THE LAW OF NEGLIGENCE AND THE 'HOSPITAL CASES'

Chin Keow v. *Government of the Federation of Malaya & Another* [1]

The principle that it is advisable to sue the person or body best able to pay has more often than not resulted in hospital boards,[2] county councils [3] or the government [4] paying for the negligence of their medical staff. Until *Gold* v. *Essex County Council*[5] was decided in 1942 it was thought that the only duty which the authorities who managed a public hospital owed towards their patients was a duty to exercise due care and skill in selecting their medical staff. It was *Gold's* case (argued by Denning, K.C. as he then was) which established for the first time the liability of the administerng authorities of a public hospital for the negligence in professional care or skill of their whole-time staff.[6] It was *Cassidy's* case [7] decided by among others, Denning L.J. (as he then was) which made hospitals liable for the negligence of their surgeons and physicians whether consultant or not so long as they were paid by the hospital

18. *Halsbury's Laws of England,* Vol. 20. (3rd ed., 1957), at pp. 27-28.

19. *Partington* v. *A-G* (1869) L.R. 4 H.L. 100 at p. 122; *Tennant* v. *Smith* [1892] A.C, 150 at p. 154 (H.L.); *Russell (Inspector of Taxes)* v. *Scott* [1948] A.C. 422 at p. 433 (H.L.).

20. *Kiliman* v. *Winckworth* (1933) 17 T.C. 569; *Littman* v. *Barron* [1951] Ch. 993 at p. 1003.

21. *Ibid.*, at p. 572.

1. (1964) 30 M.L.J. 322.

2. *Higgins* v. *Northwest Metropolitan Hospital Board* [1964] 1 W.L.R. 411 (decided against the plaintiff on *s.* 21(1) of the Limitation Act, 1939 (2 & 3 Geo. 6, c. 21).

3. *Gold* v. *Essex County Council,* [1942] 2 K.B. 293; *Collins* v. *Hertfordshire County Council* [1947] K.B. 598.

4. *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343.

5. [1942] 2 K.B. 293.

6. Lord Greene M.R. did not consider the psoition of the consulting physician and surgeon. The position of the house physician and surgeon was also left open.

7. *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343.

authority. And it was Denning L.J. again in *Roe* v. *Minister of Health*[8] who said:

> . . . hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors, but also for the anaesthetists and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole-time or part-time. The hospital authorities are responsible for all of them. The reason is because, even if they are not servants, they are agents of the hospital to give the treatment. The only exception is the case of consultants or anaesthetists selected and employed by the patient himself.

It is not surprising therefore that when a doctor in a Government clinic gave a penicillin injection to a patient without making any enquiry into the patient's history with the result that the patient died, the Government of the Federation of Malaya was successfully sued by the deceased person's dependants.[9] This case might pave the way for a multitude of actions against the Government as did *Gold* v. *Essex County Council*[10] as it is well known that hospitals in Malaysia are understaffed and working under tremendous pressure. This note will attempt to discuss *Chin Keow's* case [11] in the context of the English 'hospital cases', and will draw attention to the rather cautious attitude that the Courts in England have recently adopted before they allow actions in negligence against hospitals or their staff to succeed.

Chu Wai Lian was a female attendant employed in a Social Hygiene Clinic in Kuala Lumpur. In 1958 she was treated for ear-ache as an out-patient in another Government Clinic. During the treatment it was discovered that she was allergic to penicillin and the words "ALLERGIC TO PENICILLIN" were endorsed in block letters on her out-patient treatment card. On the 7th April, 1960 she complained to the staff nurse of the Clinic where she worked of an ulcer on her right ankle and swollen glands in the thigh. The staff nurse brought her to the second defendant who was the medical officer in charge of the Clinic and she was examined by him. What happened afterwards is a matter of some difficulty as the only evidence available was that of the doctor and the staff nurse and that evidence was highly unsatisfactory. As Ong J. put it "The nurse contradicted herself, and she and the doctor contradicted each other. As witnesses I believed neither of them." [12] What is certain however is that Chu was given a penicillin injection and that she died of anaphylactic shock as the result of that penicillin injection. In granting damages of $10,250 to the dependants of the deceased Ong J. held that the doctor was negligent and that the negligence was "a failure to take the simple, elementary precaution of asking a few questions"; [13] in other words the negligence was an omission to take the history of the patient before administering the injection. It is important to remember that only this is the *ratio decidendi* of the case. Counsel for the defendant and indeed the doctor himself attempted to suggest that if there was any negligence it consisted in the failure to carry out sensitivity tests on the patient. This argument they thought might operate in their favour as it was shown that up to 1960 doctors in government and municipal hospitals habitually gave penicillin injections without carrying out sensitivity tests. In *Bolam* v. *Friern Hospital Management Committee* [14] the plaintiff was administered electro-convulsive therapy [E.C.T.] popularly called "electric shock treatment" without any relaxant drug, restraining sheets or manual restraint with the result that the plaintiff sustained fractures of the pelvis due to the violent convulsive muscular movement brought on by the passing of the electric current through his brain. The plaintiff did not succeed in an action for negligence against the hospital because, as McNair J. said, ". . . [the doctor] is not guilty of negligence if he has

8. [1954] 2 Q.B. 66 at p. 82.

9. *Chin Keow* v. *Government of the Federation of Malaya & Another* (1964) 30 M.L.J. 322.

10. [1942] 2 K.B. 293 — It was this case which started off a series of successful actions in negligence against hospital boards, county councils and the government. Lord Denning in "The way of an Iconoclast", (1959-60) J.S.P.T.L. 77 describes the development but modestly ascribes the credit for this development to Professor Goodhart's article entitled "Hospitals and Trained Nurses", (1938) 54 L.Q.R. 553. See also a note by C. A. Wright entitled "Hospitals, Liability for Negligence of Nurses and Doctors — Respondeat Superior", (1936) 14 Can. B. R. 699.

11. (1964) 30 M.L.J. 322.

12. *Ibid*., at p. 324.

13. *Ibid*., at pp. 324-5.

14. [1967] 1 W.L.R. 582.

acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art." [15] Thus in *Chin Keow's* case [16] if the negligence consisted in a failure to take sensitivity tests, the charge of negligence could be effectively answered by showing that prior to 1960 doctors in municipal and government hospitals habitually gave penicillin injections without carrying out sensitivity tests. That Ong J. was not concerned with the failure to carry out sensitivity tests was clearly brought out in his judgment when he said:

> What the defence appeared to have been unable to appreciate was that I was not in the least concerned with the doctor's failure to carry out sensitivity tests. The negligence did not lie in the omission to carry out such tests on the patient for individual idiosyncracy. The essence of the negligence here was the failure to take the simple elementary precaution of asking a few questions. Had he done so, the mishap would never have happened." [17]

In cases where professional negligence is not alleged it is sufficient to show 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, in addition to damage caused by the failure or the doing of that act. But in cases where professional negligence is alleged (against a medical man) you cannot use the test of the reasonable or ordinary man in the street for determining negligence. The man on the Clapham omnibus or the man in the Taiping *trisha* is forced to alight and into his seat steps a reasonably competent medical man at the time the act or failure to act occurred. McNair J., put it very succintly when he said:

> ". . . 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 the 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." [18]

But there may be more than one perfectly proper standard. As Lord President Clyde pointed out in *Hunter* v. *Hanley* [19]

> In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion [20] 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 . . ." [21]

In certain cases there might of course be a deviation from what is regarded as normal professional practice. Is this to be regarded as negligence? Again Lord President Clyde provided the answer in *Hunter* v. *Hanley* [22] when he said:

15. *Ibid.*, at p. 587 — It was shown that several doctors administered E.C.T. without relaxant drugs or manual control though it was admitted that the relaxant drug prevented reaction of the muscles to electric shock and so eliminated the risk of fracture. The doctor was not to be liable for negligence merely because there was a body of competent professional opinion which might adopt a different technique.

16. (1964) 80 M.L.J. 322.

17. *Ibid.*, at pp. 324-325.

18. *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 582 at p. 586.

19. [1955] Scots L.T. 213 at 217.

20. "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." *Per* McNair J., in *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 682 at p. 587.

21. See Gregg, *The Law of Reparation in Scotland*, (4th Ed., Edinburgh, 1956), at p. 467.

22. [1955] Scots L.T. 213 at p. 217.

> . . . such a deviation is not necessarily evidence of negligence. Indeed it would be disastrous if this were so, for all inducement to progress in medical science would then be destroyed. Even a substantial deviation from normal practice may be warranted by the particular circumstances. To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice. Secondly it must be proved that the [defendant] has not adopted that practice, and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care . . .

When judging the conduct of a medical man one must do so by the standards of reasonably competent medical men *at the time.* This principle has been colourfully put by Denning L.J. (as he then was) in *Roe* v. *Minister of Health* [23] when he said "We must not look at the 1947 accident with 1954 spectacles." In that case the two plaintiffs had gone into hospital for minor operations, they were both given a spinal anaesthetic called nupercaine. After the operations both plaintiffs developed severe symptoms of spastic paraplegia, caused by phenol, and this resulted in permanent paralysis from the waist downwards. The nupercaine was stored in glass ampoules the outside of which was "frankly septic." To avoid the possibility of contamination with some germ the anaesthetist stored the glass ampoules in a solution of phenol. Unfortunately for the plaintiffs, the phenol solution seeped through "invisible cracks" in the glass container and mixed with the nupercaine with the result that the plaintiffs, instead of being injected with pure nupercaine, received a spinal injection of nupercaine mixed with carbolic acid which corroded all the nerves which controlled the lower half of their bodies. In dismissing the actions by the plaintiffs for negligence, McNair J. held that since it was only in 1951 that the attention of anaesthetists was drawn to the fact that phenol could seep through "invisible cracks" in glass ampoules, ". . . by the standard of knowledge to be imputed to competent anaesthetists in 1947, Dr. Graham was not negligent in failing to appreciate this risk and *a fortiori* the theatre staff were not negligent . . ." The plaintiffs appealed but Somervell, Denning and Morris L.JJ.; dismissed the appeal and Denning L.J. went on to say "we must not look at the 1947 accident with 1954 spectacles." [24] It is interesting to compare this decision with the decision in *Cassidy* v. *Minister of Health* [25] where the plaintiff who had two stiff fingers in his left hand went into a hospital in Liverpool for an operation. After the operation not only were the two stiff fingers that had been operated upon completely stiff but the other two good fingers were also stiff with the result that the plaintiff was left with a completely useless left hand. At first instance Streatfeild J. gave judgment for the defendants on the ground that the plaintiff had failed to prove negligence on the part of any of the hospital staff. On appeal, Somervell, Singleton and Denning L.JJ., allowed the appeal and Denning L.J. said the plaintiff could put his case in the following way "I went into the hospital to be cured of two stiff fingers. I have come out with four stiff fingers, and my hand is useless. That should not have happened if due care had been used. Explain it, if you can." But couldn't the plaintiffs in *Roe's* case [26] put their case the same way. "We went into hospital for minor operations with an otherwise fully fit body. We have come out with a half paralysed body. That should not have happened if due care had been used. Explain it, if you can." Why then did the plaintiffs in *Roe's* case fail where the plaintiff in *Cassidy's* case succeeded in his action for negligence? It could be argued that the defendants in *Roe's* case did explain how the severe physical injuries were inflicted on the two plaintiffs but can one really say there was no negligence on the part of the defendants? Denning L.J. admitted that there must have been some negligence in the handling of the ampoules "The ampoules were quite strong and the sisters said that they should not get cracked if proper care was used in handling them". [27] From then on it should have been easy going for the plaintiffs. The

23. [1954] 2 Q.B. 66 at p. 84.

24. Incidentally we may notice that a plaintiff may have to wait as long as seven years before his claim is finally determined.

25. [1951] 2 K.B. 343.

26. *Roe* v. *Minister of Health* [1954] 2 Q.B. 66.

27. *Ibid*., at p. 84.

ampoules were cracked by negligence. The ampoules were "frankly septic" on the outside. The recognised practice in that hospital was to immerse the ampoules in a phenol solution. The phenol solution percolated through the cracks and mixed with the spinal anaesthetic nupercaine. The mixture was injected into the spine of the patient with disastrous consequences. But Denning L.J. still said "I do not think their failure to foresee this was negligence." [28] It is submitted that there is very little to distinguish *Cassidy's* case from *Roe's* case. In both cases the very serious and disastrous consequences to the plaintiffs were caused by the limitations of medical science at the time the misfortune occurred. *Roe's* case is an indication that the courts will be cautious in allowing a claim for negligence where the physical injuries are due primarily to the limitations of medical science at the time rather than to the want of due care on the part of hospital authorities and their staff. While there is no indication of a return to *Hillyer's* case [29] there is some indication that the judges in England will refuse to treat a public hospital as a gold mine. Denning L.J. in *Roe's* case [30] was anxious to warn us that

> 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 and doctors* [italics supplied]. 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 technique is also attended by risks. Doctors, like the rest of us, have to learn by experience, and experience often teaches us in a hard way. Something goes wrong and shows up a weakness and then it is put right . . .

and in a later passage [31] he said:

> . . . we should be doing a disservice 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. 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 . . .

And it is these *dicta* of Denning L.J. which were described by McNair J. in 1957 [32] as "wise words used recently in the Court of Appeal".

It is difficult to predict what effect *Chin Keow's* case [33] will have on the standard of care in public hospitals in Malaysia. It may very well lead to the issuance of departmental circulars requiring doctors in public hospitals to probe the history of the patient and/or take sensitivity tests before administering penicillin injections. But this may now be a normal practice. It may lead to a better standard of care in public hospitals in Malaysia. In any case it may be important to remember that judges, at least in England, have since 1954 refused to allow a patient to treat a public hospital as a gold mine.

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28. *Ibid*., at p. 83.
29. *Hillyer* v. *St. Bartholomew's Hospital* [1909] 2 K.B. 820.
30. [1954] 2 Q.B. 66 at p. 83.
31. *Ibid*., at p. 86.
32. In *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 582 at p. 593.
33. (1964) 30 M.L.J. 322.