

# **“57 NOT OUT”**

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57 Not Out! A number of appeals, but Bolam is still batting on.

What do we know about Bolam? Well, it is the code word for the “Bolam Standard” and “Bolam Test” used when considering claims for negligence against professionals and those with special skills. The case came to court in 1957, fifty-seven years ago. Its proper title is, Bolam v Friem Hospital Management Committee 1957 1 Weekly Law Reports 582, but it is always simply referred to as Bolam.

Mr Bolam suffered mental illness and was treated for his condition by Electro-Convulsive Therapy. The treatment is carried out by placing electrodes on each side of the head and passing a current through the brain. This process can precipitate violent convulsive movements, which can take the form of a fit and muscular contractions and spasms. These can be reduced if a relaxant drug is administered prior to the treatment. During his treatments, Mr Bolam was not given these drugs and the treatment was administered without applying any form of manual restraint. The treatment was applied with Mr Bolam lying on a couch, his chin and shoulders were supported and a gag was placed in his mouth. Nurses were present on either side of the couch to prevent him from falling off.

As a result of one of the treatments, Mr Bolam fell from the couch as a result of violent muscular contractions and spasms and sustained bilateral fractures of the acetabula effectively breaking both hip joints. As a result, Mr Bolam sued the hospital for negligence.

We now enter the world of urban myth.

We think that the judge decided that the doctor was not guilty of negligence. No, it was a jury trial and it was their decision.

We think that the decision set the standard for all professionals or persons with special skills. No, for a number of years the Bolam test applied to doctors only and it took a long time for judgments in other professions to catch up.

We think that the judge established a standard of skill and care to be inspected of a professional. No, the judge said that the law was well established, although he referred to less than a handful of cases in his judgment, principally Hunter v Hanley 1955, a Scottish case. In that case, the court decided that the true test for establishing negligence on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill could be guilty of.

In Bolam, the judge put it another way, he said the 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. 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.

This is widely known as the second limb in Bolam, the effect being, that a defence may be maintained even if the act of the professional is criticised by experts, if responsible professionals would adopt the same course.

The first, and most often used limb of the Bolam Judgment is, that the test of the standard of a professional is that of the ordinary skilled man exercising that special art. It is this which we refer when we talk of the, "Bolam Standard" and "Bolam Test". It is the standard of the ordinary competent practitioner. The Bolam test will not be applied in every case. Even if there is a body of professional opinion supporting the course taken, the court may hold the profession as a whole to be negligent, where there is no logical basis for the opinion held.

The duty of the professional man, is not to be right, but to be careful. His conduct will be judged in the light of the information available, or which ought to have been available, at the time he made his decision. Therefore, not every error is negligent. It is not sufficient to prove an error, actual negligence must be proved.

It has also been held, that the Bolam test does not apply in cases where the breach of duty consists of an omission to do an act which ought to be done. In those cases, it has been said that the enquiry is in the realms of hypothesis and therefore Bolam has no part in determining what would have happened. This has been said in a number of cases, see for example Bolitho v City & Hackney Health Authority 1997 UKHL 46.

As I said at the outset, the Bolam Standard is frequently interrogated and other considerations brought to bear. The most important to be touched on in this note, are the way in which the standard is affected by contract terms, and even where negligence is held, the duty to prove causation.

In the case of causation, the burden still lies on the claimant to prove that the particular breach or negligence, caused the injury suffered.

This can be quite problematic, and the importance of it can be overlooked. In two recent cases, these issues were looked at. In 1999 Knightsbridge Development Ltd and WSP UK Ltd, February 2014 and MT Hojgaard and E.ON Climate and Renewals, April 2014, Mr Justice Edwards-Stuart in the Technology and Construction Court, gave interesting decisions. In the 1999 case, a large and prestigious apartment block suffered serious flooding, resulting from two failures of the cold water pipe work. In effect, the pipes burst because the engineers design did not anticipate the risks that floods could be caused by a build up of pressure that could give rise to a surge, known as a water hammer. The risk could have been guarded against by construction of surge arrestors and non-return valves in the system.

The system was designed in 2005 and the judge found that no engineer would have foreseen such dramatic consequences for this time, although it was alleged that the engineer was negligent in failing to appreciate the problem at the design stage.

The judge applied the Bolam Standard adding, that a professional does not warrant that the course of action he takes will be successful; even if wrong, if his course of action was in accordance with that adopted at the time by a responsible body of opinion, he will not be negligent; if the reason for the allegation and the course of action was wrong, is that professional did not foresee the risk, there was no room for the application for the Bolam test.

The judge held, at the time of design, very few engineers would have identified the particular problem, but the risk should have been appreciated as a danger from abnormally high water pressure is something that has been appreciated for years. Had the engineers realised that a pressure surge was at least a real possibility, they would have put protection into the system against it and therefore they would have failed the Bolam test.

However, in conclusion, the judge decided that even if the engineer had identified the problem, and put forward a solution, because of the passage of events, it would not have prevented the floods and therefore the claimant failed, since it could not prove the engineers negligence was causative of its loss.

In the MTH case, sixty wind turbines were built in the Solway Firth, by the contractor on behalf of E.ON. The wind turbines failed after two years and required remedial work estimated to be in the order of £20 million.

MTH argued, that the design complied with the internationally approved standard, known as J101 as produced by the Independent Classification and Certification Agency responsible for international standards in the design of offshore wind turbines. The judge held that MTH had not fallen below the Bolam standard, it was not therefore negligent. However, in its contract with E.ON it had agreed that the turbines when constructed would be fit for their purpose, and most importantly, would fulfil a design life of at least 20 years. In those circumstances, the judge held, failure after only two years was a clear breach of contract terms, and design life warranty.

Although this was a design and build case, and clearly a decision that will cause difficulty in that area, there was a clear warning to professionals who may agree to a standard more onerous than that applied by Bolam, even when they may not have intended to do so. The judge held, the contract term was more potent than the Bolam Standard.

Frequently, a design and build contractor will require the design professional to adhere to the standards in the specification, Employers Requirements, Commercial Schedules and Conditions of Contract with Annexes. It may be that, within those lengthy and complicated documents, which become contractual documents, upon entering into an appointment, there are very onerous requirements, not least that the design professional should not put the design and build contractor in breach of any of the terms of its own contract, with the ultimate client.

In summary, the Bolam Standard and the Bolam Test remain the benchmarks against which the professionals performance will be judged, but the contract terms must be carefully considered as these may alter or replace the standard required putting a greater responsibility upon the professional. On the other hand, even if the professional is in breach or negligent, his act may not have been causative of the loss and thereby a sustainable defence may be created.