

## Legal versus medical causation

### Case analysis: Bolitho versus City and Hackney Health Authority

Medical practitioners are familiar with medical research and publishing requirements. A quick appraisal of the authors, journal, institution, date and type of article allows the physician to judge what weight or reliance to place upon the data and discussion presented. Legal citations are different, however. The English and Hong Kong court systems are hierarchical—the highest court in England being the House of Lords (HL) and in Hong Kong, the Court of Final Appeal. Judgements made in the highest court are binding on all courts below. A civil case involving medical negligence, no matter how important, is not immediately heard before the highest court. In Hong Kong, the case is heard in the first instance by a High Court or District Court judge sitting alone, who will give judgement in favour of one party. Either party, the plaintiff or the defendant, may seek leave to appeal this judgement before three judges in the Court of Appeal. In England, as in the Bolitho case, a further appeal can be granted on important matters of law, before five judges in the HL. The most authoritative version of their Lordships' judgement in the Bolitho case was published in Appeal Cases (AC) in 1998 commencing page 232.

A case of this legal magnitude is not for the faint-hearted. Patrick Bolitho suffered injury in January 1984. Judgement in the first instance was delivered on February 1991, the case being heard by the Court of Appeal in December 1992, with the HL handing down judgement in late 1997. Most of the previous major medical negligence cases were referred to in the judgements. For someone outside the legal profession it is not possible to comprehend the amount of legal work required by such a case—a mammoth and costly undertaking, financially and psychologically, for all involved (plaintiffs, doctors, and lawyers).

Bolitho is an important case because their Lordships discuss many of the legal principles constituting negligence, including causation. For an action in negligence to succeed, the plaintiff must show that the defendant's negligence caused the damage. This is the test for causation and is usually called the 'but for' test. It is often stated thus: but for the defendant's negligence, the plaintiff would not have been injured and suffered damage. Causation as defined by the law is often a difficult concept for medical practitioners. Doctors' ideas of medical causation are based on different factors and may include their analysis of symptoms and signs, reference to appropriate articles in learned journals, and the drawing of inferences regarding a sequence of highly probable events. This process leads the doctor to a logical conclusion that fits the medical facts. For example, a doctor might reason that the administration of intravenous

adrenaline in error, caused acute hypertension and cardiac dysrhythmia such that myocardial demand outstripped supply, which resulted in acute myocardial infarction and death.

In the Bolitho case, a 2-year-old boy suffering croup was readmitted to St Bartholomew's Hospital under the care of Dr H and Dr R. On the following day he suffered two short episodes at 12.40 pm and 2.00 pm during which he turned white and clearly had difficulty in breathing. Dr H was called in the first instance and she delegated Dr R to attend in the second instance but neither doctor attended on either occasion. On both occasions the patient quickly appeared to return to a stable state. At about 2.30 pm, the child suffered an acute upper respiratory tract obstruction (URTO) and a cardiac arrest, resulting in severe brain damage. He subsequently died and his mother continued his proceedings for medical negligence as administratrix of his estate.

The defendant health authority accepted that Dr H had acted in breach of her duty of care to the patient but contended that the cardiac arrest would not have been avoided even if Dr H or some other suitable deputy had attended earlier than at the cardiac arrest. It was common ground between the parties that tracheal intubation carried out before the last episode of URTO would have ensured a patent airway so that acute airway obstruction could not lead to cardiac arrest. The judge found that the views of the patient's expert witness and Dr D for the defendants, though diametrically opposed, both represented a responsible body of professional opinion espoused by distinguished and truthful experts. The judge held that if Dr H had attended and not intubated the patient, she would have discharged her duties to a proper level of skill and competence according to the standard represented by the defendant's expert (Dr D). Therefore, it had not been proved that the admitted breach of duty by the defendants had caused the injury that occurred to the patient. In understanding the conclusion reached in the last sentence, the reader will have gone some way to understanding causation in the legal sense. The Court of Appeal by majority dismissed an appeal by the patient's mother and she appealed to the HL.

The HL held that a doctor could be liable for negligence with respect to diagnosis and treatment, despite a body of professional opinion sanctioning the doctor's conduct, where it had not been demonstrated to the judge's satisfaction that the body of opinion relied on was reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field were of a particular opinion, would sufficiently demonstrate the reasonableness of that opinion. However, where it was demonstrated that the professional opinion would not withstand logical analysis, the judge

would be entitled to hold that the body of opinion was not reasonable or responsible. This case did not represent such a situation, since it was implicit in the judgement that the Court of Appeal judge had accepted Dr D's view as reasonable. Although the judge thought that the risk involved called for intubation, the judge could not dismiss Dr D's views to the contrary as being illogical. The appeal, accordingly, was dismissed.

As an anaesthetist and former paediatric intensivist, this decision appears an illogical medical conclusion. A senior registrar was called twice by an experienced 'sister in charge' to see a child with a disease known to be associated with increased risk of URTO and the doctor failed to even review the child. Given that the child subsequently had a cardiac arrest due to URTO, surely it would have been 'the doctor's fault' that the child suffered airway obstruction and the doctor would be considered negligent. But for legal causation to be satisfied, Dr H had to first say that she would have intubated the patient if she had attended the patient before his arrest. If, however, Dr H said that she would not have intubated the patient in any event, and if a body of expert opinion agreed that such a course of action was appropriate in the circumstances, then in law, Dr H's omission would not have caused the patient's damage. By finding Dr D's view in support of Dr H's actions reasonable, there was a body of opinion which was of the view that Dr H reached an accepted standard of care of an ordinary skilled medical practitioner exercising and professing to exercise her skill.

Viewing the case retrospectively, the question of negligence should not have been founded on whether or not the patient should have been intubated prior to cardiac arrest, but rather whether a safe system of care had been put in place for a child at risk of acute URTO. From the medical perspective, the child should have been admitted to a paediatric intensive care facility with a physician on hand to immediately deal with such an emergency should it arise. Upper airway obstruction was an obvious risk, carrying the potential prospect of death, but was preventable with appropriate management.

Bolitho demonstrates the importance and value the Court places on expert medical opinion in reaching a decision in cases of medical negligence. The judge is entitled to prefer 'one respectable body of professional opinion to another', but for expert opinion to be rejected by the court, it has to be found 'not capable of withstanding logical analysis' or irresponsible, unreasonable, and not respectable. It is because of the reliance the Court places upon medical expert evidence that it is vital that the medical profession graciously and honestly continues to provide this important and vital service to the Hong Kong public.

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