Abstract

I believe there will always be a possibility of medical risk or mistake, therefore, there will always be room to reform the tort framework for liability. The medical negligence system is put in place in order to protect patients from negligence carried out by doctors and medical professionals and help return them to the position they were in before the negligence occurred.

A common question that I have discovered in my research and in this article is: does the current UK system drive doctors to performing procedures which are not necessarily the most beneficial to their patient, due to it having less risks? This article discusses elements of the framework that are effective, possible reforms that have previously been suggested as well as new findings, my personal opinion and outlook on medical negligence within the UK.
The conclusions that I reached show that I believe there is a need for reform, however, I do also believe certain aspects of the current system are effective. Through the implementation of aspects of The Redress Act 2006, The Saatchi Bill and the successful elements of the current framework I propose a reform that will reduce the number of medical negligence claims and create a more effective, up-to-date framework.

Introduction

It is suggested that the increased number of medical negligence claims, “Has encouraged clinicians to practice ‘defensive medicine’ and avoid risky procedures”. I believe in order for change to occur there must be a more effective system put in place, or, the current framework must be expanded upon and modernized. However, does the progression of medicine that has occurred since the decision of the Bolam case, almost 60 years ago, prove that medical professionals are not afraid to advance tried and tested practices and continue to expand and develop modern medicine?

This leads me to ask 3 questions which I will discuss throughout this article:

1. Does the increase in medical negligence claims leave medical professionals in fear, causing them to practice defensive medicine?

2. Does this leave doctors lacking encouragement to improve upon and continue to find more innovative ways to benefit their patients, as well as advancing medicine?

3. Or, is the current system beneficial to both doctors and patients as it may encourage doctors to be more systematic in the diagnosis and more accurate in surgeries and/or other medical proceedings, As well as learning from previous medical negligence claims and taking full responsibility for their patients, thus giving the patient a better outcome?

The doctor-patient relationship is one based on trust: a patient believes that his/her doctor will provide the best treatment available and applicable to their condition. We expect medical professionals to honor their duty of care to the best of their knowledge and ability. Communication is key to this honest, trusting, relationship, it is possible that the current framework has damaged this relationship as it is said to “undermine” it, as well as being “damaging to the morale of clinicians and clinical teams” and does not provide “explanations and apologies to patients who suffer harm”. I believe having trust and confidence in our doctors is extremely essential to the framework of medical negligence, this is an area where I believe the current tort framework could be enhanced, through full disclosure and communication to patients, “action to improve communication and information sharing with patients as well as developing a more modern process of informed consent will also help reduce complaints and claims for litigation”, which I will also discuss in this article.

Case Law

The Bolam Test

The present framework for medical negligence stems from the Bolam v Friern Hospital Management Committee case, “The Bolam test provides that if the medical opinion is not capable of withstanding logical analysis the judge is entitled to conclude that the opinion offered is unreasonable and the action is negligent.” The test set the standards for professionals including doctors and potentially provides a defence for them: “A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men, skilled in that particular form of treatment; nor is he negligent merely because there is a body of opinion which would adopt a different technique.”

Criticisms of the Bolam test surrounds the high standard “the claimant must overcome in order to prove a
doctor negligent”, as they would be faced with a team of medical professionals who would verify whether or not they would have come to the same conclusions the defendant did. I believe the development of this test through Bolitho v City and Hackney health Authority created a test that is more realistic for claimants to receive a fair outcome for any negligence they have suffered.

The Bolitho Test

The Bolam test was appealed in Bolitho v City and Hackney Health Authority, helping to establish approved practices. Lord Browne-Wilkinson adapted the test, adding, “the court has to be satisfied...that such opinion has a logical basis’. ‘The court was not obliged to hold that a doctor was not liable for negligent treatment or diagnosis simply because evidence had been called from medical experts who genuinely believed that the doctor’s actions conformed with accepted medical practice.” Thus the judge must be satisfied that “a defensible conclusion [is reached] on the matter”.

Marriott v West Midlands RHA

The Bolitho Test was applied further in Marriott v West Midlands RHA where it was held that “...dismissing the appeal, the trial judge was entitled to carry out her own assessment of risk in the circumstances and was not bound to follow the opinions of a body of experts. The opinion could be subjected to scrutiny in order to ascertain whether it was based on logic...the judge was entitled to consider whether the experts properly considered the risk when formulating their opinion. The judge had not erred in concluding that it was not a reasonable exercise of a GP’s discretion to leave the patient at home in the circumstances, Bolitho City and Hackney HA [1998] A.C. 232 applied. “Despite this decision, subsequent case law has shown a reluctance on the part of judges to hold that a view genuinely held by a competent medical expert is unreasonable” (see Wisniewski v Central Manchester HA [1998] P.I.Q.R. P324).

The Sidaway Test

The Sidaway test adds the factor of disclosure of outcomes, procedures and risks to a patient “The Doctor’s duty can be seen, to be one which requires him not only to advise as to medical treatment but also to provide his patient with the information needed so the patient can balance the medical advantages and risks alongside, his family, business or social responsibilities of which the doctor may be only partially informed.”

I believe The Sidaway test increases patient’s confidence in their doctors and the UK’s healthcare system. This does not only benefit patients but also doctors. Full disclosure of information gives the patient a complete picture, which they can make an informed decision on; therefore, the doctor’s decision is indefeasible. Despite this, there are criticisms of the Sidaway decision “The danger with this is that it places doctors on a pedestal whilst leaving the courts without adequate means of scrutiny”. However, I believe that doctors are still fully responsible for their patients, and therefore, the patient making the decision does not remove the duty of care a doctor has, or, the liability for any negligence that may happen after the information has been passed on. This is a strong factor of the current framework I deem to be effective and should be further implemented.

The development of the case law could be considered an element that does not need reform, as it establishes that both patients and healthcare professionals are equals.

Reform proposals and changes to the law

The rise in medical negligence claims filed against the NHS has increased its financial burden. This has encouraged a reform that is “seeking to rectify flaws within the existing system”. It is suggested that this increase has resulted from “increasing complex and ambitious interventionist procedures being undertaken”. If doctors are practicing tried and tested procedures, as suggested previously, why are there a vast number of medical negligence claims for explorative procedures? I, therefore, question whether I do believe that the
current UK system does discourage the advancement of medicine and testing out new procedures. Despite this, I do believe that the tort framework should not only be in place for people to receive damages for malpractices but to prevent them from occurring to begin with.

**Making Amends – Clinical Negligence Reform**

The purpose of this reform published in July 2003 by Sir Liam Donaldson, (Chief Medical Officer) is to reduce the number of medical errors that occur. It states that the “NHS is one of the first health systems in the world to give high priority to enhancing patient safety by systematically learning from what goes wrong”.

The aim: “the emphasis of the NHS is directed at preventing harm, reducing risks and enhancing safety so that the level of medical error is reduced; there is a better co-ordinated response to harm and injury resulting from health care including investigation, support, remedial treatment and care where needed and fair recompense; the system...is affordable and reasonably predictable in the way it operates; the system for providing redress acts as an incentive on health care organisations and their staff to improve quality of care and patient safety”.

I believe this is an extremely effective way to significantly decrease the number of medical errors as well as encouraging doctors to be more confident in their capabilities. As doctors continue to become more aware of what practices are ineffective and cause harm to patients, through the investigation the reform suggests, they will practice more reliable and successful procedures. “The relevance to medical litigation is obvious...if more of the healthcare risks that currently cause harm to patients are identified, anticipated and reduced, then the number of avoidable injuries to patients should be reduced. So too should their severity. This must be the primary aim.”. This reform proposal lead to the NHS redress scheme.

**The NHS Redress Act 2006**

I believe the redress scheme offers a more positive approach to liability within the tort framework of medical negligence. It encourages doctors to learn from medical mistakes, shifting away from the “blame” element of the past and offers patients more help and support. It also focuses on processing claims in a quicker time period, cutting expenses, encouraging a “consistent, speedy and appropriate response to clinical negligence”.

The Redress Act 2006 was put in place in order to provide patients with:

(a) The making of an offer of compensation in satisfaction of any right to bring civil proceedings in respect of the liability concerned,(b) The giving of an explanation,
(c) The giving of an apology, and
(d) The giving of a report on the action which has been, or will be, taken to prevent similar cases arising, but may specify circumstances in which one or more of those forms of redress is not required.

The UK needs a framework that “is sufficiently flexible to work effectively for the different health needs and approaches within the NHS and [has the ability] to adapt to future changes”. I consider the Redress act to be able to provide this flexibility and improve the current framework for medical professionals and patients. The Act “aims to supplement the tort-based system of compensation, without going all the way to adopting a no-fault compensation system”. This improvement could greatly benefit the NHS system; the question is, was it a success?

There is some debate on whether or not the redress has changed the framework “it does not appear that it intends to at present. This may in part have been delayed because of the proposal to extend the portal to low value clinical negligence cases”. I believe this reform should be implemented fully by the NHS, as it has clear advantages that will benefit not only patients but also doctors, to have an overall effective system that will cut costs, reduce negligence and, potentially develop medicine.
Lord Saatchi’s Medical Innovation Bill:

It is proposed that the current framework is prohibiting doctors from finding new, innovative ways to improve medicine. Lord Saatchi’s strongly agrees with this, thus, the Saatchi Bill was created. The purpose of the bill is to completely reform against the current framework of clinical negligence and suggests a new approach that will allow doctors to revolutionize medicine by completely eradicating defensive medicine “The medical innovation bill is designed to dispense with the Bolam test of whether a doctor’s treatment is negligent. He believes that the current law mandates adherence to standard practice”.

The Bill is not fully supported, The “BMA, MDU, MPS and the NHSLA” are opposed to the Bill, however, with the support of the government Lord Saatchi aims to drive the bill through parliament . The controversy and disagreement that surrounds the bill is due to the belief that the current UK system “does not impede medical innovation”. Although I do understand that defensive medicine is widely practiced I am aware that medicine has not remained the same, as it was when the Bolam case was decided.

The main issue critics have with the Saatchi Bill is that “they are concerned that the Bill will have adverse ramifications for patients safety”. The most important outcome of medical negligence is the safety of patients – this cannot be forgotten. However, I believe in the importance of medical innovation: medicine should not be held back due to fear of liability. Medicine must continue to develop and this is where I support elements of the Saatchi Bill. Although it is controversial and slightly radical, the Bill has many strong aspects that I believe could change the current rigid framework and allow for the flexibility that the Redress Act proposes. I suggest a reform that incorporates elements of both, The Redress Act and the Saatchi Bill to create a framework that allows for medicine to advance as well as Medical professionals being able to learn from negligence claims and avoid them. Finding new ways to treat and diagnose patients and therefore, continuously modernize medicine, perhaps coming closer Lord Saatchi’s aim of “one day curing cancer”.

Problems within the NHS and the current UK framework:

The current framework is effective to a certain degree, but there are also many ways that it needs to be reformed (some of which are mentioned in this article previously). Within the NHS, however, I believe that certain changes and cuts have caused further problems for the UK system. “Changes to the law mean that, aside from exceptions which involve lasting and severe brain damage to children, legal aid will no longer be available to those wishing to make a claim of medical negligence against healthcare providers. It means that the baseline means of support for anyone who has been adversely affected by medical negligence has been removed, making the possibility of getting compensation a much more difficult prospect”.

Examples of other problems with the “traditional system of paying compensation based on tort law”:

- The length of time the process takes from claim to compensation and the complexity of the system;
- The high legal costs of litigation proceedings;
- The relative absence of alternative ways to resolve disputes in medical injury cases
- Discouragement from reporting errors, which is a prerequisite to learning from them . The NHS has been accused of trying to cover up malpractice and deliberately withholding evidence to hamper such prosecutions. Denying liability and haggling over costs has also led to controversially high legal fees incurred by defending these proceedings

I believe a reform, when implemented fully, could rectify these issues and enhance the positive attributes to the current framework.

Conclusions:

This Article explores many elements of the current UK Tort framework for liability within medical negligence,
as well as possible reforms that I believe need to take place in order for an effective system to be in place in the UK. It outlines the fact that liability for medical negligence should not cause patients to be sceptical and doubtful of their doctors as well as suggesting ways to prevent doctors from practicing defensive medicine. I have reached many conclusions on whether or not a reform is necessary. In these conclusions I offer a new reform that is a combination of the effective procedures that are contained in, The current UK tort framework for liability in Medical negligence, The NHS Redress Act 2006 and The Saatchi Bill to produce a framework that reduces the amount of medical negligence cases in the UK and creates a fair and trusting atmosphere for doctors, medical professionals and patients. These are:

- That medicine needs to be improved upon continuously – this must not be held back due to fear of liability as The Saatchi Bill suggests, I believe in the importance of removing the practice of defensive medicine, in order to allow doctors to innovate and modernise upon medicine;
- However, I do not believe in “dispensing” with the Bolam case, as the Bill suggests, as I believe that is an effective element of the current framework. The development from The Bolam test, to The Bolthio test, to The Sidaway Test, creates a system where doctors and patients are equal and allows for a fair outcome;
- Medical professionals must disclose all information about procedures, surgeries and any other medical undertakings so patients are able to assess possible outcomes with help and advice from doctors. However, patients being aware of these does not mean doctors cannot be held liable for any negligence that occurs;
- The Redress Act 2006 adds positive attributes to a possible reform, that doctors must learn from Medical negligence cases and use this as a way to improve medicine. When a claim of medical negligence is made I believe the reform should ensure that they are dealt with effectively and in a non-time consuming manner. This will not only make the system more cost effective but it will also allow patients to receive the correct damages to help return them to the position they were in before the negligence occurred as within the current framework “the cost of proceedings often outweighs the compensation given to patients”. The Redress Act also aims to provide patients with answers, explanations and apologies which I believe should be fully incorporated into the reform;
- Finally, I believe the most important aspect of Liability of medical negligence is that the number of negligence cases are reduced through learning from past cases and adopting new procedures that work best for patients and creating a positive and fair system within the UK’s medical negligence framework.

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