Bolitho v. City and Hackney Health Authority [1997] UKHL 46; [1998] AC 232; [1997] 4 All ER 771; [1997] 3 WLR 1151 (13th November, 1997)

HOUSE OF LORDS

Lord Browne-Wilkinson Lord Slynn of Hadley Lord Nolan
Lord Hoffmann Lord Clyde

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

BOLITHO
(ADMINISTRATRIX OF THE ESTATE OF PATRICK NIGEL BOLITHO) (DECEASED) (A.P.)
(APPELLANT)
v.

CITY AND HACKNEY HEALTH AUTHORITY
(RESPONDENTS)

ON 13 NOVEMBER 1997

LORD BROWNE-WILKINSON

My Lords,

This appeal raises two questions relating to liability for medical negligence. The first, which I believe to be more apparent than real, relates to the proof of causation when the negligent act is one of omission. The second concerns the approach to professional negligence laid down in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 583.

The claim relates to treatment received by Patrick Nigel Bolitho at St. Bartholomew's Hospital on 16 and 17 January 1984 when he was two years old. Patrick suffered catastrophic brain damage as a result of cardiac arrest induced by respiratory failure. The issues investigated at trial were wide ranging but as a result of the judge's findings I can state the relevant facts quite shortly.

On 11 January 1984 Patrick was admitted to St. Bartholomew's suffering from croup and was treated under the care of the senior paediatric registrar, Dr. Janet

Horn, and the senior house officer in paediatrics, Dr. Keri Rodger. On 15 January he was discharged home. No complaint is made about this episode in his treatment.

On the evening of 16 January his parents became concerned about his condition. He had not slept well and had been restless; further he seemed to be having increasing difficulty in breathing and was wheezier. As a result he was re-admitted to St. Bartholomew's on the evening of 16 January. Dr. Rodger examined him and was also concerned about his condition. At 8.30 p.m. she arranged for him to be nursed by a special nurse on a one-to-one basis. On the following morning, 17 January, the medical notes indicated that he was much better but that there was still reduced air entry on the left side. He was seen on the morning round by the consultant who carried out an examination (albeit not a full one) but he was not concerned about his condition. Patrick ate a large lunch.

At around 12.40 p.m. on 17 January there occurred the first episode. The nurse who was observing Patrick summoned Sister Sallabank, a skilled and experienced nurse. Sister Sallabank described his respiratory sounds as "awful" but reported that surprisingly he was still talking. He was very white in colour. The sister was sufficiently concerned about his condition to bleep Dr. Horn rather than to go through the usual chain of command by first contacting the senior house officer, Dr. Rodger. She took this course because she felt something was acutely wrong. Sister Sallabank asked Dr. Horn to come and see Patrick straight away as he was having difficulty in breathing and was very white. Dr. Horn seemed alarmed that Patrick was in such distress when he had appeared perfectly well a short time before during the consultant's round. Sister Sallabank told Dr. Horn that there had been a notable change in Patrick's colour and that he sounded as though something was stuck in his throat. Dr. Horn said that she would attend as soon as possible. In the event, neither she nor Dr. Rodger came to see Patrick. When Sister Sallabank returned to Patrick she was extremely surprised to see him walking about again with a decidedly pink colour. She requested a nurse to stay with Patrick.

At around 2 p.m. the second episode occurred. The nurse observing Patrick called Sister Sallabank back to Patrick. Sister Sallabank saw that he was in the same difficulties as he had been in at 12.40 p.m. and she became very worried. She went off to telephone Dr. Horn again. Dr. Horn informed Sister Sallabank over the telephone that she was on afternoon clinic and had asked Dr. Rodger to come in her place. While the sister was talking to Dr. Horn, the nurse reported to her that Patrick was now pink again; the sister then took the opportunity to explain to Dr. Horn in detail the episodes which Patrick had experienced. Dr. Rodger did not attend Patrick after the second episode. Her evidence was that her bleep was not working because of flat batteries so that she never got the message.

After the second episode, Sister Sallabank instructed Nurse Newbold to sit with Patrick: she was told that the doctors were coming to see him because he had been unwell earlier. Nurse Newbold tried to take Patrick's pulse and rate of respiration

but this proved very difficult as he appeared quite well and was jumping about and playing in his cot. She described Patrick as being very chatty and interested in reading the letters on a dish.

At about 2.30 p.m. the events leading to the final catastrophe began. There was a change in Patrick's condition. Although he retained his colour he became a little agitated and began to cry. Nurse Newbold left a colleague with Patrick and reported to Sister Sallabank who told her to bleep the doctors again. While she was on the telephone to the doctors, the emergency buzzer sounded having been set off by the nurse left with Patrick. Nurse Newbold immediately returned to Patrick. Sister Sallabank also heard the buzzer and sent out a call for the cardiac arrest team. Patrick had collapsed because his respiratory system was entirely blocked and he was unable to breathe. As a result he suffered a cardiac arrest. He was revived but there was a period of some nine to ten minutes before the restoration of respiratory and cardiac functions. In consequence, Patrick sustained severe brain damage. He has subsequently died and these proceedings have been continued by his mother as administratrix of his estate.

The case came on for trial before Hutchinson J. There was a conflict of evidence between Sister Sallabank and Dr. Horn as to what was said to Dr. Horn in the course of the two telephone calls at about 12.40 and 2 p.m. The judge accepted Sister Sallabank's version (which is the one I have summarised above). On that basis, the defendants accepted that Dr. Horn was in breach of her duty of care after receiving such telephone calls not to have attended Patrick or arranged for a suitable deputy to do so.

Negligence having been established, the question of causation had to be decided: would the cardiac arrest have been avoided if Dr. Horn or some other suitable deputy had attended as they should have done. By the end of the trial it was common ground, first, that intubation so as to provide an air way in any event would have ensured that the respiratory failure which occurred did not lead to cardiac arrest and, second, that such intubation would have had to be carried out, if at all, before the final catastrophic episode.

The judge identified the questions he had to answer as follows:

> "[Mr. Owen, for the defendants] submitted therefore that (if once it was held that Dr. Horn was negligent in failing to attend at either 12.40 p.m. or 2 p.m) the sole issue was whether Patrick would on one or other of these occasions have been intubated. In submitting that on this aspect of the case the issue was what would Dr. Horn or another competent doctor sent in her place have done had they attended, Mr. Owen was, I think, accepting that the real question was what would Dr. Horn or that other doctor have done, *or what should they have done*. As it seems to me, if Dr. Horn would have intubated, then the plaintiff succeeds, whether or not that is a course

> which all reasonably competent practitioners would have followed. If, however, Dr. Horn would not have intubated, then the plaintiff can only succeed if such failure was contrary to accepted medical practice (I am not purporting to consider the legal tests in detail, and merely using shorthand at this stage). . . . Common to both sides is the recognition that I must decide whether Dr. Horn would have intubated (or made preparations for intubation), and, *even if she would not, whether such a failure on her part would have been contrary to accepted practice in the profession*." (Emphasis added.)

As to the first of those issues, Dr. Horn's evidence was that, had she come to see Patrick at 2 p.m., she would not have arranged for him to be intubated. The judge accepted this evidence. However, he found that she would have made preparation to ensure that speedy intubation could take place: in the event that proved to be an irrelevant finding since the judge found that such preparations would have made no difference to the outcome. Therefore, the judge answered the first of his two questions by holding that Dr. Horn would not herself have intubated if, contrary to the facts, she had attended.

As to the second of the judge's questions (i.e. whether any competent doctor should have intubated if he had attended Patrick at any time after 2 p.m.), the judge had evidence from no less than eight medical experts, all of them distinguished. Five of them were called on behalf of Patrick and were all of the view that, at least after the second episode, any competent doctor would have intubated. Of these five, the judge was most impressed by Dr. Heaf, a consultant paediatrician in respiratory medicine at the Royal Liverpool Children's Hospital, which is the largest children's hospital in the United Kingdom. On the other side, the defendants called three experts all of whom said that, on the symptoms presented by Patrick as recounted by Sister Sallabank and Nurse Newbold, intubation would not have been appropriate. Of the defendants' experts, the judge found Dr. Dinwiddie, a consultant paediatrician in respiratory diseases at the Great Ormond Street Hospital, most impressive.

The views of the plaintiff's experts were largely based on the premise that over the last two hours before the catastrophe Patrick was in a state of respiratory distress progressing inexorably to hypoxia and respiratory failure. The defendants' experts, on the other hand, considered the facts as recounted by Sister Sallabank indicated that Patrick was quite well apart from the two quite sudden acute episodes at 12.40 p.m. and 2 p.m. The judge held that the evidence of Sister Sallabank and Nurse Newbold as to Patrick's behaviour (which he accepted) was inconsistent with a child passing through the stages of progressive hypoxia.

Having made his findings of fact, the judge directed himself as to the law by reference to the speech of Lord Scarman in *Maynard v. West Midlands Regional Health Authority* [1984] 1 W.L.R. 634, 639:

> ". . . I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judge's finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment negligence is not established by preferring one *respectable* body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if he be a specialist) is necessary." (Emphasis added.)

The judge held that the views of Dr. Heaf and Dr. Dinwiddie, though diametrically opposed, both represented a responsible body of professional opinion espoused by distinguished and truthful experts. Therefore, he held, Dr. Horn, if she had attended and not intubated, would have come up to a proper level of skill and competence, i.e. the standard represented by Dr. Dinwiddie's views. Accordingly he held that it had not been proved that the admitted breach of duty by the defendants had caused the catastrophe which occurred to Patrick.

An appeal to the Court of Appeal was dismissed by Dillon and Farquharson L.JJ., Simon Brown L.J. dissenting. Their decision is reported only in [1994] 1 Med. L.R. 381. I will have to consider some of their reasons hereafter.

The Bolam test and causation

The locus classicus of the test for the standard of care required of a doctor or any other person professing some skill or competence is the direction to the jury given by McNair J. in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 583, 587:

> "I myself would prefer to put it this way, that he 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 . . . Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view."

It was this test which Lord Scarman was repeating, in different words, in *Maynard's case* in the passage by reference to which the judge directed himself.

Before your Lordships, Mr. Brennan, for the appellant, submitted, first, that the *Bolam* test has no application in deciding questions of causation and, secondly, that the judge misdirected himself by treating it as being so relevant. This argument, which was raised for the first time by amendment to the notice of appeal in the Court of Appeal, commended itself to Simon Brown L.J. and was the basis

on which he dissented. I have no doubt that, in the generality of cases, the proposition of law is correct but equally have no doubt that the judge in the circumstances of the present case was not guilty of any self-misdirection.

Where, as in the present case, a breach of a duty of care is proved or admitted, the burden still lies on the plaintiff to prove that such breach caused the injury suffered: *Bonnington Castings Ltd. v. Wardlaw* [1956] AC 613; *Wilsher v. Essex Area Health Authority* [1988] AC 1074. In all cases the primary question is one of fact: did the wrongful act cause the injury? But in cases where the breach of duty consists of an omission to do an act which ought to be done (e.g. the failure by a doctor to attend) that factual inquiry is, by definition, in the realms of hypothesis. The question is what would have happened if an event which by definition did not occur had occurred. In a case of non-attendance by a doctor, there may be cases in which there is a doubt as to which doctor would have attended if the duty had been fulfilled. But in this case there was no doubt: if the duty had been carried out it would have either been Dr. Horn or Dr. Rodger, the only two doctors at St. Bartholomew's who had responsibility for Patrick and were on duty. Therefore in the present case, the first relevant question is "what would Dr. Horn or Dr. Rodger have done if they had attended?" As to Dr. Horn, the judge accepted her evidence that she would not have intubated. By inference, although not expressly, the judge must have accepted that Dr. Rodger also would not have intubated: as a senior house officer she would not have intubated without the approval of her senior registrar, Dr. Horn.

Therefore the *Bolam* test had no part to play in determining the first question, viz. what would have happened? Nor can I see any circumstances in which the *Bolam* test could be relevant to such a question.

However in the present case the answer to the question "what would have happened?" is not determinative of the issue of causation. At the trial the defendants accepted that if the professional standard of care required any doctor who attended to intubate Patrick, Patrick's claim must succeed. Dr. Horn could not escape liability by proving that she would have failed to take the course which any competent doctor would have adopted. A defendant cannot escape liability by saying that the damage would have occurred in any event because he would have committed some other breach of duty thereafter. I have no doubt that this concession was rightly made by the defendants. But there is some difficulty in analysing why it was correct. I adopt the analysis of Hobhouse L.J. in *Joyce v. Merton, Sutton and Wandsworth Health Authority* [1996] 7 Med. L.R. 1. In commenting on the decision of the Court of Appeal in the present case, he said, at p. 20:

> "Thus a plaintiff can discharge the burden of proof on causation by satisfying the court *either* that the relevant person would in fact have taken the requisite action (although she would not have been at fault if she had not) *or* that the proper discharge of the relevant person's duty towards the plaintiff required that she take that action. The former alternative calls for no explanation since it is simply the factual proof of the causative effect of the original fault. The latter is slightly more sophisticated: it involves the factual situation that the original fault did not itself cause the injury but that this was because there would have been some further fault on the part of the defendants; the plaintiff proves his case by proving that his injuries would have been avoided if proper care had continued to be taken. In the *Bolitho* case the plaintiff had to prove that the continuing exercise of proper care would have resulted in his being intubated."

There were, therefore, two questions for the judge to decide on causation: (1) What would Dr. Horn have done, or authorised to be done, if she had attended Patrick? and (2) If she would not have intubated, would that have been negligent? The *Bolam* test has no relevance to the first of those questions but is central to the second.

There can be no doubt that, as the majority of the Court of Appeal held, the judge directed himself correctly in accordance with that approach. The passages from his judgment which I have quoted (and in particular those that I have underlined) demonstrate this. The dissenting judgment of Simon Brown L.J. in the Court of Appeal is based on a misreading of the judge's judgment. He treats the judge as having only asked himself one question, namely, the second question. To the extent that the Lord Justice noticed the first question--would Dr. Horn have intubated?--he said that the judge was wrong to accept Dr. Horn's evidence that she would not have intubated. In my judgment it was for the judge to assess the truth of her evidence on this issue.

Accordingly the judge asked himself the right questions and answered them on the right basis.

The Bolam test--should the judge have accepted Dr. Dinwiddie's evidence?

As I have said, the judge took a very favourable view of Dr. Dinwiddie as an expert. He said:

> ". . . I have to say of Dr. Dinwiddie also, that he displayed what seemed to me to be a profound knowledge of paediatric respiratory medicine, coupled with impartiality, and there is no doubt, in my view, of the genuineness of his opinion that intubation was not indicated."

However, the judge also expressed these doubts:

> "Mr. Brennan also advanced a powerful argument--which I have to say, as a layman, appealed to me--to the effect that the views of the defendant's experts simply were not logical or sensible. Given the recent and the more remote history of Patrick's illness, culminating in these two episodes, surely it was unreasonable and illogical not to anticipate the recurrence of a life-threatening event and take the step which it was acknowledged would probably have saved Patrick from harm? This was the safe option, whatever was suspected as the cause, or even if the cause was thought to be a mystery. The difficulty of this approach, as in the end I think Mr. Brennan acknowledged, was that in effect it invited me to substitute my own views for those of the medical experts."

Mr. Brennan renewed that submission both before the Court of Appeal (who unanimously rejected it) and before your Lordships. He submitted that the judge had wrongly treated the *Bolam* test as requiring him to accept the views of one truthful body of expert professional advice even though he was unpersuaded of its logical force. He submitted that the judge was wrong in law in adopting that approach and that ultimately it was for the court, not for medical opinion, to decide what was the standard of care required of a professional in the circumstances of each particular case.

My Lords, I agree with these submissions to the extent that, in my view, 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 opinion that the defendant's treatment or diagnosis accorded with sound medical practice. In the *Bolam* case itself, McNair J. stated [1957] 1 W.L.R. 583, 587, that the defendant had to have acted in accordance with the practice accepted as proper by a "*responsible* body of medical men." Later, at p. 588, he referred to "a standard of practice recognised as proper by a competent *reasonable* body of opinion." Again, in the passage which I have cited from *Maynard's* case, Lord Scarman refers to a "respectable" body of professional opinion. The use of these adjectives -responsible, reasonable and respectable--all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.

There are decisions which demonstrate that the judge is entitled to approach expert professional opinion on this basis. For example, in *Hucks v. Cole* (a case from 1968 reported in [1993] 4 Med. L.R. 393), a doctor failed to treat with penicillin a patient who was suffering from septic places on her skin though he knew them to contain organisms capable of leading to puerperal fever. A number

of distinguished doctors gave evidence that they would not, in the circumstances, have treated with penicillin. The Court of Appeal found the defendant to have been negligent. Sachs L.J. said, at p. 397:

> "When the evidence shows that a lacuna in professional practice exists by which risks of grave danger are knowingly taken, then, however small the risk, the court must anxiously examine that lacuna--particularly if the risk can be easily and inexpensively avoided. If the court finds, on an analysis of the reasons given for not taking those precautions that, in the light of current professional knowledge, there is no proper basis for the lacuna, and that it is definitely not reasonable that those risks should have been taken, its function is to state that fact and where necessary to state that it constitutes negligence. In such a case the practice will no doubt thereafter be altered to the benefit of patients. On such occasions the fact that other practitioners would have done the same thing as the defendant practitioner is a very weighty matter to be put on the scales on his behalf; but it is not, as Mr. Webster readily conceded, conclusive. The court must be vigilant to see whether the reasons given for putting a patient at risk are valid in the light of any well-known advance in medical knowledge, or whether they stem from a residual adherence to out-of-date ideas."

Again, in *Edward Wong Finance Co. Ltd. v. Johnson Stokes & Master* [1984] 1 A.C. 296, the defendant's solicitors had conducted the completion of a mortgage transaction in "Hong Kong style" rather than in the old fashioned English style. Completion in Hong Kong style provides for money to be paid over against an undertaking by the solicitors for the borrowers subsequently to hand over the executed documents. This practice opened the gateway through which a dishonest solicitor for the borrower absconded with the loan money without providing the security documents for such loan. The Privy Council held that even though completion in Hong Kong style was almost universally adopted in Hong Kong and was therefore in accordance with a body of professional opinion there, the defendant's solicitors were liable for negligence because there was an obvious risk which could have been guarded against. Thus, the body of professional opinion, though almost universally held, was not reasonable or responsible.

These decisions demonstrate that in cases of diagnosis and treatment there are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence (I am not here considering questions of disclosure of risk). In my judgment that is because, in some cases, it cannot be demonstrated to the judge's satisfaction that the body of opinion relied upon is reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks

and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.

I emphasise that in my view it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence. As the quotation from Lord Scarman makes clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported. It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the bench mark by reference to which the defendant's conduct falls to be assessed.

I turn to consider whether this is one of those rare cases. Like the Court of Appeal, in my judgment it plainly is not. Although the judge does not in turn say so, it was implicit in his judgment that he accepted that Dr. Dinwiddie's view was a reasonable view for a doctor to hold. As I read his judgment, he was quoting counsel's submission when he described the view that intubation was not the right course as being "unreasonable and illogical." The appeal of the argument was to the judge "as a layman" not a conclusion he had reached on all the medical evidence. He refused to "substitute his own views for those of the medical experts." I read him as saying that, without expert evidence he would have thought that the risk involved would have called for intubation, but that he could not dismiss Dr. Dinwiddie's views to the contrary as being illogical.

Even if this is to put too favourable a meaning on the judge's judgment, when the evidence is looked at it is plainly not a case in which Dr. Dinwiddie's views can be dismissed as illogical. According to the accounts of Sister Sallabank and Nurse Newbold, although Patrick had had two severe respiratory crises, he had recovered quickly from both and for the rest presented as a child who was active and running about. Dr. Dinwiddie's view was that these symptoms did not show a progressive respiratory collapse and that there was only a small risk of total respiratory failure. Intubation is not a routine, risk-free process. Dr. Roberton described it as "a major undertaking--an invasive procedure with mortality and morbidity attached--it was an assault." It involves anaesthetising and ventilating the child. A young child does not tolerate a tube easily "at any rate for a day or two" and the child unless sedated tends to remove it. In those circumstances it cannot be suggested that it was illogical for Dr. Dinwiddie a most distinguished expert to favour running what, in his view, was a small risk of total respiratory collapse rather than to submit Patrick to the invasive procedure of intubation.

Tragic though this case is for Patrick's mother and much as everyone must sympathise with her, I consider that the judge and the Court of Appeal reached the right conclusions on the evidence in this case. I would dismiss the appeal.

LORD SLYNN OF HADLEY

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Browne-Wilkinson. I agree with his analysis of the questions which have to be decided in cases of this kind and of the correct approach in law in deciding them. Despite my anxiety as to the result in this particular case, it is to me clear that Hutchinson J. asked the right questions and did not misdirect himself in answering them. He was entitled on all the evidence to accept that of Dr. Dinwiddie. Accordingly, I agree that this appeal must be dismissed.•

LORD NOLAN

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons which he has given, I, too, would dismiss this appeal.

LORD HOFFMANN

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Browne-Wilkinson. For the reasons which he has given, I, too, would dismiss this appeal.

LORD CLYDE

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Browne-Wilkinson. For the reasons which he has given, I, too, would dismiss this appeal.