

Conundrums of the extremes expounded in Bolam and Bolitho tests: unlawfulness in Delict as a way forward

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The application of Bolam and Bolitho tests as expounded in *Bolam v Friern Hospital Management Committee* (1957 1 WLR 583) and *Bolitho v City Hackney H.A* (1998 A.C. 23) respectively has been subjected to prolonged criticism in medical negligence litigation. While, under Bolitho, the purported peer medical opinion can be challenged, or departed from, on the grounds of the said opinion being incapable of withstanding logical analysis, or is irresponsible or unreasonable, Bolam inordinately relies on the peer professional medical opinion, leaving the peers to set the required standard of care, and thereby, to be the final arbiters of medical negligence litigation. Owing to the complexities of the two extremes expounded in Bolam and Bolitho, much controversy has engendered on the healthy balance of doctor-patient relationship. Additionally, the judges are often placed in a dilemma as to the proper approach to be adopted, when adjudicating medical negligence litigation. In light of such a quandary, the author proposes Wrongfulness/Unlawfulness in Delict as an opportune element to pitch the extremes expounded in Bolam and Bolitho. According to the test of Wrongfulness, the negligent conduct or the omission that causes harm, will be analysed in light of the general reasonable yardstick, on considerations of policy and on the legal convictions of the community, as established by the courts. Hence, the author views that, since the reasonableness criterion in Wrongfulness applies as a mechanism that inquires into the question whether a legally protected interest of a person has been infringed in an unreasonable manner or not, the judges can be more circumspect in evaluating medical opinion. Further, it would pave the way for the judges to objectively assess the situation, without rejecting medical opinion merely because it does not withstand logic and/or rationale, or the accepted medical opinion states otherwise.

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