test, unlike what the courts in Australia have done. The Malaysian courts have shown their stance in some of the decisions they have made⁵. The courts in India take a similar view with the Malaysian courts with regard to the Bolam test. All this shows that courts in different Common Law jurisdictions have the authority to decide which decisions of fellow Common Law jurisdiction they should follow in their own jurisdictions. This

⁴ Chapter 11 of the Laws of Zambia.

⁵ P N J Kassim, "Does the Bolam Test Still Reign in Malaysia?" *Faculty of Laws IIUM Gomba*, p1.

is because none of the jurisdictions is bound by the other's decisions. Thus, the Supreme Court of Zambia would still be on firm ground by not applying the decision in *Bolitho* even if that decision had made a significant shift to the application of the Bolam Test.

The author is thus of the view that the Supreme's Court decision is sound at law because firstly, as stated earlier, the shift made in the *Bolitho* case is not a significant one and secondly, that even if the said decision did in fact make a significant shifting change, the Court is not bound by decisions from other Common Law jurisdictions. The decisions of such courts are merely persuasive and the Supreme Court of Zambia has authority to follow them or not.

In conclusion, then, the author is of the view that the legal framework and jurisprudence on the law on medical negligence in Zambia remains the Bolam Test, as originally propounded in the Bolam Case because it has unreservedly been adopted and applied by the Supreme Court of Zambia in all the five cases reported in the Zambia Law Reports concerning medical negligence. The five cases include *Cicuto v Davidson and Oliver*⁶, *Edna Nyasulu v Attorney General*⁷, *Wang v Health Professionals Council of Zambia*⁸, *Rosemary Bwalya v ZCCM Malcom Watson Hospital and Dr Malik*⁹, and the case at hand; the Kopa Case. It should be borne in mind that the first three cases are High Court decisions while the last two are Supreme Court decisions. The Supreme Court also unreservedly applied the Bolam Test in the 1998 unreported case of *Matenda v ZCCM*.

From the foregoing, it is clear that the law governing medical negligence in Zambia is in accordance the Bolam Test as it was originally propounded in *Bolam v Friern Hospital*

⁶ (1968) ZR 149 (HC).

⁷ (1983) ZR 105 (HC).

⁸ 2012/HK/339.

⁹ (2005) ZR 1 (SC)

Management Committee, and the decision of the Supreme Court in the Kopa Case enhances the legal framework and jurisprudence on medical negligence in Zambia.

This legal framework as it stands is sufficient and effective in protecting victims of medical negligence in Zambia. This fact is further enhanced by the existence of legislation that not only regulates the conduct of health practitioners, but also protects persons who may have fallen victim to negligence by medical practitioners. The legislation is the Health Professions Act¹⁰, which in Section 61 makes provisions of what may amount to professional misconduct. Medical negligence itself may fall within the ambits of professional misconduct as provided for in the Act. This was certainly the finding of the High Court in the recent case of *Wang v Health Professions Council of Zambia*¹¹ in which the plaintiff was challenging the defendant's confiscation of his practicing licence due to his negligent treatment of a patient. The High Court held that the appellant's negligent treatment of a patient did in fact amount to professional misconduct as envisaged by the Act, thus the defendant was justified in depriving him of his practicing licence. The Court further upheld the decision of the Health Professions Council by which the Council ordered the appellant's hospital to compensate the victim of the appellant's negligent treatment. It thus can be seen that the legal framework and jurisprudence in Zambia is in fact sufficient and effective in protecting victims of medical negligence.

4.5 CONCLUSION

This chapter has provided a critique of the decision of the Supreme Court in the case of *Kopa v University Teaching Hospital Board of Management*¹². The chapter outlined the brief facts of the case, the decision of the court and then finally gave a critique of the said decision. The critique is

¹⁰ Number 24 of 2009.

¹¹ 2012/HK/339.

¹² SCZ Number 8 of 2007.

to the effect that the Supreme Court correctly applied the Bolam Test and that the decision of the Supreme Court is sound at law. The chapter has concluded that the law in Zambia with regard to medical negligence remains that which was propounded in the Bolam Case and this is the position the Supreme Court has taken in the Kopa Case and every other medical negligence case that has been decided before the Zambian courts.

The chapter has also found that the decision of the Supreme Court enhances the legal framework and jurisprudence on medical negligence in Zambia, and that the same is sufficient and effective in protecting victims of medical negligence.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter aims at providing a conclusion of the paper undertaken and also to give recommendations for further research on the topic of medical negligence in Zambia. The chapter will begin by giving a conclusion of the discussion undertaken in the writing of this paper, outlining the findings of each chapter. Thereafter, a section containing recommendations will follow.

5.2 CONCLUSION

The aim of this paper was to critically analyse the decision of the Supreme Court of Zambia in the case of *Kopa v University Teaching Hospital, SCZ Number 8 of 2007*. The paper has achieved this aim through meeting the set objectives which included an elucidation of the principles governing general negligence and professional negligence. The concept of medical negligence was also discussed, bringing out all the elements that constitute the tort. The essay went on to provide a critical analysis of the decision of the Supreme Court in the Kopa Case, making a finding that the court correctly applied the principles governing medical negligence today, as can be seen from the practice of most Common Law jurisdictions today, because the Bolam Test remains the accepted standard for determining medical negligence. The essay made an observation to the effect that the Supreme Court is not bound to follow decisions of courts in other Common Law jurisdictions, hence it's decision in the Kopa Case, regardless of the fact that it did not apply the findings of the English court in the Bolitho Case (whether the shift made therein is significant or not), is sound at law. The essay, nonetheless, maintained through case law examples that the decision in the Bolitho Case made no significant changes to the Bolam

Test. The conclusion of the author was that the law governing medical negligence is thus based on the Bolam Test as expounded in the Bolam Case.

The paper has also found that the legal framework and jurisprudence governing the law on medical negligence in Zambia is basically the principles outlined in the Bolam Case, and that the same is sufficient and effective in protecting victims of medical negligence, especially with the existence of the Health Professions Act, Number 24 of 2009.

In as far as enhancing the legal framework and jurisprudence of medical negligence in Zambia is concerned, the paper found that the decision of the Supreme Court in the Kopa Case does in fact do so, and the decision is sound at law. The court's decision is consistent with previous decisions it has made on the subject and in that regard, the decision enhances the legal framework of medical negligence in Zambia.

5.3 RECOMMENDATIONS

The essence of any legal system is to ensure that justice should not only be done, but it must be seen to be done. This position cannot be achieved except where there is certainty of the law. In this regard, the author takes the view that despite the decision of the Supreme Court in the case of *Kopa v University Teaching Hospital Board of Management* being a sound decision at law, the courts in Zambia need to take a more robust approach when determining cases of medical negligence. The courts need not only state the law as it was propounded in the Bolam Case and make a fast determination and end there, but they also need to take note of the developments in other Common Law jurisdictions. This is not to say that the courts should adopt the decision of courts elsewhere; this is to state that taking a more robust approach in determining matters ensures a larger degree of certainty.

For example, when dealing with medical negligence claims, the courts in India, Australia and Malaysia do not only make a determination forthwith and settle the matter, but they take note and explain briefly the developments in the area of medical negligence that are taking place in other Common Law jurisdictions, then further state that they would or would not take a certain approach and in addition give reasons as to why they have decided in a manner similar or different from courts in other jurisdictions.

The Supreme Court in the Kopa Case merely stated the law; a fairly reasonable observer of developments in the area of medical negligence in other Common Law jurisdictions could not be faulted for being uncertain of the Supreme Court's view with regard to arguments that in fact the Bolam Test has seen a significant shift since the decision in the Bolitho Case.

It would appear that delving into a discussion as to the effect of the Bolitho Case on the Bolam Test would merely be an academic exercise on the part of the court but the courts are not precluded from commenting on a concern which may serve public interest, even if it seems academic in nature. Thus, a particularly certain position with regard to the area of medical negligence, especially in Zambia where the jurisprudence on medical negligence is in its infancy, would definitely fall within the ambit of public concern and interest as it would help to not only have a clear and certain law on the subject, but would in the long run help to protect victims of medical negligence.

BIBLIOGRAPHY

BOOKS

- Rogers, W V H. *Winfield & Jolowicz on Tort 18th edition*. London: Sweet & Maxwell Publishers, 2010.
- Breen, Kerry J, et al. *Good Medical Practice: Professionalism, Ethics & the Law*. Cambridge: Cambridge University Press, 2010
- Elliot, Catherine and Quinn, Frances. *Tort Law, 7th edition*. Harlow: Pearson Education Limited, 2009
- Deveraux, John. *Medical Law, 2nd Edition*. New South Wales: Cavendish Publishing (Australia), 2002.
- Stauch, Marc, et al. *Sourcebook on Medical Law 2nd edition*. London: Cavendish Publishing Limited, 2002
- Stephenson, Graham. *Source Book on Torts, 2nd edition*. London: Cavendish Publishing Limited, 2000
- Elliot, Catherine and Quinn, Frances. *Tort Law 8th edition*. Harlow: Pearson Education Limited, 2011
- Cooke, John. *Law of Tort 10th edition*. Harlow: Pearson Publishing Limited, 2011
- Owen, Richard. *Essential Tort Law 3rd edition*. London: Cavendish Publishing Limited, 2000.
- Stuhmcke, Anita. *Essential Tort Law 2nd edition*. Sydney: Cavendish Publishing (Australia), 2001.
- Harpwood, Vivienne. *Principles of Tort Law 4th edition*. London: Cavendish Publishing Limited, 2000.
- Loewy, Erich. *Textbook of Medical Ethics*. New York: Plenum Publishing Corporation, 1989.
- Carr, Claudia. *Unlocking Medical Law and Ethics*. London: Hodder Publishers, 2012.
- Herring, Jonathan. *Medical Law 2nd edition*. Harlow: Pearson Education Limited, 2010.
- Stauch, Marc et al. *Texts, Cases and Materials on Medical Law and Ethics 4th edition*. New York: Routledge Publishers, 2012.
- Maclean, Alasdai. *Briefcase on Medical Law 2nd edition*. London: Cavendish Publishing, 2004.

ARTICLES

- Studdert, David M. "Medical Malpractice". *New England Journal of Medicine* (2004)
- Sappideen, Carolyn. "Bolam in Australia—More Bark than Bite?" *UNSW Law Journal* 33, no. 2, (2010)
- Kassim, PNJ. "Does the Bolam Test Still Reign in Malaysia?" *Faculty of Laws IIUM Gombak*.

THESES AND DISSERTATIONS

- Chibwe, Fanwell. "*Damages in Negligence Cases in Zambia*". Bachelor's Degree Dissertation, University of Zambia, 2010.
- Mwanawasa, Mayamba. "*Professional Negligence in Zambia: an Appraisal of the Medical Profession*". Bachelor's Degree Dissertation, University of Zambia, 2005.

Phillips, Andrew Fulton. "*Medical Liability and the Law of Negligence*". PhD Thesis, University of Edinburgh, 1992.

de Vries, Ubaldus. "*Professional Negligence Reconsidered*". PhD Thesis, Dublin City University Business School, Republic of Ireland, 1996.