

[QUEEN'S BENCH DIVISION.]

* BOLAM v. FRIERN HOSPITAL MANAGEMENT
COMMITTEE.

[1956 B. No. 507.]

1957
Feb. 20, 21,
22, 25, 26.McNair J.
and a jury.

Negligence—Hospital—Operation—Electro-convulsive therapy—Patient injured during course of treatment—Varying methods of administering treatment—Method adopted in accordance with one body of medical opinion—Liability of hospital.

During the course of electro-convulsive therapy [E.C.T.] treatment administered to him at the defendants' mental hospital, the plaintiff, a voluntary patient, sustained bilateral "stove-in" fractures of the acetabula. E.C.T. treatment consisted in the passing of an electric current through the brain of the patient which, when given unmodified, i.e., without the prior administration of a relaxant drug, resulted in violent muscular contractions and spasms, attended with a known, though slight, risk of bone fracture. In accordance with his normal practice the doctor treating the plaintiff had given the E.C.T. unmodified, and without applying any form of manual restraint other than to support the plaintiff's chin and hold his shoulders, nurses being present on either side of the couch in case the plaintiff fell off. The plaintiff claimed damages, alleging, inter alia, that the defendants were negligent (1) in failing to administer any relaxant drug prior to the passing of the current through his brain; (2) since they had not administered such drug, in failing to provide at least some form of manual restraint or control beyond that given; and (3) in failing to warn him of the risks involved in the treatment. Expert witnesses called by either side gave evidence as to the different techniques which they adopted in giving E.C.T. treatment; some used relaxant drugs, some restraining sheets, and some manual control, but all agreed that there was a firm body of medical opinion opposed to the use of relaxant drugs, and also that a number of competent practitioners considered that the less manual restraint there was, the less was the risk of fracture. It was the practice of the defendants' doctors not to warn their patients of the risks of the treatment (which they believed to be small) unless asked; if asked, they said that there was a very slight risk. The witness called for the plaintiff considered that it would not be right not to warn a patient of the risks of the treatment:—

Held, (1) that a doctor who had acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique.

Dictum of Lord President Clyde in *Hunter v. Hanley*, 1955 S.L.T. 213, 217, applied.

(2) That in determining whether or not the plaintiff was entitled to succeed on his allegation of failure to warn, the material considerations were, first, whether or not the defendants, in not warning him of the risks involved in the treatment, had fallen below a standard of practice recognized as proper by a competent body of professional opinion and, if a good medical practice did require warning, then, secondly, would the plaintiff, if warned,

have refused to undergo the treatment, and that it was for the plaintiff to show to the satisfaction of the court that, had he been warned he would not have taken the treatment.

JURY ACTION.

The plaintiff, John Hector Bolam, sued the defendants, the Friern Hospital Management Committee, claiming damages for negligence on the part of the defendants, their servants or agents, in electro-convulsive therapy [E.C.T.] treatment administered to him on August 23, 1954, when, during the treatment, he sustained fractures of the pelvis on each side caused by the head of the femur being driven through the acetabulum or cup of the pelvis.

The following facts appeared from the evidence. The plaintiff, having previously been a voluntary patient at the Friern Hospital, a mental hospital, was re-admitted as a voluntary patient on August 16, 1954, suffering from depression and on August 19 and 23 was treated for his condition by E.C.T. E.C.T. treatment is carried out by placing electrodes on each side of the head and allowing an electric current to pass through the brain. One of the results of passing the electric current through the brain is to precipitate violent convulsive movements in the form of a fit in the patient, and muscular contractions and spasms; if a relaxant drug is administered to the patient prior to the treatment, the muscular reactions can be reduced as to be barely discernible, but the plaintiff was given the treatment without any prior administration of such drug and it was during the convulsive muscular movements in the course of his treatment that he sustained his injuries. On August 23 the treatment was given to the plaintiff by one Dr. Allfrey, who, in accordance with his normal practice, and with that of his chief, one Dr. Bastarrechea, consultant psychiatrist attached to the defendant hospital, had given the treatment "unmodified," i.e., without the prior administration of a relaxant drug, and without applying any form of manual restraint. The treatment was given to the plaintiff whilst he was lying on a couch, and the precautions were to support his chin, to hold his shoulders and to place a gag in his mouth, while nurses were present on either side of the couch to prevent him from falling off.

The plaintiff alleged, inter alia, that the defendants were negligent in that they had failed to administer to him before the current was passed through his brain a suitable relaxant and/or anaesthetic drug or drugs to prevent or control the violence of the convulsion; failed to supply sufficient nurses to control his convulsive movements whilst undergoing the fit; permitted the treatment to be given without either the previous administration of a relaxant drug or the provision of manual control of his convulsive movements; and failed to warn him of the risks which he was running when he consented to the treatment, in particular, failed to warn him that they proposed to carry out the treatment

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without relaxant drugs being previously administered and without manual control being available.

The defendants denied liability.

On behalf of the plaintiff evidence was given by an expert (Dr. Randall), a consultant psychiatrist, who was of the opinion that relaxant drugs and an anaesthetic should be used when E.C.T. treatment was given, as the drugs prevented reaction of the muscles to the electric shock and so eliminated the risk of fracture; he said that up to 1953 he had only used relaxant drugs in selected cases but that since then he had used them in all cases. He admitted, however, that although he was in favour of the use of relaxant drugs, there was a large body of competent persons, whose opinion he respected who took a contrary view, and that he could not say that a practitioner using E.C.T. in 1954 who did not use relaxants was falling below the standard of care required of a competent medical practitioner merely by failure to use relaxant drugs. His personal opinion, which he said was shared by others was that, if relaxants were not used, some form of manual control or restraint was necessary; he said that if a relaxant was not given it was in his view foolhardy to give E.C.T. treatment without using some form of restraint, but agreed that there was a school of thought which took a different view and that it was the view of some competent doctors whose opinion he respected that the more restraint there was, the more likelihood there was of fracture.

On behalf of the defendants evidence was given by Dr. Bastarrechea to the effect that he was normally opposed to the use of relaxant drugs as he considered that there was, with their use, a risk of mortality while he considered that the risk of fracture with unmodified E.T.C. to be minimal; he said that, as a matter of clinical judgment he balanced the risk of death with the use of relaxants against the risk of fracture and decided that it was better not to use relaxants except in special circumstances, and that he only gave relaxant drugs in selected cases where the risk of unmodified E.C.T. would be greater than usual, and that there was no special reason why the plaintiff should have been given a relaxant drug. Other witnesses gave evidence as to the different techniques which they adopted in giving E.C.T.; some used restraining sheets, some relaxant drugs, some manual restraint, but all agreed that there was a firm body of opinion which was opposed to the use of relaxant drugs as a matter of routine. The defendants' evidence was that they used to provide manual control but had not done so since 1951, as it was their view, borne out by their experience, that the less restraint there was, the less the risk of fractures.

On the question of warning, the plaintiff's witness thought that it would not be right not to warn a patient of the risk of fracture while the defendants took the view that it was not desirable to warn patients of the risk unless they asked about it.

It also appeared from the evidence that the nature of the plaintiff's injury was exceptional.

N. R. Fox-Andrews Q.C. and *Roger Ormrod* for the plaintiff.
James Stirling Q.C. and *E. Sutcliffe* for the defendants.

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The following cases were referred to in argument: *Hatcher v. Black*¹; *Marshall v. Lindsey County Council*²; *Hunter v. Hanley*.³

McNAIR J. Members of the jury, it is now my task to try to help you to reach a true verdict, bearing in mind that you take the law from me and that the facts are entirely a matter for your consideration. You will only give damages if you are satisfied that the defendants have been proved to be guilty of negligence. Counsel for the plaintiff quite squarely faces up to that and accepts that he has to satisfy you that there was some act of negligence, in the sense which I will describe in a moment, on behalf of the defendants—and that primarily means Dr. Allfrey—and that that proved negligence did cause the injuries which the plaintiff suffered, or at least that the defendants negligently failed to take some precaution which would have minimised the risk of those injuries.

Before dealing with the law, it is right that I should say this, that you must look at this case in its proper perspective. You have been told by Dr. Page that he had only seen one acetabular fracture in 50,000 cases, involving a quarter of a million treatments, and it is clear, is it not, that the particular injury which produced these disastrous results in the plaintiff is one of extreme rarity. Another fact which I think it is right that you should bear in mind is this, that whereas some years ago when a patient went into a mental institution afflicted with mental illness, suffering from one of the most terrible ills from which a man can suffer, he had very little hope of recovery—in most cases he could only expect to be carefully and kindly treated until in due course merciful death released him from his sufferings—today, according to the evidence, the position is entirely changed. The evidence shows that today a man who enters one of these institutions suffering from particular types of mental disorder has a real chance of recovery. Dr. Marshall told you that in his view that change was due almost entirely to the introduction of physical methods of treatment of mental illness, and of those physical methods the electric convulsive therapy which you have been considering during the last few days is the most important. When you approach this case and consider whether it has been proved against this hospital that negligence was committed, you have to consider that against that

¹ The Times, July 2, 1954.

³ 1955 S.L.T. 213.

² [1935] 1 K.B. 516; 51 T.L.R. 279.

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background, and bearing in mind the enormous benefits which are conferred upon unfortunate men and women by this form of treatment.

Another general comment which I would make is this: on the evidence it is clear, is it not, that the use of E.C.T. is a progressive science. You have had it traced for you historically over the quite few years in which it has been used in this country, and you may think on the evidence that even today there is no standard settled technique upon all points, to which all competent doctors will agree. The doctors called before you have mentioned in turn different variants of the technique they use. Some use restraining sheets, some use relaxants, some use manual control; but the final question you have got to make up your minds about is this, whether Dr. Allfrey, following upon the practice he had learnt at Friern and following upon the technique which he had shown to him by Dr. Bastarrechea, was negligent in failing to use relaxant drugs or, if he decided not to use relaxant drugs, that he was negligent in failing to exercise any manual control over the patient beyond merely arranging for his shoulders to be held, the chin supported, a gag used, and a pillow put under his back. No one suggests that there was any negligence in the diagnosis or in the decision to use E.C.T. Furthermore, no one suggests that Dr. Allfrey or anyone at the hospital was in any way indifferent to the care of their patients. The only question is really a question of professional skill.

Before I turn to that, I must tell you what in law we mean by "negligence." In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Mr. Fox-Andrews put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a

perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if he conforms with one of those proper standards, then he is not negligent. Mr. Fox-Andrews also was quite right, in my judgment, in saying that a mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds. That again is unexceptionable. But the emphasis which is laid by the defence is on this aspect of negligence, that the real question you have to make up your minds about on each of the three major topics is whether the defendants, in acting in the way they did, were acting in accordance with a practice of competent respected professional opinion. Mr. Stirling submitted that if you are satisfied that they were acting in accordance with a practice of a competent body of professional opinion, then it would be wrong for you to hold that negligence was established. In a recent Scottish case, *Hunter v. Hanley*,¹ Lord President Clyde² said: "In the realm of "diagnosis and treatment there is ample scope for genuine "difference of opinion and one man clearly is not negligent merely "because his conclusion differs from that of other professional "men, nor because he has displayed less skill or knowledge than "others would have shown. The true test for establishing "negligence in diagnosis or treatment on the part of a doctor is "whether he has been proved to be guilty of such failure as no "doctor of ordinary skill would be guilty of, if acting with "ordinary care." If that statement of the true test is qualified by the words "in all the circumstances," Mr. Fox-Andrews would not seek to say that that expression of opinion does not accord with the English law. It is just a question of expression. 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. I do not think there is much difference in sense. It is just a different way of expressing the same thought. 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. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying: "I do not believe in "anaesthetics. I do not believe in antiseptics. I am going to "continue to do my surgery in the way it was done in the "eighteenth century." That clearly would be wrong.

Before I get to the details of the case, it is right to say this, that it is not essential for you to decide which of two practices is the better practice, as long as you accept that what the defendants

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¹ 1955 S.L.T. 213.

² *Ibid.* 217.

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did was in accordance with a practice accepted by responsible persons; if the result of the evidence is that you are satisfied that his practice is better than the practice spoken of on the other side, then it is really a stronger case. Finally, bear this in mind, that you are now considering whether it was negligent for certain action to be taken in August, 1954, not in February, 1957; and in one of the well-known cases on this topic it has been said you must not look with 1957 spectacles at what happened in 1954.

The plaintiff's case, as it has developed in the evidence, primarily depends upon three points. Firstly, that the defendants were negligent in failing to give to the plaintiff a warning of the risks involved in the treatment, so that he might have a chance to decide whether he was going to take those risks or not. Secondly, that they were negligent in failing to use any relaxant drugs which admittedly, if used, would have to all intents and purposes excluded the risk of fracture altogether. Thirdly—and this was, I think, the point upon which Mr. Fox-Andrews laid the most emphasis—that if relaxants are not used, then at least some form of manual control beyond shoulder control, support of the chin, and pillow under the back, must be used.

I am not going to take you through the whole of the evidence again, but let us examine those three points. Bear in mind that your task is to see whether in failing to take the action which it is said the defendants should have taken, they have fallen below a standard of practice recognized as proper by a competent reasonable body of opinion? First let me deal with the question of warning; when you are dealing with this point, there are two questions which you have to consider. First, does good medical practice require that a warning should be given to a patient before he is submitted to E.C.T. treatment; and, secondly, if a warning had been given, what difference it would have made? Are you satisfied that the plaintiff would have said: "You have told me what the risks are. I will not take those risks. I prefer not to have the treatment"? The plaintiff relies, on this aspect of the case, upon the evidence of Mr. Randall, whom you may think was a most distinguished psychiatrist, well qualified to express an opinion. You may also think that he was very cautious, in that in most of his answers on these matters of practice he said "My personal opinion is" so and so, "The way I do it is" so and so, "The circles in which I move do" so and so. Only once did he use a word of criticism against the defendants, when he expressed the view that not to use manual control was foolhardy. Asked about his practice, he said: "Having assessed the patient, it is then put to him that he might benefit from electric convulsive therapy—some people call it electro-shock therapy, but from the point of view of the patient that is not material because the patient is never aware either that he has a shock or a convulsion. It is put to the patient, and our practice at St. Thomas's and my practice at Charing Cross is to provide the patient with a consent form." Then he is asked: "Would

“ you warn him of the risks involved ? (A) Yes, I would indeed; in fact, we do. I make a practice always of saying to the patient that using the technique of relaxation he would be given an injection which would put him to sleep; that he would then be given another injection which would have the effect of paralysing all his muscles so that he could not move ”; and he said: “ I explain to the patient that if he were not given a relaxant drug his body would make some strong movements ” and “ If you do feel very sincerely as a doctor that it is the only hope of relieving this horror, would you think it wise to discourage the patient by describing to him the possible risk of serious fractures ? (A) I suppose that one has to form some opinion as to whether the patient is likely to be influenced by it. Depressed patients are often deluded about their bodily health, and nothing will alter their attitude. Taking that distortion of judgment into account, it is probable that to tell a patient that a risk of fracture exists will not materially alter his attitude to treatment, or his attitude to his illness.” If that is right, that to tell him of the risk of fracture will not materially alter his attitude to treatment or his attitude to his illness, you may ask yourselves: “ Is there really any great value in giving this warning ? ” Asked: “ Would you quarrel with a point of view as being wholly unsound if it was held that it was not beneficial to the patient to hear about that sort of thing ? (A) I can believe that there would be circumstances in which it could be considered that it would not be beneficial to tell a patient of possible dangers and mishaps, subject to what I have already said.” Then I put: “ Do you think that other competent people might take a contrary view to the one which you have expressed ? (A) I think so, my Lord; yes, they might. (Q) Other competent people might think that it is better not to give any warning at all ? (A) I think that is going a little further than I could go generally, but I think that other people might consider it better not to give any warning at all.” In re-examination, when he was asked: “ Do you think it ever right to give no warning of the risk to a person who can understand the warning ? ” he said “ I think it is not right to give no warning of the risks to a patient who can understand the import of the warning.” That is the highwater mark of the case for the plaintiff in favour of the view that it was negligent, in the sense I have used, not to give a warning. But, against that, you have got to consider the evidence given by the defendants; firstly, Dr. Bastarrechea, who said: “ I do not warn as to technique. I do not think it desirable to do so. If the patient asks me about the risks, I say there is a very slight risk to life, less than in any surgical operation. Risk of fracture, 1 in 10,000. If they do not ask me anything, I do not say anything about the risk,” and that in his view there was some danger in emphasizing to a patient who ex hypothesi is mentally ill, any dangers which in the doctor’s view were minimal, because, if he

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does so, the patient may deprive himself by refusal of a remedy which is the only available hopeful remedy open to him. In cross-examination he said: "I agree that when an operation is decided upon, the patient should be carefully examined, but I do not agree the patient should be warned of all the risks involved. I agree a man should be given the opportunity of deciding whether to take the risk, but I leave him to put the question. I do not agree that he should be told of all the risks. I do say that he should be told there are some slight risks, but I do not tell him of the catastrophe risk." Dr. Baker, from Banstead Hospital, said: "I have to use my judgment. Giving the full details may drive a patient away. I would not say that a practitioner fell below the proper standard of medical practice in failing to point out all the risks involved." Dr. Page, the Deputy Superintendent of the Three Counties Hospital, said: "I say that every patient has to be considered as an individual. I ask them if they know of the treatment. If they are unduly nervous, I do not say too much. If they ask me questions, I tell them the truth. The risk is small, but a serious thing when it happens; and it would be a great mistake if they refused to benefit from the treatment because of fear. In the case of a patient who is very depressed and suicidal, it is difficult to tell him of things you know would make him worse."

Having considered the evidence on this point, you have to make up your minds whether it has been proved to your satisfaction that when the defendants adopted the practice they did (namely, the practice of saying very little and waiting for questions from the patient), they were falling below a proper standard of competent professional opinion on this question of whether or not it is right to warn. Members of the jury, though it is a matter entirely for you, you may well think that when dealing with a mentally sick man and having a strong belief that his only hope of cure is E.C.T. treatment, a doctor cannot be criticized if he does not stress the dangers which he believes to be minimal involved in that treatment.

If you do come to the conclusion that proper practice requires some warning to be given, the second question which you have to decide is: If a warning had been given, would it have made any difference? The only man who really can tell you the answer to that question is the plaintiff, and he was never asked the question. He dealt with it quite shortly, and I was waiting for the question to be put. He says: "On August 16 I was examined by Dr. Bastarrechea. He told me he recommended convulsive treatment. I knew what it meant; but Dr. Bastarrechea did not give me any warning of any risk." I was rather waiting for the next question: "What would you have done if he had told you there was a 1 in 10,000 risk?" but the question was not put. Surely, members of the jury, it is mere speculation on your part to decide what the answer would have been. He might very well have said: "You have treated me for six months by rest. That

“worked as a temporary cure on me, but it did not last. You now tell me that you recommend this form of treatment. At the same time, you tell me there is some risk involved in it. Well, I am going to take it, rather than continue in my present condition.” At any rate, whether that is right or wrong, as it seems to me, you might well take the view that unless the plaintiff has satisfied you that he would not have taken the treatment if he had been warned, there is really nothing in this point.

I now pass to what I venture to believe is the real point which you have to consider, or the two real points you have to consider: Was it negligent, in the sense which I have indicated not to use relaxants? It is really a double point: Was it negligent not to use relaxants and, if no relaxants were used, was it negligent to fail to use manual control? But it is easier to take them separately. On the plaintiff's side, the argument is put this way, that if relaxants had been used, it is common ground that the risk of fracture in the operation would, to all intents and purposes, be excluded; therefore it ought to be excluded. On the other hand, the defendants say: “It is really not as simple as that.” They say: “The risk of fracture without relaxants is really minimal, although if it does occur, of course, to the individual patient it may be very serious, but the actual risk is minimal. But there is also, in the use of relaxants with an anaesthetic, another risk which has got to be balanced against it, and that is the mortality risk.” They say: “Forming a judgment as best we can as medical men, balancing what we believe to be a remote risk of fracture on the one hand with what we believe to be a remote risk of mortality on the other hand, we, as a matter of professional skill, have decided not to use relaxants except in cases where there is something special in the man's condition which indicates that a relaxant should be used.” For instance, if a man has had a recent fracture or is suffering from some arthritic condition, or hernia, they say: “We would use relaxants merely to avoid the greater risk of straight E.C.T. in those particular cases, but we select the cases for relaxants by the exercise of our clinical judgment.”

[His Lordship reviewed the evidence on this issue summarized above and continued:] On that body of evidence, is it open to you to say that mere failure to give relaxants is itself any evidence of negligence in the case of a medical man? There is a firm body of opinion against using relaxants as a routine, and there is agreement from all the witnesses that there is this body of opinion, although one (Dr. Randall) prefers to take the risk of relaxants and thus eliminate the risk of fractures. That is all I will say to you on that.

Now we come to the question of manual control. It is urged by the plaintiff: “If you do not use relaxants, which you know will eliminate all risk of fracture, the least you can do is to exercise some form of manual control. You did not use any manual control, and this disaster happened.” Here again the

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defendants say you are in the realm of two schools of thought. They say: "There is a school of thought, to which we adhere, " which believes honestly, on reasonable grounds, that if you " definitely hold a man down firm, either with a restraining sheet " or by a nurse lying over his body or holding him down firmly, " you do in fact increase the risk of fracture." They hold that view; and, holding that view, they, since the end of 1951, have adopted a new technique of leaving the limbs free to move, except that the man is held down at the shoulders and a nurse stands on either side of the couch ready to catch the man if he shows any sign of falling off.

Dr. Randall, called on behalf of the plaintiff, was quite definitely of the opinion, a personal opinion which he said was shared by others, that some manual control was necessary. Indeed, it is not disputed by the defendants, that some people think that manual control is desirable. But Dr. Randall was asked: "In your view, would a practitioner in this art of " ordinary competence in 1954 have administered this treatment " without any precaution?" said "It is the opinion of some " people that restraint is not indicated; but I would not have " given the treatment without some form of restraint. (Q) There " is a school of thought who would take a different view? (A) " Yes. (McNair J.): And who would give E.C.T. without any " restraint? (A) Yes, my Lord."

[His Lordship referred to the evidence of Dr. Randall and continued:] That is the view of a skilled person whose evidence you have heard, and you have to form your judgment as to how far he was merely expressing a personal view in favour of the practice which he preferred, or to what extent (if at all) he was condemning the practice advocated by the defendants. But, as against that, you have got to weigh the whole body of opinion represented by the witnesses called by the defendants. Dr. Bastarrechea was quite definite in his view that since he changed over to the use of no manual control after 1951, a decision which he took as a matter of clinical judgment, he got the impression that the fracture risk at any rate had not increased. He had got the impression that it had diminished. He had not at that time got out the figures, merely basing that judgment upon his clinical experience and on discussions with colleagues.

[His Lordship reviewed the evidence on this issue and continued:] Dr. Allfrey dealt with this matter. I have not said anything about Dr. Allfrey in detail, though he is primarily the man under attack, for it was during his operation that the disaster occurred. You have got to form your judgment of Dr. Allfrey, and make up your minds whether you think that he was a careful practitioner interested in his art, giving thought to the different problems, or whether he was a man who was quite content just to follow the swim. You may recall that on quite a number of occasions in the course of his evidence he gave instances where he had really applied his inquiring mind to the problem and come

to a conclusion. On the use of restraint, he told you that during his training he knew that there was a school of thought that favoured restraint, but that he got the impression that the general view was against it. He recalls how he was taught by the man responsible for his training that there was a greater danger of fracture if two ends of a rigid member like a stick were held firm than if one was left swinging or both were left swinging, and that rather persuaded him that there was something in the view that restraint should not be used. He, at his hospital, Knole, adopted under tuition (and, as he got older, on his own responsibility) the practice of leaving the limbs free to move, merely holding down the shoulders. When he got to Friern he found the same practice was being carried out by his chief there, Dr. Bastarrechea. Having had his technique shown to him, he followed it. The question you have got to make up your minds about is whether he is, in following that practice, doing something which no competent medical practitioner using due care would do, or whether, on the other hand, he is acting in accordance with a perfectly well-recognized school of thought. Dr. Marshall at Netherne adopts the same practice. Dr. Baker at Banstead adopts the same practice. It is true, and in fact interesting as showing the diversity of practice, that Dr. Page at the Three Counties mental institution adopts a modification of that, inasmuch as he prefers to carry out the treatment in bed, with the patient controlled to some extent by the blanket, sheets and counterpane. That may be of interest to you as showing the diversity of practice; but it would not be right, would it, to take that as a condemnation of the practice adopted by the defendants?

Before I leave this question of liability it is right to refer you to some wise words used recently in the Court of Appeal in *Roe v. Minister of Health*,³ a case not dissimilar to this. That was a case where two men in the prime of life were submitted to an anaesthetic for, in both cases, some trivial condition requiring operative treatment and, as the result of a mishap in the anaesthetic, both men came off the operating table paralyzed. After a very long inquiry, the trial judge came to the conclusion that it had not been established that, by the standard of care and knowledge operating at the time, the anaesthetist was negligent. The Court of Appeal took the same view, and Denning L.J. said⁴: “If the anaesthetists had foreseen that the ampoules might get cracked with cracks that could not be detected on inspection they would no doubt have dyed the phenol a deep blue; and this would have exposed the contamination. But I do not think that their failure to foresee this was negligence. It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals

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³ [1954] 2 Q.B. 66; [1954] 2 All E.R. 131. ⁴ [1954] 2 Q.B. 66, 83.

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“ and doctors. Medical science has conferred great benefits on
 “ mankind, but these benefits are attended by considerable risks.
 “ Every surgical operation is attended by risks. We cannot take
 “ the benefits without taking the risks. Every advance in tech-
 “ nique is also attended by risks. Doctors, like the rest of us,
 “ have to learn by experience; and experience often teaches in
 “ a hard way. Something goes wrong and shows up a weakness,
 “ and then it is put right. That is just what happened here.”
 Then again⁵: “ One final word. These two men have suffered
 “ such terrible consequences that there is a natural feeling that
 “ they should be compensated. But we should be doing a dis-
 “ service to the community at large if we were to impose liability
 “ on hospitals and doctors for everything that happens to go
 “ wrong. Doctors would be led to think more of their own safety
 “ than of the good of their patients. Initiative would be stifled
 “ and confidence shaken. A proper sense of proportion requires
 “ us to have regard to the conditions in which hospitals and
 “ doctors have to work.” And this is important⁶: “ We must
 “ insist on due care for the patient at every point, but we must
 “ not condemn as negligence that which is only a misadventure.”

That concludes what I wish to say on the question of liability.

[His Lordship, having directed the jury on the question of damages, left to them the following questions: (1) Do you find for the plaintiff or the defendants; and (2) If you find for the plaintiff, what sum of money do you award as damages?]

After a retirement of 40 minutes the jury returned a verdict for the defendants.

Judgment for the defendants.

Solicitors: *Pennington & Son; J. Tickle & Co.*

J. F. L.

⁵ [1954] 2 Q.B. 66, 86.

⁶ *Ibid.* 87.

[HOUSE OF LORDS.]

H. L. (N.I.)† * McCLELLAND APPELLANT;
 AND
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 Feb. 18, NORTHERN IRELAND GENERAL HEALTH
 19, 20; SERVICES BOARD RESPONDENT.
 Apr. 4.

Master and Servant—Contract of service—Implied term—Duration of service—Officer of statutory board—Advertisement inviting applications for post—Employment expressed to be “permanent and “pensionable”—Contract providing for termination in certain contingencies—Right to terminate employment in circumstances not specified.

† Present: LORD OAKSEY, LORD GODDARD, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD EVERSHED.