STANDARD PRACTICE AND JUDICIAL RESPONSIBILITY

Thean Chew v. *The Seaport (Selangor) Rubber Estate, Ltd.*

and

Chin Keow v. *Government of the Federation of Malaya & Anor.*

Despite the fact that the mythical legal deity, the reasonable man, exercises a vital control over every negligence case, no one has ever laid eyes on such a person, though there is a suspicion in England that he may be found on the Clapham omnibus.[1] It is said that he does not possess the courage of Achilles, the wisdom of Ulysses or the strength of Hercules;[2] he is, to borrow a phrase from Broadway, "just an ordinary man."[3] Just an ordinary man, yet it is he who personifies the plaintiff's expectations of how the defendant will act and who sets the standard which the defendant must achieve. The question: what would a reasonable man have done in the circumstances? must be answered in every case in which negligence is in issue, but despite the ordinariness of the man, this is not an easy question to answer in any given case. Resort to prior cases is often useless, for in negligence each case unhelpfully turns on its own facts. For the trier of fact to ask what he himself would have done is improper[4] because his personal standards may be higher or lower than those of the reasonable man. But if the reasonable man is such an ordinary fellow, there must be plenty of his kind around; why not define what a reasonable man would do in terms of what ordinary men actually do?

Is actual practice reasonable practice? Or is the standard of reasonableness which the court applies a normative standard which defines what ought to be rather than a descriptive standard which merely reflects what is?[5] This question, the central question of this note, had to be faced squarely by Ong, J. in *Thean Chew* v. *The Seaport (Selangor) Rubber Estate, Ltd.*[6] In that case, the plaintiff's husband was fatally injured when a diseased rubber tree standing on the defendant's rubber estate immediately adjoining the highway fell and struck the lorry in which the plaintiff's husband was riding. In a claim by the plaintiff for damages under section 7 (8) of the Civil Law Ordinance,[7] two expert witnesses, one a Visiting Agent called by the plaintiff and the other a manager of another rubber estate called by the defendant, testified that if they had seen the tree before it fell they would not have considered it dangerous enough to warrant cutting it down as long as it was still producing latex. A third expert witness, an experienced estate manager, called by the plaintiff, testified that while he was not certain whether he would have taken the tree out, the normal procedure would be to keep tapping the tree unless it was very seriously diseased. In the course of his opinion in which he found the defendant's estate manager negligent, Ong, J. said:[8]

> I agree that the evidence of witnesses of such high standing in the rubber planting industry is entitled to the greatest weight in that it may be considered as standard practice in estate management to leave diseased trees standing until their yield of latex drops considerably or ceases or their condition becomes plainly dangerous. Established standard practice may well

1. *Hall* v. *Brooklands Auto Racing Club* [1933] 1 K.B. 205 at p. 224. And in the United States he apparently takes the magazines at home and mows the lawn in the evening in his shirtsleeves. *Ibid.*
2. *Winfield on Torts,* (Sixth ed. 1954), at p. 491. See also *Glasgow Corporation* v. *Muir* [1943] A.C. 448 (Scot.) *per* Lord Macmillan at p. 457; "The reasonable man is presumed to be free both from over-apprehension and from over confidence."
3. From the musical comedy, "My Fair Lady."
4. *Eyeres* v. *Gillis & Warren, Ltd.,* (1941) 28 Man. 164 (Manitola).
5. See generally Montrose, "Is Negligence an Ethical or a Sociological Concept?" (1958) 21 M.L.R. 259; Morris, "Custom and Negligence", (1942) 42 Colum. L.R. 1147.
6. (1960) 26 M.L.J. 166 (High Ct.).
7. Federation of Malaya Civil Law Ordinance, 1956 (No. 5 of 1956).
8. *Thean Chew's* case, *supra,* note 6, at pp. 169-70.

> be the practice of reasonable and prudent estate owners. It may, on the other hand, fall below or even surpass, the standard required by law of a reasonable and prudent landowner, which is the test that the law requires to be applied. Evidence of standard practice cannot, however, be substituted for my own judgment or relieve me of the duty of deciding on the evidence whether the defendant's manager has properly discharged the duty of care that he owes to passersby on the highway. These witnesses are neither jurors nor assessors by whose opinions I am bound on a question of fact....
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> [I]t is clear, in my opinion, that [the defendant's estate manager] had failed to take even the most elementary precautions to prevent danger to persons on the highway in case this tree should fall. Any simple expedient, by way of shoring or bracing the trunk, so that the tree would fall in some other direction than the highway, would have been completely effective, and failure to do so, in view of the obviously diseased condition of the tree, amounts to taking a risk which I consider entirely unjustifiable. The danger of the tree in that condition falling was reasonably foreseeable and the damage to persons on the highway such that it was, or should reasonably have been, within the contemplation of any prudent land owner.

Here then is a fairly clear rejection of standard practice as the conclusive test for establishing what a reasonable man would have done. The standard of reasonable care is an abstract standard of what ought to be done which may not necessarily correspond with what actually is done; though the reasonable man is an ordinary man, the ordinary man is not always reasonable.

It may come as somewhat of a surprise to Anglo-centered lawyers to compare the good sense reflected in Ong, J.'s statement with a statement of Judge Learned Hand in *The T.J. Hooper*.[9] In that case the defendant's tug boat, while towing a string of barges up the Atlantic coast, ran into a heavy storm which resulted in the loss of the plaintiff's cargo. In a suit for damages, the plaintiff alleged that the defendant was negligent in failing to have on board his tug boat a working radio with which he could have received the Weather Bureau reports that would have enabled him to avoid the storm. The defendant argued that the plaintiff had failed to establish negligence since it was not standard practice at the time to have radios on tug boats. In finding the defendant negligent, Judge Hand said:[10]

> Is it then a final answer that the business had not yet generally adopted receiving sets? There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves.... Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[11]

Confronted with cases such as these[12] the curious mind asks: Why shouldn't standard practice be accepted as conclusive proof of reasonable practice? Where does the court get the authority to upgrade the standards of the community? Isn't this a task which is traditionally left to the legislature? These questions probe deeply into the foundations of the whole legal process and can be answered, if at all, only in terms of drawing a distinction between what is and what ought to be and realising that in giving our courts the power to decide cases, we have

9. 60 F. 21. 737 (U.S., 2d Cir., 1932), 19 Va. L.R. 526.

10. *Ibid*., at p. 740.

11. The quoted statement is dictum for the plaintiff had established that some tug boats carried receiving sets, and Hand J. noted that there was therefore no custom at all. *Ibid*., at p. 740.

12. For a Canadian decision involving a similar question, see *Ware's Taxi Ltd.* v. *Gilliham* [1949] S.C.R. 637, [1949] 3 D.L.R. 721. For a similar English holding see *Cavanagh* v. *Ulster Weaving Co., Ltd.* [1960] A.C. 145.

in fact given them the power to decide what ought to be rather than merely to reflect what is.[13] To the extent that courts exercise this power by refusing to accept standard practice as conclusive evidence of reasonable practice, they are acting as the legal conscience of the community, forcing it, by threat of a law suit, to upgrade its standards.

However, it is perhaps not necessary to probe quite so deeply into the function of a court to explain the two cases above cited, for in neither case is the standard practice that is being evaluated the standard practice of the whole community; it is rather the practice of a small group within the community: rubber estate owners in *Thean Chew's* case and tug boat owners in *The T.J. Hooper.* To allow these small groups to set their own standard would contradict the principle, long established in negligence cases, that the defendant is not to be allowed to set his own standard. One reason frequently given for this is that allowing the defendant to set his own standard would:

> .... leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various.... Instead therefore of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.[14]

The danger of individual variation is perhaps reduced when the judgment of a group is concerned, but even the collective judgment of a group does not overcome a second objection to allowing the defendant to set his own standards. This is that the defendant, involved as he is with bis own interests and goals, cannot be relied on fully to consider the interests of the plaintiff in deciding what is reasonable. The estate managers in deciding whether to take out a diseased rubber tree may give undue weight to the fact that the tree is still producing and making money, and not enough weight to the possibility of injury to the plaintiff. The tug boat captain may give undue weight to the expense involved in installing a radio and not enough weight to the possibility of injury. One of the principle functions of a court is to bring to bear on the decision of the case a detached independent judgment which objectively weighs the interests of both parties in reaching a decision as to what is reasonable; thus it is the court, not the defendant or his group which must make the decision.

Therefore it is submitted that both Mr. Justice Ong and Judge Hand were correct in not automatically accepting standard practice as reasonable practice for to do so would be to abdicate the court's responsibility to distinguish the "is" from the "ought" and reach an objective decision which effectively considers the interests of both parties.

A more difficult problem is involved when the defendant is a highly skilled doctor rather than a rubber estate owner. It has long been a principle of the law of negligence that because the doctor holds himself out as possessing certain skills which the ordinary man does not possess, the ordinary reasonable man test is inadequate. The doctor is not required to use the skill or care which might be used by the most skilled or most careful doctor, but he is required to act in accordance with the skill and care of the reasonably skilled and careful doctor,[15] which is something different from the standard expected from the man on the Clapham Omnibus.[16]

13. See Montrose, *op. cit. supra* note 5; Morris, *op. cit. supra* note 5.

14. *Vaughn* v. *Menlove* (1837) 3 Bing. N.C. 467 at p. 475 (C.P.); However exceptions may be made for children: *Walmsley* v. *Humenick* [1954] 2 D.L.R. 232 (B.C. Sup. Ct.); *Yachuck* v. *Oliver Blais Co., Ltd.* [1949] A.C. 386 (P.O.); *Charbonneau* v. *MacRury* 84 N.H. 510, 153 A. 457 (Sup. Ct., New Hampshire 1931) : and lunatics: *Cf. Buckley* v. *Smith Transport Ltd.* [1946] O.K. 798; [1946] 4 D.L.R. 721. (Ont. C.A.). But *cf. White* v. *White* [1960] P. 39; [1949] 2 All E.R. 339 (C.A.) *per* Denning L.J.

15. *E.g., Rich* v. *Pierpont* (1862) 3 F. & F. 35 (N.P.).

16. See *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 582 at p. 586 (Q.B.) *per* McNair J.:

The formulation of the doctor's standard of care in such broad terms is a relatively straightforward matter; the difficult problem is the ascertainment, in any particular case, of just what it is that a reasonable doctor would have done. Can the court make this decision for itself or must it rely on the standard practice of the medical fraternity as conclusive evidence of reasonable practice? This question is raised but not answered by *Chin Keow* v. *Government of the Federation of Malaya & Anor.*[17] In that case the deceased died from anaphylactic shock as a result of a penicillan injection prescribed by the second defendant, a doctor working in a clinic of the first defendant. The plaintiff alleged that the doctor had been negligent in failing to make prior inquiry from the deceased which would have revealed that she was allergic or hypersensitive to the drug. The defendant apparently relied heavily on the argument that prior to 1960, doctors in government hospital habitually gave penicillan injections without any prior sensitivity tests, and that since the doctor had been following standard practice, he had not been negligent.[18] In finding that the defendant had been negligent, Ong, J. dismissed the defendant's argument based on standard practice as irrelevant:[19]

> 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 idosyncracy. The essence of the negligence here was the failure to take the simple, elementary precaution of asking a few questions. . . .
>
> I should have thought that some probing at least into every patient's history was the very first thing any doctor would start with on seeing a patient. The doctor here was guilty of negligence by his omission to do so. It is quite irrelevant that up to 1960 doctors in government hospitals habitually gave injections without tests. What could have been relevant was evidence that it was accepted practice among government doctors throughout the country that patients' history was never probed before prescribing a penicillin injection. I doubt that any doctor in government service can be found to testify in court to this effect. . . .

This passage raises the immediate question: what would the court have done if the defendant had been able to prove that it was standard practice to prescribe injections without prior inquiry? Would Ong, J. have followed the statement of McNair J. in *Bolam* v. *Friern Hospital Management Committee*[20] to the effect that "[A doctor] 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."? Or would Ong, J. have been prepared to hold, as he did in *Thean Chew's* case,[21] that standard practice is not necessarily reasonable practice; that a court must make an independent judgment of whether the standard practice is reasonable?[22]

Despite the fact that it has been held that a deviation from standard medical

> 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; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

17. (1964) 30 M.L.J. 322 (High Ct.).

18. *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 582 (Q.B.).

19. *Chin Keow's* case, *supra* note 17, at pp. 324-5.

20. [1957] 1 W.L.R. 582 at p. 587.

21. *Supra* note 6.

22. Note that Ong J. does not answer this question; he merely says that it would be *relevant* if it were standard practice not to ask questions; he does *not* say it would be *conclusive.*

practice is not conclusive proof of negligence,[23] there is a respectable body of opinion which holds that a doctor's adherance to standard medical practice is conclusive proof of reasonableness.[24] But if rubber estate managers and tug boat captains cannot rely on standard practice to exonerate them, then why should doctors enjoy this special privilege? For surely the same considerations that were marshalled in favour of the results in *Thean Chew's* case and the *T.J. Hooper* would apply to a case concerning standard medical practice. To be sure, in the case of standard medical practice the court is dealing with a practice established by a highly trained group of men who presumably are devoted to the best interests of the plaintiff; the court is not dealing with a group of rubber estate owners whose real interests lie in making money from their rubber trees. But even so, while this may mean that the standard medical practice should be given great weight by the court, does the fact that the doctor is a highly trained professional mean that the court must abdicate its responsibility for reaching its own independent decision whenever standard medical practice is involved? With regard to other professional groups such as lawyers, accountants and bankers, the courts seem hesitant to adopt the standard practice of the profession, at least where the practice does not adequately guard against obvious risks.[25] Is there something special about the medical profession?

An American writer has indicated two reasons which he finds persuasive for giving the doctors special treatment.[26] First, the layman trier of fact, be he judge or juryman, lacks the technical capacity adequately to determine what a reasonable doctor would do in any given set of circumstances. Secondly, the free, confident exercise of judgment of the doctor is very valuable in medicine and the patient is apt to get better treatment if the trained doctor is allowed to exercise his trained judgment freely, knowing that if something goes wrong he will be judged by the standards of the profession, and not by a layman[27].

Is either of these reasons really persuasive? Taking the second reason first, it may be argued that, especially in jurisdictions where a jury, with its built in sympathy for the plaintiff, does not constitute the trier of fact,[28] the necessity for medical freedom could be reflected in placing great weight on standard medical practice without making it conclusive.[29] It is the first reason which is harder to overcome, for unless the trier of fact is given a special medical education in court, a process which is at best unsatisfactory and at worst impossible, the law would allow an untutored layman to second guess the trained expert, a prospect to

23. *Hunter* v. *Hanley* [1955] S.L.T. 213 (Scot. Ct. of Sess.), In *Thean Chew's* case, *supra* note 6, at pp. 169-70 Ong J. noted that in *Caminer* v. *Northern & London Investment Trust, Ltd.* [1951] A.C. 88 it had been suggested that deviation from the principles of good estate management was not necessarily negligence and said: "In my view, therefore, compliance with the principles of good estate management, of itself, is no more a ground for relieving a landowner of liability than is default a ground of liability."

24. The American courts have almost unanimously adopted such a position. See generally, McCoid, "The Care Required of Medical Practitioners", (1958-59) 12 Vand. L.R. 549. The passage cited from *Bolam's* case, *supra* not 20, would seem to indicate that England also follows this rule. But see Fleming, "Developments in the English law of Medical Liability", (1958-59) 12 Vand. L.R. 633, 640-46, where Fleming suggests that the privilege afforded doctors by American courts has not found unqualified acceptance in British practice.

25. See *e.g.,* Lord Wright in *Lloyds Bank* v. *Savory & Co.* [1933] A.C. 201 at p. 232:

> It is argued that this is not the ordinary practice of bankers, and that a bank is not negligent if it takes all precautions usually taken by bankers. I do not accept that latter proposition as true in cases where the ordinary practice of bankers fails in making due provision for a risk fully known to those experienced in the business of banking. (Cited by Fleming, *op. cit. supra* note 24, at p. 641 n. 43.).

26. McCoid, *op. cit. supra* note 24, at pp. 607-09.

27. Compare *Roe* v. *Ministry of Health* [1954] 2 Q.B. 66 at pp. 86-7 *per* Denning L.J.:

> [W]e 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 the good of their patients. Initiative would be stifled and confidence shaken,

28. It is significant that *Bolam's* case, *supra* note 18, was tried before a jury.

29. See Fleming, *op. cit. supra* note 24.

which no doctor would look forward, and which clearly may hamper his treatment of the patient.[30]

Thus where a highly complex medical operation is involved, it is submitted that a court is justified in facing up to its lack of medical training and surrendering its responsibility for setting the reasonable standard to the profession itself, in the realization that they, with their intensive training and devotion to the welfare of the patient, are really better equipped to make that decision than any court could ever hope to be.[31]

But does this mean that the court should defer to standard medical practice in every case? To come back to our original question, if the defendant in *Chin Keow's* case had established that it was standard practice not to ask questions, would the court have been bound to find that such a practice is reasonable? If it is felt that the court in a case such as *Chin Keow's* case should not be bound by the standard medical practice, then can such a case be distinguished from a case like the *Bolam's* case where it is felt that the court's non interference is wise?[32]

Professor J.L. Montrose has suggested that a distinction might be drawn between a failure to provide any precaution against risks which are known or ought to be known and "the question which arises of whether precautions in fact taken are adequate,"[33] and that while it is "sound ethics and good law for a court, judge or jury to condemn a professional practice which does not provide against risks known to the profession or which the court judges ought to be known,"[34] it may not be good law for the court to attempt to decide whether precautions in fact taken are adequate. This is at first blush a plausible distinction because the question of whether any precaution is necessary is more likely to be within the competence of the court than is the question of whether a particular precaution is adequate, which may involve technical questions which lie beyond the competence of a court. Under such a rule, *Chin Keow's* case, where no precaution was taken, could be distinguished from *Bolam's* case where the question was whether the precautions taken were adequate.[35] However, with respect, it is submitted that a distinction which is drawn in terms of whether any precaution is taken may lead to difficulties. Where the absence of any precaution is the result of a conscious careful evaluation on the part of a highly trained doctor the court may not be competent to direct that a precaution should be taken. On the other hand, where the precaution taken is one which is clearly inadequate because the medical profession has not carefully considered the risks involved, there would seem to be no reason why the court should not step in and find the inadequate precaution unreasonable.

30. See the statement of an anonymous doctor reported in Silverman, *"Medicine's Legal Nightmare, Part One", "Saturday Evening Post",* April 11, 1959, p. 13, at p. 48: "Now, whenever a new patient comes into my office, I ask myself, 'is this the fellow who's going to sue me?' and God help me, I'm beginning to decide my treatments not on the basis of what's best for the patient but on what will look best in court." (Quoted by McCoid, *op. tit. supra* note 19, at p. 608 n. 271).

31. Thus in *Bolam's* case, *supra* note 20, where the issue was whether the doctor was negligent in not providing relaxant drugs, restraining sheets and manual control for a mental patient who was undergoing electro convulsive therapy, it is submitted that the court was correct in instructing the jury that the doctor could not be found guilty of negligence if he had acted in accordance with a practice adopted by a responsible group of doctors, because the jury does not and could not know enough about the intracacies of electro convulsive therapy to evaluate the risks involved.

32. See *supra* note 31.

33. Montrose, *op. cit. supra* note 5, at p. 263.

34. *Ibid*., at p. 263.

35. As for *Bolam's* case. Professor Montrose has this to say:

> Perhaps the attitude of McNair J. in *Bolam's* case may be "explained" as being concerned with the adequacy of precautions designed by those with skill and competence to safeguard against a realised risk. The case for the defence was that free movement of the limbs was the best precaution against injury. It is uniformity with a practice consisting in a technique of precautions against risks which eliminates negligence. We are, however, far from judicial recognition of a distinction between failure to provide against a risk, and adequacy of precautions. The most that can be said is that *Bolam's* case is consistent with the distinction. *Ibid*., at p. 264.

It is submitted that the distinction should instead be drawn between those situations in which the standard practice is based on involved techniques which are beyond the competence of the court and those situations where the standard practice is based on simple considerations which may be evaluated by the ordinary man. This principle would guarantee the medical profession the freedom to set its own standards in fields in which the court is not competent to set them but would not prevent the court from setting the standards except in cases in which it is clearly necessary for the court to surrender its responsibility to the profession. Such a principle would of course raise problems of drawing the line between the spheres of competence of the court and the medical profession, but courts are daily engaged in drawing lines in difficult areas and this difficulty, though real, should not prove insurmountable. Such a distinction seems to have been drawn in Canada,[36] and there would seem to be no reason why it should not be drawn in Malaysia. If such a principle were to be adopted, then it would not have availed the defendant in *Chin Keow's* case to have proved that it was standard medical practice not to ask questions, for this is clearly a situation in which the court is capable of assessing the risks as well as the medical profession.

In conclusion, it is suggested that while standard practice is relevant in determining what a reasonable man would have done, standard practice should not conclude the issue even in cases involving professional negligence, unless it is clear to the court that the trier of fact is unable adequately to assess the risks involved. The threat of a lawsuit is a potent stimulous to the use of reasonable care, a stimulous which is rendered ineffective if the defendant, either as an individual or as a group, is allowed complete freedom to set his own standards. At the same time it must be borne in mind that the medical profession is a highly trained profession which is dedicated to the welfare of the patient, and that too much interference on the part of an untrained trier of fact, be he judge or juryman, may do more harm than good; therefore a court should be extremely reluctant to condemn any medical practice which has been adopted by a substantial group of the profession.

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36. See *Anderson* v. *Chasney* [1949] 4 D.L.R. 71 (Manitoba C.A.) where the plaintiff's estate sued a doctor who removed the plaintiff's tonsils and adenoids using sponges without tape or strings attached and without having a nurse present to check on the sponge count. After the operation the plaintiff suffocated and died because a sponge had been left in his throat. Testimony was presented to the effect that a nurse was never present to check on the sponge count in an "open space" operation and that the use of sponges with strings was very rare. In reversing the trial court, which had found for the defendant, on the grounds that it could not substitute its judgment for that of medical experts, McPherson, C.J.M. said at 74:

> While the method in which the operation was performed may be purely a matter of technical evidence, the fact that a sponge was left in a position where it was or was not dangerous is one which the ordinary man is competent to consider in arriving at a decision as to whether or not there was negligence.

The decision of the Manitoba Court of Appeal was upheld on appeal to the Supreme Court of Canada. [1950] 4 D.L.R. 223.

See also *Taylor* v. *Gray* (1937) 11 M.P.R. 588, [1937] 4 D.L.R. 123 (New Brunsw. C.A.) where the plaintiff sued the defendant for negligence in leaving forceps in the abdomen of the plaintiff during an operation. The court said at 590, 127:

> While men eminent in their profession have given evidence of their system of practice, yet every system put forward must stand the test of judicial examination and, possibly, of reprobation by a jury. There is no question here of skill displayed in the operation itself, nor of the technique employed in performing it. In such matters we have to be governed by the best professional opinion we can get. But in a case which involves none of these elements but simply whether or not the defendant has shown that he was not negligent in respect of the non-removal of the instrument from the abdominal cavity, the opinion of one man is about as good as that of another.

But see the dictum of MacKinnon L.J. in *Mahon* v. *Osborne* [1929] 2 K.B. 14 at p. 44 (C.A.) where the defendant left a sponge in the plaintiff's stomach: "There is the misfortune that the jury was not instructed that they must take the standard of care and diligence of a surgeon from those who could alone, from their expert knowledge, inform them of it."