Who does medical law benefit the most?

Law, an integral part of society, can be defined as " The body of rules which govern the affairs of the people within a community."[1] It affects how we perform our daily actions and the medical profession is not immune to its imposition. Medical professionals have to abide to their own specialized section of the law, known as medical law, which is essentially the branch of law which concerns the prerogatives and responsibilities of medical professionals and the rights of the patient.[2]

Medical law has been a key part of the legal system for a very long time, having been first introduced by Hammurabi of Mesopotamia (1792-50bc) as part of Hammurabi's code, in which a legal responsibility was placed on medical practitioners, along with specified punishments for incompetence and negligence. Non-negotiable fees for patients were also defined within the code.

It was stated in the code that,

218."If a physician makes a large incision with an operating knife and kill him (the patient), or open a tumor with the operating knife and cut out the eye, his hands shall be cut off."

Today such a law in the UK would be considered impractical and immoral (due to the harm to doctors and the coinciding depletion of the medical profession should the law be implemented), however the same underlying principle that the law should protect the patient's rights and punish the medical practitioner if they breach these rights, is still in place.

In modern medical law there are four key ethical principles:[3]

- Autonomy- Is where the patient has the right to make a decision over what medical treatment they should receive, unless the patient is incompetent.
- Non-malfeasance- States medical professionals should not cause harm to their patients.
- Beneficence- States medical professionals must provide the best medical treatment for their patients.
- Justice- States patients should be treated equally and fairly. One patient should not be improperly given preferential treatment over another.

Three of the main areas of medical law today are negligence, confidentiality and torts:

- Negligence occurs when a duty of care owed to the patient and this is breeched and as a result causes damages. Medical negligence is the most commonly pursued area of medical law in courts today.
- Confidentiality encompasses contract law as it can be seen that a breach of confidentiality is a breach of contract. The information that has been unlawfully disclosed must be of a personal, private or intimate nature for the case to be considered a breach of confidentiality (*Stephens V Avery (1988)*).
- Torts- are mostly associated with medical malpractice (as there is in these situations a contract that has been breached). Medical malpractice which can be defined as "an act (or failure to act), by a health care professional, deviating from the accepted standards of services and practices of the medical community, thereby causing harm to the patient."[4] most commonly presents itself in the form of the following situations;
    - incorrect or insufficient treatment
    - misdiagnosis
    - incorrectly prescribed medicine

---

[1] Readers digest Universal Dictionary- Page 872- 1987 London- Readers Digest Universal Press

[2] Lawbore- http://lawbore.net/medical- E Albon and H Richardson- City University London- 2011

[3] Medical Law- Page 4-7 - Jonathan Herring -2010- Pearson Education-Essex England

[4] http://www.buzzle.com/articles/medical-malpractice-lawsuits.html- Medical Malpractice lawsuits- Roy D'Silva- 12/02/2011

Another key area of medical law is human rights law, to which legal principles from the European convention on human rights (articles) are applied to medical law[5]:
Article 2 states that everyone has the right to life; in medical law this mean a medical professional should not purposefully kill a patient.
Article 14 states that everyone has the right not to be discriminated against; in medical law this relates the ethical principle of justice, where one patient should not be given preferential treatment over another patient.
Article 8 states that everyone has the right to respect for private life; in medical law this means that doctor patient confidentiality should be upheld and respected. A patient's decision to not have a treatment must also be respected.

It could be seen that, in theory, medical law is there purely to benefit the patient by protecting them from unlawful actions of medical professionals. However, in application it is not nearly this simple nor beneficial to patients as it may have been intended, as it often ends up benefitting other parties.

In recent years there has been a large increase in medical law claims, in particular negligence and more specifically medical negligence and malpractice claims. In 2005 / 2006 the National Health Service Litigation Authority (NHSLA) saw 9194 cases closed at the end of the year, but the end of year 2010/11 they saw 13,301 cases closed. This represents 45% increase in just 5 years. Such rapid increase in legal action can be seen to be due to a multitude of reasons.
In 1999 the Access to Justice Act was introduced, its purpose being to allow people to take legal action, who would not have previously chosen to do so because they were financially unable. This law has allowed a greater number of people to take legal action, in 2010/11 the Ministry of Justice spent over £19 on providing financial aid to medical law cases and there have also many been consequences that have occurred of which the benefits are not felt by those taking the legal action. These consequences include;

- -A generally poorer quality of work, means that a smaller percentage of cases are won.
- -Over billing by legal representatives. According to an audit by the government's legal services commission "35% of suppliers are charging 20% more than they should be"[6]. These excessive fees come from the government's budget and in turn reduce the amount of money the government has available to spent of both legal services and the NHS.

However due to the proposed government budget cuts and an aim to reduce the number of negligence cases going to court from 2015 onwards all financial aid for medical negligence cases(with a few exceptions for which human rights are interlinked) will be cut.[7]
Another reason as to why there has been an increase in the number of claims is due to something known in law as a conditional fee agreement, but is more commonly known as "no win, no fee" policy . This works on the basis whereby the client agrees with their lawyer a percentage of the compensation that upon winning will be taken as the lawyers fee, should the case be won. This percentage can be up to 100% the lawyers standard fee. This causes the lawyers to have a far more personal interest in winning the case, due to the large financial benefit on their part. For a considerable time conditional fee agreements were not allowed to be used in cases of medical law, however that condition has recently been removed and since doing so the amount of claims has soared.
Though only a small number of medical negligence cases actually make it to court (around 4%), those cases that do make it to court and win their claim often receive

---

[5] Medical Law- Page 8 - Jonathan Herring -2010- Pearson Education-Essex England

[6] As Law for AQA-Page 217-Catherine Elliot and Frances Quinn-2008- Pearson Education- Essex-

[7] Cost of suing NHS too high-http://www.guardian.co.uk/society/2011/mar/29/cost-suing-nhs-too-high- Juliet Rix- 28/03/2011

exceedingly large amounts of money. In 1999/2000 the total amount awarded in medical negligence and malpractice claims was £373 million , then in 2005/06 it was £384.4 million and in 2010/11 it was £729.1 million[8]. This demonstrates an increase of 195% in 11 years.
Another possible cause for the increase in legal action is society's changing view on doctors with the development of the "compensation culture", with fewer people than ever following the "doctor knows best" psychology. This change in view point has caused people to question the once definitive decisions and actions of doctors.

In a society where 5% of the general public report suffering some form of adverse affects of medical care an increase in legal action in medical law claims could be seen to represent that the patients are using the increased access to legal aid to pursue their case, and in turn more patients than ever should be benefitting from medical law. However for the medical law to actually benefit the plaintiffs then the process of legal actions would have to be a successful, easy, fluent and efficient process. As stated previously, medical law, in theory has be designed to have the benefitting party as the patients. However the public opinion on who benefits the most from medial law is very different with 64% of people believing that legal professionals benefit the most and 18.5% believing that doctors benefit the most, with only 18.5% believing that patients are the beneficiaries of medical law.
In the case of *A v National Blood [2001]3 All ER 289* Authority medical law fulfilled its duty to protect that patient as when the claimant A had a blood transfusion and was subsequently infected with Hepatitis C damages were claimed under the Consumer Protection Act (1987). It was deemed that in the situation in this case that the blood could be considered a product, and it was perfectly reasonable to expect the blood to be clean. There was a strong defence argument which included;

- the blood should not be considered a product and in the case would not be applicable to the Consumer Protection Act
- It was unreasonable to expect the blood to be completely free of impurities. In response to this the Judge commented that if the public expectations are inaccurate then it is the duty of the producer to "reformulate" these expectations.
- That at the time there was no effective screening programme or way of identifying Hepatitis C. In response to this the Judge commented that the knowledge was available at that point in time to identify the Hepatitis C, considering that in various other countries routine screening programmes were in place.

As a result the Judge ruled in favour of the clamant stating " The question is whether the risk was known about, not whether it could have been eliminated"[9].

The case of *Kishver v Sandwell & West Birmingham Hospitals NHS Trust* also demonstrates how medical law can benefit a patients, Miss Kishver was born premature at 25 weeks and suffered mild brain damage due to this, however just a first few weeks into her life nurses failed to summon the attention of doctors as her heart rate dropped due to metabolic acidosis and septicaemia. These were left untreated for a considerable time and resulted in ataxic cerebral palsy, and as a result her quality of life has been considerable reduced and she will never be able to be independent.
A medical investigation was undertake during the case which produced many inconclusive or contradictory conclusions. It was finally decided during the trail that the defendants actions had contributed to Miss KIshver's brain damage and she was awarded £4.5 million[10].Cases like this are reputably difficult to conclude as they require a large amount of input from medical experts all with caring inputs and motives.

---

[8] NHSLA Anual report and cases 2010/2011

[9] Medical Law and Ethics- Page 142-Jonathan Herring-2010- Oxford university press- Oxford

[10] http://www.avma.org.uk/data/files/kishver_case_report_for_db.pdf- AMVA Case report

The case of *Gregg V Scott [2005] UKHL 2* is an example of medical malpractice. When Mr Gregg visited Dr Scott complaining about a lump in his underarm, Dr Scott misdiagnosed it believing it was benign. However a year later Mr Gregg's lump was correctly diagnosed as being cancer of the lymph gland.He legally pursued Dr Scott with a claim that he had a decreased chance of recovery due to the misdiagnosis occurring, as he had only a 25% chance of surviving 10 years at the time of the correct diagnosis compared to the 42% chance of surviving 10 years he would have had should he have been diagnosed correctly in the initial diagnosis[11]. It was well known by the court that during the period of misdiagnosis the tumour grew significantly and by the time he was correctly diagnosed, his prognosis during and after chemotherapy was poor.
He argued that if he had properly diagnosed correctly the first time round then his chemotherapy would have had a better chance of a more favourable outcome. When this case first went to court the judge ruled that even if the cancer had been properly diagnosed then it was more than likely that there would be no cure for his condition. After a long and drawn out trail and referrals to both the Court of Appeal and House of Lords it was decided that Mr Gregg would receive no compensation for the misdiagnosis and Dr Scott was acquitted of all charges. This was the case even though it had been proven that he failed to diagnose the Mr Gregg correctly. This ruling was because under current law if a claimant has suffered harm because the defendant was negligent during treatment or diagnosis then they can only claim if they can show that they have suffered harm by this incorrect treatment or diagnosis. However surely this goes again the core principle of medical law, which is to protect a patient and punish the doctor in situations where they do not up hold the duty of care and correct practice they have towards the patient. In this case neither occurred with the patient not receiving any compensation and the doctor not having any consequences for their incorrect practice. In the past medical ethics was a fundamental element in a doctors training, with almost all doctors taking the Hippocratic oath on the completion of their training. This oath which sets out a variety of ethics which a doctor was expected to uphold even though the oath itself is not legally binding. However in recent years there has been a sharp decline in the number of doctors taking the Hippocratic oath with now less than 50% of all doctors in the UK taking the oath, this is compared to the 98% of doctors in the United States who take an oath of some form[12].

Though much of medical law is about protecting the patients, there are areas about the protection of a doctors rights. The Bolam test which was formed during the case of Bolam v Friern HMC case states;
–A doctor (or any other health care professional) 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 art[13].

In this case Mr John Bolam was advised to undergo electroconvulsive therapy to help with his on-going depressive illness. However Mr Bolam's doctor did not inform him of the risks involved with the procedure and he suffered several injuries as well as not receiving the appropriate relaxant drugs during the procedure. Upon hearing the case McNair J introduced what is now the Bolam test and through applying it to this case for which the doctor was acting in accordance with what was accepted as proper by doctors at this time meant that the doctor was not guilty of negligence, his opinion was backed up by the jury, who's opinion was in favour of the Friern hospital management.

---

[11] Medical Law and Ethics- Page 117-118-Jonathan Herring-2010- Oxford university press- Oxford

[12] http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1121898/- Medical oaths and s- Georgian Russell- 22/12/2001

[13] *[1957] 2 All ER 118 ,121*

However the Bolam test in its raw form has flaws as what may be in accordance with a practice accepted as proper by a responsible body of medicine men is not always the best or correct act. As said by McNair J during the trial a man could come in and under this principle say that they do not believe in anaesthetics or antibiotics as this is the was surgery was done in the 18th century and he chose to continue to perform surgery in this way. His response to this situation was to add to the Bolam test that the act must be in accordance with current accepted practice and if a practice has been proved to be incorrect then they are guilty of negligence. Though there have been many criticisms of the Bolam test including it making doctors work up to the high standards expected by the public, it also has many benefits including allowing doctors develop new practices without the fear of litigation([14]so long they can prove that other doctors feel the treatment is worth trying), it also reduces litigation and a repercussion of which is a reduction in the cost to the NHS and this is why the Bolam test has since been approved by the House of Lords in the following cases: *Maynard v West Midlands RHA*, *Whitehouse v Jordan, Sidaway v Bethlem RHG and Bolitho v CIty and Hackney HA* . From these cases it can be said that even if a medical professional fails to correctly diagnose a patient or give information about an alternative treatment it will not necessarily be considered negligence if they were acting in a way that was above the minimal acceptable practice.
Vicarious liability is another area of law which protects medical professionals. It states that if an employee commits a tort “In the course and scope .“ of their employment then it is the employer who is liable.This essentially means that so long a doctor (or any other medical practitioner) is working within accordance of what is expected of them for their job then it is not the doctor him self that is liable but rather their employer. This can be quite evidently seen in many of the cases previously mentions for which the defendant is a NHS trust or Health Association.
There is often much stigma associated with the truthfulness of doctors in the court, with doctors refusing to divulge information to those outside their tight professional community. This often makes gaining evidence on the true nature of a case difficult as key witnesses may refuse to give any information that could cause harm to their colleague, which can cause automatic suspicion on their part.This is a situation that many feel needs to change with Mr Webb the Liberal Democrats health spokesperson saying “ The NHS needs to move away from the blame culture of the past, where staff were afraid to admit mistakes occur a more open culture would reduce the number of negligence cases in the future.” However with far larger budgets for legal services than your average patient, they more that often receive the very best legal services money can buy, bringing them an advantage over the claimant. And though the general public’s views on doctors may have changed, It is still recognised that a high level of intelligence, hard work and competence is required to succeed as a doctor, characteristics that are shared by legal professions creating a mutual respect for each other.
It is also important to recognise that there is a need for the protection of the doctors rights in medical law as if they are in constant fear of have legal action taken against them if they are not performing to the best of their capacity. Many doctors now feel that they have to take extra unnecessary steps during diagnosis and procedure to ensure that no legal action can be taken. These extra steps (which are often completely unnecessary) cost the health services greatly not only financially, but in doctors time. A person can go into A&E with an injury that is clearly a broken digit, and been seen by a doctor that is capable of making a correct diagnosis without any further examination or test, but due to the rigorous diagnostics required to ensure all legal responsibilities are fulfilled they are required to have an x-ray. This x-ray not only wastes the time of the doctor and the patient but wastes they x-ray facility which could be used for a more serious incident, and irrespective of if the digit is broken or dislocated the treatment is exactly the same.

---

[14] Claredon Law series, Introduction to law second edition- Tony Weir- 2006- Oxford university press- Oxford, England- Page 107

Who does medical law benefit the most?

It is important to recognise that there is a need for the law to protect doctors, with doctors causing medical negligence often due to being over worked, tired and under pressure, which all lead to human error and poor decisions being made. Yet it is the hospitals and health care trusts who are putting their doctors under this unnecessary pressure, and making them work more shifts and hours than is appropriate, and in this may lead to a situation where the doctor is not in a state to perform they job correctly, but yet they are expected to continue. Also it must be remembered that doctors are only human, they are exposed to the faults that we all have and make mistakes, as does everyone else, the only difference being that the mistakes they make may have far more catastrophic consequences.
In the past doctors are being tested to their limits with a 2005 study on the standards of excellence in the NHS by MEE(Medical Education England) found that junior doctors in particular are over worked, under supervised and given cases far beyond their expertise thus resulting in unnecessary risk for the patient. The AMA (Australian Medical Association) even found that 80% of junior doctors in Australia are working 18+ hour shifts, these incredibly long hours lead to a state of mind similar to that of a person who has had excessive alcohol consumption[15]. By being in such a state the doctors ability to make correct and well informed decisions is reduced and increases the chance of negligence and misdiagnosis and in turn an increase in a chance of a case being pursued legally. In these situations it is necessary for the law to protect these doctors as they are not at fault for their malpractice or misdiagnosis. Since Summer 2009 the law has taken a large leap in protecting the rights of these junior doctors when the EU implemented a law stating that a trainee doctor can only work up to a maximum of 48 hours per week, this in turn not only protects the doctors but the patients by reducing the risk endured by medical practice .

Though not one of the legal parties in the case, the legal profession are key to medical law, by ensuring it is applied correctly. They are also part of the development of new litigation and tests such as the Bolam Test. Today medical law has become such a prevalent part of law, that there are many firms that specialise purely on medical law, thus demonstrating that the economy generated by medical law cases is capable of supporting a whole industry. It also provides many opportunities not only in the specialised solicitors firms but also in health care associations and the NHSLA (National Health Service Litigation Authority) who all have vast legal departments. The increase in legal action due to the Conditional fee agreements and the Access to Justice Act 1999 has been of great benefit to lawyers, with an increase in business, and financial gain, especially through the condition fee agreements. The NHSLA stated in their most recent financial report that “the cost of the claimants lawyers compared to the defence solicitors is significantly higher and that the availability and increased usage of the conditional fee agreement has led to the disproportional amount of damages paid.” It was also shown that out of the £257 million paid in legal costs in 2010/2011 76% was paid to the claimant lawyers. Today more than ever it is socially acceptable to question a doctors judgment and the media has had a part in changing societies view, with frequent advertisements on “no win , no fee”, medical negligence and malpractice lawyers, who are customer friendly and remove all that was daunting about the legal system.
The NHS has set aside £8 billion pounds s for the next ten years to pay for the cost of medical negligence, is a value far higher than it has ever previously been. Dr Gerard Panting, of the Medical Protection Society stated “that although the increase in legal action has contributed to the increasing budget the biggest cause for the increase is due to the ever-increasing legal costs and pay outs”. With about 2/3 of the money paid out going to high value cases for which many receive compensation of over £1 million.

---

[15] http://news.bbc.co.uk/1/hi/world/asia-pacific/1150236.stm- Overworked Doctors like drunks- 2/2/2001- Author unkown

Who does medical law benefit the most?

In the case of Tautum Hallows, who doctors failed to diagnosed a brain tumor and as a result ended up losing her sight. She received £1 million in compensation, however her mother stated " That she would not have risked suing the NHS should she not have had her very good salary and the legal aid she received" and with good reason too, the total cost for Hollows legal fees which she would have had to have paid should she not have won the case were close to £300,000. The reason behind this extortionate fee was that the case required long and in-depth medical expertise so often seen in medical negligence cases to pinpoint where failure occurred. The National Audit Office found within a review that in most cases under £45,000 the associated legal and administrative costs exceeded that final damages award.
In a civil litigation costs review in January 2010 Lord Justice Jackson commented that a removal of "success fees" would help to balance the disproportion of legal costs in England. Though in reply to his recommendations many legal firms felt this would drastically reduce the number of claims they would be dealing with (and in turn a reduction in their income), with Mr Russell Levy of Leigh Day and Co. stating that the cuts are "Likely to halve the number of medical negligence cases that we take on." The very evident financial gain that lawyers receive from medical negligence then poses the question whether medical law has moved from fulfilling the moral obligation to protect doctors and patients alike to fulfilling the monitory desires of legal professionals?

In reality no one party solely benefits from medical law and all of the different parties benefit in varying amounts and ways. Patients traditionally have psychologically benefited as they can feel that justice has been served and that the legal system has upheld its moral obligation, however in the modern compensation culture many more patients are seeking medical laws financial rewards. For doctors the benefits of medical law mean that they can continue to perform their job without feeling that they are constantly susceptible to legal action without protection. However for both doctors and patients the benefits are infrequently felt, with few patients winning their cases and feeling the moral and financial benefits, and for doctors even just having legal action taken against them no matter what the outcome can ruin their reputation and self-esteem. The general public as a whole are also most certainly not benefitting from medical law, With Lord Justice Jackson's comment during a review summarising this perfectly having said "The cost of both sides are ultimately borne by the public". This then leaves the legal profession, who in my opinion benefit the most from medical law, as no matter how the case turns out they will always reap the financial and most prevalent rewards of medical law.

By Rebecca Martin Candidate No 6141 Centre No. 22227