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For doctors, then, the standard would be the 'reasonable doctor'. But having established this, we come to an important question, namely determining what such reasonable doctor would have done. How does the court decide what a 'reasonable doctor' would have done? In such instances the courts will used the so-called '*Bolam* test', as laid down in the case of *Bolam* v. *Friern Hospital Management Committee* [1957] 1 WLR 582:

> **'. . . the standard of care expected of professionals is not that of the reasonable lay person, but that of a reasonable person having the same skills as the defendant has.'**

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Bolam v. *Friern Hospital Management Committee* [1957] 1 WLR 382

The claimant suffered fractures while undergoing electro-convulsive therapy under the direction of the defendant. Whilst being treated, the doctor did not restrain the claimant, nor was he given any muscle relaxants, and it was alleged that if this had been done, he would not have suffered the fractures whilst convulsing.

At the trial, expert evidence was led that reflected medical views in favour of giving muscle relaxants and constraining a patient whilst administering shock treatment, but for the defence contrary medical opinion was given.

The court held the defendant not liable, holding that as long as the doctor acts in accordance with 'a practice accepted as proper by a responsible body of medical men skilled in that particular art', she will be taken as having acted as a reasonable doctor and accordingly there would be no breach of duty and no liability.

This is controversial, as the case established that a professional defendant will not be held liable if her conduct accorded with one view of responsible common practice, even though some other members of her profession hold another opinion. Thus, the standard expected of professionals is that of *a* competent body of professional opinion, not of professional opinion *generally*. It could therefore conceivably be a practice that is only accepted by a minority of professionals.

It has been argued that the court thereby allowed doctors to set their own standards, and even that the court abdicated its adjudicatory function in doing so.

The *Bolam* test has caused controversy and was subject to much criticism, but the House of Lords has approved the test in relation to various aspects of medical treatment. However, the test appears to have been modified somewhat by the House of Lords in the following case.

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Bolitho v. *City and Hackney Health Authority* [1997] 4 All ER 771

The claimant's two-year-old son was admitted to hospital with respiratory difficulties. Over the course of his stay, he appeared to get better at stages, and at stages his condition appeared to deteriorate. Finally, he deteriorated to such extent that he did not get enough oxygen, suffered brain damage and subsequently died. One of the issues before the court related to whether a

reasonable doctor would have intubated the child or not. The claimant in this case was able to produce an expert witness who said that the boy in question should have been intubated, while the doctor in this case was able to produce an expert witness to say that intubation would not have been the correct treatment.

In this situation, the *Bolam* principle had always been taken as suggesting that the doctor was therefore not negligent – other medical opinion might disagree with what she did, but she could produce evidence that it was a practice accepted by a responsible body of medical opinion.

However, Lord Browne-Wilkinson, with whom the other Law Lords agreed, thought differently. While agreeing that the *Bolam* test was still the correct one to apply, he said that the court was not obliged to hold that a doctor was not liable for negligence simply because some medical experts had testified that the doctor's actions were in line with accepted practice. The court had to satisfy itself that the medical expert's opinion was reasonable, in that they had weighed up the risks and benefits, and had a logical basis for their conclusion.

In other words, following the *ratio* in *Bolitho*, the court cannot abdicate its role of adjudicating evidence.

There are some signs that the *Bolam* test is no longer applied quite as strictly as before, and that the *Bolitho* case is being used to hold medical opinion to a proper standard of reasonableness. For example, in *Gouldsmith* v. *Mid Staffordshire General Hospitals NHS Trust* [2007] EWCA Civ 397, the claimant's fingers were amputated and she submitted expert medical opinion that, had she been referred for specialist care, this could have been avoided by surgery. The Court of Appeal, applying *Bolitho*, held that the trial judge should have considered whether the specialist would have been negligent in not conducting the operation.

Lord Browne-Wilkinson himself in *Bolitho* pointed out (at 242), that in other professional areas, the courts do not abdicate their function of weighing up expert evidence. For example, in *Edward Wong Finance Co. Ltd.* v. *Johnson Stokes & Master* [1984] AC 296, the defendant's solicitors had completed a mortgage transaction in local 'Hong Kong style' rather than English style. This enabled a dishonest solicitor for the borrower to abscond with the loan money. Expert evidence was led that completion in Hong Kong style was almost universally adopted in Hong Kong and was therefore in accordance with a body of professional opinion there. Nevertheless, the defendant's solicitors were held liable for negligence by the Privy Council because it accepted that there was an obvious risk which could have been guarded against. Thus, in the view of the court, the body of professional opinion, though almost universally held, was not reasonable or responsible and was therefore not compelling.

Take note

Even though *Bolitho* seems to restore to the court its role of weighing evidence, *Bolam* is still applied. Lord Browne-Wilkinson held that a judge would only be entitled to reject expert medical evidence in the very rare case where it had been demonstrated that the professional opinion was incapable of withstanding logical analysis. He further held that in most cases the fact that distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion.

The defendant's course of action would therefore only be judged as falling below the standard of care if it was backed up by very poor medical evidence indeed!

State of the art defence

In areas such as medicine and technology, the state of knowledge about a particular subject may change rapidly, so that procedures and techniques which are approved as safe and effective might very quickly become outdated, and even be discovered to be dangerous.

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State of the art defence

The case of *Roe* v. *Minister of Health* [1954] 2 QB 66 established that, where this happens, a defendant is entitled to be judged according to the standards that were accepted at the time when they acted.

In *Roe*, the claimant was paralysed after receiving an injection containing a contaminated anaesthetic. Unknown to the defendants at the time (1947), it is possible for contaminants to enter glass ampoules through minuscule cracks. In this instance, the phenol in which the ampoule containing the anaesthesia was stored, entered into the syringe with which the claimant was injected. The Court of Appeal (hearing the matter much later) applied the test of what was the standard of medical knowledge in 1947 in respect to the detection of the presence of the phenol in the ampoules and held the defendants not liable. This is called the 'state of the art' argument which a defendant can use as a defence to a claim.

Children

The standard of care owed by a child is that which can be expected of a reasonable child of the defendant's own age. In *Mullin* v. *Richards* [1998] 1 All ER 920 the claimant's eye was seriously injured after she and the defendant played at fencing with plastic rulers. Both were 15 years old at the time. The court held that, while an ordinary, reasonable adult would not normally play around in such a manner, it was entirely in accord with what could be expected of an ordinary, reasonable 15-year-old.

Similarly, in *Keown* v. *Coventry Healthcare NHS Trust* [2006] EWCA Civ 39 it was held that there was no liability when an 11-year-old boy fell while climbing on a fire escape, as at that age the child knew the risk of what he was doing.

Other considerations to determine standard of care

Apart from setting the standard higher for professionals, and lower for children, the courts take several other factors into account when determining the standard of care.

Likelihood of harm

Where one person owes a duty to another, she must guard against the risk of causing harm. The court will consider the likelihood that harm will occur. In *Bolton* v. *Stone* [1951] AC 850 (HL) there was held to be no liability when a cricket ball was hit out of cricket grounds and hit the claimant while she was walking in the road. The court examined the frequency of this kind of risk occurring and on the facts (evidence showed that balls had been hit into the road only approximately six times in the preceding 30 years) held that it was rare enough not to make the reasonable man think twice about playing on

those grounds. In contrast, in *Miller* v. *Jackson* [1977] QB 966 (CA), on similar facts, there was held to be liability because cricket balls were hit out of the ground frequently.

The defendant must also take into account any factors that might increase the risk of harm occurring. In *Haley* v. *London Electricity Board* [1965] AC 778 the defendants had excavated a trench along a pavement to effect electrical repairs. They put up a railing, but unfortunately this was two feet off the ground, which meant that when the claimant, who was blind, tapped along with his stick he missed the railing and fell into the trench. As a result he suffered severe damage to his hearing and was rendered almost totally deaf. The House of Lords held that the defendants owed a duty of care towards people who walked along the pavement, and that such duty included blind people. On the facts it was held that by not putting the barrier where a blind person, who in his turn took the kind of precautions to be expected from his disability (such as using a stick), could perceive it, they had breached their duty and were held liable.

The extent of the possible harm

The court will also ask, if harm does occur, how serious is it likely to be? If it is likely to be relatively minor, it is unlikely that the court would decide that a reasonable person (who is not overcautious) would have had second thoughts about proceeding with the action complained of. However, if the consequences of things going wrong are likely to be significant, it is less likely that a reasonable person would have continued with the action.

In *Paris* v. *Stepney Borough Council* [1951] AC 367 an employer did not supply an employee who was blind in one eye with safety goggles. In the industry concerned (motor vehicle repairs) it was standard practice to provide safety goggles. The court held that the defendants had owed a higher duty of care towards the claimant, because it was known that an injury to his 'good' eye could have dire consequences – which in this case did come to pass – namely blindness.

Similarly, in *Walker* v. *Northumberland County Council* [1995] 1 All ER 737 the defendant was held to have owed a higher duty of care to the claimant because they were aware of his fragile state of mind (which was caused by overloading him with work).

Cost and practicability of precautions

If there is a risk, it is only necessary to do what is reasonable to try and avoid causing harm. There is no obligation to go to extraordinary lengths, especially where the risk is small. The court engages in a balancing exercise – the risk, on the one hand, is considered against the cost and practicability of taking precautions. We have already seen in *Bolton* v. *Stone* that the defendants escaped liability due the small risk of cricket balls being hit out of the relevant grounds.

However, if precautions are relatively easy and cheap to take, this is also taken into account and it is more likely that the defendant will be held liable. The Court of Appeal confirmed this in *Shine* v. *London Borough of Tower Hamlets* [2006] All ER (D) 79, where a small boy was injured when he tried to 'leapfrog' a bollard which the local council had not kept in proper repair. Lord Buxton

Take note

Be careful not to confuse this somewhat special duty of care with the so-called 'thin skull rule', which only applies once we get to the stage where the court considers causation. We examine the thin skull rule in more detail later (Chapter 4). For now just note that it means that, should the claimant have some condition or peculiarity which means that her damages would be more than for the average person, it's too bad for the defendant. If it was proved that the defendant breached a duty to the claimant and this caused the claimant's damage, liability will be for the full extent of the damage. In short, the thin skull rule says that a defendant should 'take his victim as he finds him'.

contrasted the relatively easy and cheap precaution of repairing a bollard which the council admitted it had a duty to, and was planning to repair in any case, with the facts in *Bolton* v. *Stone*:

> **'On the one hand the accident, although it was held to be foreseeable, was the result of a prodigious and unprecedented hit of the cricket ball out of the ground, on some computations a shot that travelled more than 100 yards; against on the other hand the only way of preventing that possible occurrence being either to shut down the cricket ground altogether or place fences around it of an excessive and no doubt unsightly nature. Although the case is authority for the general principle that there should be a balance, it goes no further than that. Applying the balance in this case, it seems clear to me that the balance comes down firmly on the side of saying that it would not be an unreasonable burden on the local authority to have taken the precaution in this case of getting their bollard into its proper state.'**

Further, the higher the risk of damage, or the more serious the possible consequences, the more likely that a reasonable person would take proper precautions. What is proper and appropriate will be a matter to be decided on the facts of each case.

Reasonable foreseeability

The reasonable person cannot be expected to take precautions against risks that are not foreseeable: see *Roe* v. *Minister of Health*, above, where at the time the medical practitioners could not have foreseen that phenol can seep through minuscule cracks in the glass ampoules storing anaesthetics.

Common practice

Failure to conform to a common practice of taking safety precautions can be evidence of negligence because it shows that the defendant has not done what others in the community regarded as reasonable. However, it cannot be regarded as conclusive evidence, because the claimant will still have to prove that the failure was the cause of her loss. So it will not be enough to say 'the defendant did not follow common (or industry) practice'.

Brown v. *Rolls Royce Ltd* [1960] 1 WLR 210 illustrates this. A factory worker contracted dermatitis and sued his employer in negligence, alleging that it was common practice for employees doing his type of work to be supplied with barrier cream, something which his employers failed to do. The House of Lords held that proof of a common practice may be compelling evidence assisting a claimant in proving negligence, but that in itself it is not enough to found negligence. In *Allen* v. *British Rail Engineering Ltd* [2001] EWCA Civ 242, the claimants sued the defendants for injury to their hands caused by the use of vibrating tools in the course of their employment. The defendants showed that it was only some years after the tools were used that it became known that they could cause damage. The court agreed that the defendants should only be held liable for that time and accordingly reduced (apportioned) the damages that the claimants were awarded.

On the other hand, this works the other way around too. Where a defendant can show that she has complied with common practice as regards safety precautions, this can provide good evidence that she was not negligent, although it is not conclusive because a particular conduct may be negligent despite it being common practice.

In other words, it will not be a defence to say 'everybody else was doing it'.

Sporting events

At a sporting event the competitors and spectators may be owed a *lower* standard of care than the general standard. It is assumed that, by participating in sport, or even by attending as a spectator, one consents to some risk. In *Wooldridge* v. *Sumner* [1963] 2 QB 43 (CA) a photographer at a horse show was injured when the defendant, a rider, took a corner fast and crashed into him. The defendant

was not held liable, and the court stated that the duty of care at a sporting event would only be breached if the competitor displayed a 'reckless disregard' for the safety of the spectator.

Social value of the activity

The defendant will not be held liable in negligence if there is a justification for taking the risk in question. Put another way, if what is being done is of social value, a lower standard of care may be required. For example, if the purpose is to save somebody's life, it may be justified to take an abnormal risk. Another example would be speed limits on roads – without doubt a speed limit of 10 mph would significantly lower the risk of motor vehicle accidents, but the social utility of speedy transportation outweighs such a measure.

Some values are obviously worth taking risks for. For example, in *Watt* v. *Hertfordshire County Council* [1954] 1 WLR 835 a fireman was injured by an improperly secured jack whilst on his way to save the life of a woman trapped under a car. His claim failed.

Other values are less easy to assess and the balancing exercise may be more difficult.

REFLECTION

One often hears urban myths about apparently harmless activities being prevented on 'health and safety' grounds – i.e. for fear of being sued in case of injury. Still, the law itself takes a more common sense approach in weighing up the social utility of an activity against the risk of injury or damage – and here social utility includes leisure activities. Think, for example, of the weight given to the social utility of playing cricket in *Bolton* v. *Stone.* Another case is illustrative. We look at the case of *Tomlinson* v. *Congleton Borough Council* [2003] 3 All ER 1122 in detail later (in Chapter 8) but it is useful briefly to consider its impact on this area of law. In this case the claimant dived into the shallow end of a lake owned by the defendant council, struck his head and suffered a severe spinal injury. The House of Lords, in considering whether a beach, used by many people and if used properly for permitted purposes posed little risk, should be closed by the council for fear of liability in case of injury. The House struck a blow for common sense, making it clear that the social utility of the amenity in this case outweighed the risk, especially given the fact that the risk was exacerbated by the irresponsible behaviour of the claimant himself.

There is also statutory recognition of the common sense approach.

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Compensation Act 2006, section 1

Section 1 of the Compensation Act 2006 states:

> **'A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might –**
>
> **(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or**
>
> **(b) discourage persons from undertaking functions in connection with a desirable activity.'**