THE MENTAL CONTENT OF NEGLIGENCE

By JUDGE J. G. NORRIS

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"THAT it may please Thee to forgive us . . . our sins, negligencies and ignorances" is the general supplication in the Litany. The practising members of this Society might well make this a particular supplication, not to the Almighty alone, but to each of their respective patients and clients. And solicitors would do well to bear in mind the sage words of Thomas Ingoldsby:

> "A servant's too often a negligent elf;
> If it's business of consequence: Do It Yourself!"

But since patients and clients may be proof against prayer, and solicitors needs must employ clerks, at times even in business of consequence, we may be pardoned for devoting some attention to the subject of negligence as a possible ground for the liability of professional men to those for or upon whom they have exercised their art.

A consideration of the mental content of negligence, the matter of this paper, may well begin with a very brief inquiry upon fundamentals. If liability to compensate a plaintiff injured by a tort is imposed for the purpose of discouraging such harmful activity by compelling the defendant to compensate those injured thereby, as crime is discouraged by fine, imprisonment or execution, then generally speaking liability for tort must logically involve a mental element as does liability for crime. *Actus non facit reum nisi mens sit rea.* This was the view taken by Sir John Salmond. (*Torts,* 5th edn. p. 12 et seq.) The guilty mind for the purpose of liability in tort, according to Salmond, might consist either in wrongful intent or in mere negligence. The moralizing attitude of the nineteenth century may have been responsible for the development of this theory. Salmond's view is today generally discarded. There are, it is true, some torts one mode of committing which may be by negligence—in which negligence is one

possible element in the totality necessary to constitute liability. Negligence in this sense may be described as careless conduct.

If, however, liability in tort is imposed to protect certain rights relating to person, property or reputation and to provide compensation for wrongs infringing such rights, then it is by no means necessary that liability should involve any mental element. That these are the purposes of the common law of tort is today generally accepted. It is also now well established that there is an independent tort of negligence as opposed to negligence as a mode of committing other specific torts. It is with the mental content of this separate tort of negligence that we are chiefly concerned. It is with respect to this separate tort that the now classic words of Lord Wright in *Lochgelly Iron Co. v. McMullan* 1934 A.C. 1 at 35 were used: "In strict legal analysis negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing". The duty referred to is a duty to use care.

The mental content of negligence must therefore be found (if at all) in the considerations determining whether in particular circumstances a duty to the plaintiff to use care exists, whether that duty has been broken, and whether the damage alleged is such that the law regards it as having been caused by the breach of duty.

Apart altogether from tort, a duty of care may arise from a contract. Breach of a contract to use care is described as negligence. Solicitors, and in Victoria barristers, almost invariably enter into a contract with their clients. If the patient himself employs the medical man, a contract certainly exists between them, and it may exist in other cases. Insofar as the duty of care arises by reason of a contract, the mental element is of course of major importance. Whether the law requires a true *consensus ad idem* for the making of a contract, or whether it requires only the exhibition of the phenomena characteristic of agreement and refuses in general to allow the party exhibiting such phenomena to deny to the other party that he in fact has agreed, the nature and extent of the duty of care will be determined, theoretically at any rate, by the minds of both parties or by the mind of the party who has relied on the evidences of agreement manifested by the other. For practical purposes the important thing is that a duty of care arising from contract only is owed to the other party to the contract, and no third party injured by a failure to use

care can sue for breach of contract. There are also differences in the damages recoverable in contract and in tort. (*Bailey v. Bullock* 1950 W.N. 482.)

It is clear law that in some cases professional men are liable in tort notwithstanding the existence of a contract between them and those who utilize their services. To this matter I shall refer later. But while the injured party may in those circumstances sue either in tort or in contract, "where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort". (*Hall v. Brooklands Auto-Racing Club* (1933) 1 K.B. 205 per Scrutton L.J. at 213.) So if a professional man cares by a special contract to limit his liability for negligence to his patient or client, he may thereby gain some measure of protection. There may be of course both practical and ethical objections to this, and moreover the Courts have displayed a marked tendency to construe such contracts as not limiting liability if they can reasonably so construe them. (*White v. John Warwick* (1953) 1 W.L.R. 1285.)

To return to the matter of tort, it is a question of law for the judge to decide whether in any particular case a duty of care to the plaintiff exists. We must note that the test here may involve a subjective element. The duty of care does exist in the many various situations in which judges have recognized its existence. So far as a general statement as to the circumstances in which such a duty exists can be made, it is to be found in Lord Atkin's words in *Donoghue v. Stevenson* 1926 A.C. at 580. "You must take reasonable care to avoid acts or omissions which you *can reasonably foresee would be likely to injure your neighbour.* Who then in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." As Winfield points out (6th edn. 483) "reasonable care" and "reasonable foresight" in Lord Atkin's speech will leave upon the judge the task of settling in each particular case what is reasonable. Accordingly while the test is obviously in general objective to that extent the test of the reasonable man is subjective and not objective. The matter is put by Lord Macmillan in *Glasgow Corporation v. Muir* 1943 A.C. at 457. "The standard of foresight of the reasonable man is in one sense an impersonal test. It eliminates the personal equation and is independent of the idiosyncracies of the particular person

whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man ought to have had in contemplation, and what accordingly, the person sought to be made liable ought to have foreseen. . . . What to one judge may seem far-fetched may seem to another natural and probable."

The lawyers present may be interested in a thesis maintained by a member of the English Bar, Mr. E. Anthony Machin, in 17 Mod. L.R. 403. In brief, his thesis is that it is necessary for the plaintiff to show not only that "in the circumstances the defendant owed him a duty of care: he must show further (but need show only) that the duty pertained to a specific interest of his being the specific interest damaged". A discussion of this view would be inappropriate here, but the argument is illustrated by the decision of the majority of the Court of Appeal in *Brunsden v. Humphrey* (1884) 14 Q.B.D. 141, where the plaintiff having recovered in one action for damage to his cab in a collision caused by the defendant's negligence, was nevertheless allowed to recover in a second action for personal injuries caused in the same collision. "One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. Another wrong was done as soon as the driving also caused injury to the plaintiff's person."

So far as the members of this audience personally are concerned, this discussion is academic. They are well aware that medical men are under a duty to use care to their patients, whether or not there is a contract between the doctor and the patient. That is to say, the doctor is liable in tort as well as in contract. And even if there is a contract, the patient may none the less sue in tort if he so chooses. As to whether solicitors are in any circumstances liable in tort for negligence to their clients is a matter of controversy. Lack of time forbids a discussion of the matter. It may be noted that Judge Charlesworth, in the 2nd edn. of his work on *Negligence* at p. 396 and in the 11th edn. of Clerk & Lindsell at p. 583 asserts categorically that the solicitors' duty is a contractural duty owed to his client alone. Cordery on

Solicitors 4th edn. 163 and Winfield 5th edn. 512 assert that he may be liable in tort for breach of his duty where there is no contract. To quote Sir Roger de Coverley: "Much may be said upon both sides".

We turn now to consider what constitutes a breach of the duty to use care. It is here to be noted that in determining whether a breach of a duty to take care has been committed the same principles are applicable whether the duty arises in contract or in tort. (Pollock 15th edn. 335-6.) In tort, it is always difficult to distinguish between on the one hand the determination of the question of the extent of the duty of care—i.e. whether a duty of care does exist to the plaintiff in the circumstances, which is as we have seen a question of law and accordingly for the judge to decide, and on the other hand a decision as to whether that duty has been broken, which is a question of fact—and therefore for the jury.

Whether a breach of duty has been committed is resolved by reference to the standard of the hypothetical reasonable man. "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." (Alderson B. in *Blyth v. Birmingham Waterworks* 11 Ex. 781 at 784.) As has been pointed out, negligence is conduct, not a state of mind. We may refer again to Lord Macmillan's words above quoted. Apart from the one subjective element there mentioned, it is apparent that the test is objective. Another distinguished judge has said "the person concerned is sometimes described as 'the man in the street' or 'the man in the Clapham omnibus' or, as I read recently in an American author, 'the man who takes the magazines home, and in the evening pushes the lawn mower in his shirt sleeves'." (Greer L. J. in *Hall v. Brooklands Auto-Racing Club* (1933) 1 K.B. at 224.) But the man in the street regarded as the ordinary reasonable prudent man for the purpose of the law is, by reason of his freedom from every weakness which might endear a human being to his fellows, an odious and repellent creature—in fact, he is the perfect prig. Indeed Sir Alan Herbert has argued convincingly that the charming nature of the female sex renders it impossible to postulate the existence of the reasonable woman.

The standard of care required of lawyers and doctors in the practice of their respective professions is not happily expressed

by reference to such an individual as the man in the Clapham omnibus or the American gentleman previously described. If a person holds himself out as possessing a special skill, the standard of care and skill required of him in that regard is that of an ordinarily competent practitioner. "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill." (*Lamphion v. Phibos* 8 C. & P. 475.) If a person lacking that degree of skill and competence to which he pretends undertakes work requiring it, he is guilty of negligence not because he lacks the skill and competence but because he undertakes the work without possessing it. The standard is still an objective one. There is a well-known general rule that "a defendant charged with negligence can clear his feet if he has acted in accordance with the general and approved practice". (*Vancouver General Hospital v. McDaniel* (1935) 152 L.T. 56 at 57.) This rule is not of universal application, for the general practice may not conform to the standard of a reasonably prudent man. As Lord Tomlin once said, "Neglect of duty does not cease by repetition to be neglect of duty". But it is a fairly reliable safeguard for professional men. In the case in which this principle was enunciated in these terms (by a Scottish judge) the Privy Council held that no case of negligence had been established against the Vancouver General Hospital in the following circumstances. The plaintiff, a child suffering from diphtheria, was a patient in the hospital. In adjoining rooms were smallpox patients, and the nurses attending them came into contact with the plaintiff. Nine days after her discharge from hospital she developed smallpox. The negligence alleged against the hospital was the juxtaposition of smallpox patients to the plaintiff and the attendance upon her of nurses who attended them. The hospital system was in brief sterilization as opposed to isolation and at the relevant time (1932) was in accord with the general, if not universal, practice in Canada and the United States. That being so, the Privy Council were of opinion that there was no negligence.

In a more recent case this principle was approved by the House of Lords. In 1942 a surgeon suspecting an enlarged prostate made a diagnosis of inoperable cancer after opening a patient's bladder and discovering what he described as an indurated mass about the size of a man's hand, which he examined by eye and hand only. He did not make a cystoscopic examination or examine a specimen of the growth microscopically to ascertain if it were cancerous or not. The patient, believing he had only a few months to live, left his home in England and went to the United States where his wife's family lived. There a cystoscopic examination revealed a prostate with a median bar and at the base of the bladder the opening of a fairly large diverticulum. An operation being performed, the diverticulum was found to be filled with calcarious material which was removed, and a small fibrotic prostate was disclosed. Pathological examination of a portion revealed a condition of benign prostate hypertrophy. There was no trace of cancer of the prostate or of the bladder. On his return to England in 1945 the patient sued the English surgeon for damages. The trial judge found in the patient's favour, but the Court of Appeal reversed the decision and the House of Lords affirmed the Court of Appeal. They found on the evidence that the surgeon had acted in accordance with the general and approved practice of his profession in England in 1942. No specimen could have been taken by means of a cystoscope unless it were fitted with a rongeur attachment and this was rare in England in 1942 and the surgeon did not then possess one. The failure to take a specimen from the indurated mass for pathological examination was said on behalf of the surgeon to be due to the serious danger of perforating the bladder wall. (*Whiteford v. Hunter* 1950 W.N. 553.) It will be noted that the highest possible standard of care was not required; a cystoscope of the special type was not unknown, but as it was rare and presumably not usually employed, it was not required to be used.

But assume the surgeon in question had been in possession of the cystoscope of the appropriate type and knew of its possible use in the case. It is submitted that he might well have been guilty of negligence if he had failed to make the cystoscopic examination in that event. A subjective element does exist in the determination of whether the standard of the reasonable man in the circumstances has been reached. A defendant cannot by appealing to the standard of the hypothetical ordinary reasonable man be acquitted of negligence when his own knowledge enables him if

he behaves reasonably to display more care and skill than the ordinary. A specialist in medicine may, by reason of his more than ordinary knowledge, be expected to be put on his guard when the ordinarily reasonably competent practitioner might not be expected to be aware of the necessity for exercising care. As knowledge is part of man's mental qualities, here we have a mental element modifying the normal objective standard. And when a man possesses a greater skill than ordinary, it is submitted if he fails to exercise that higher skill of which he is capable, he may fail to behave as would a reasonable man in the circumstances (which circumstances include his own higher skill). Here again the subjective element enters into what is generally an objective standard. (Cf. Seavey 41 H.L.R. 1.)

It is interesting to observe the attitude of the Courts towards cases where the professional man or woman is relatively less skilled by reason of inexperience. In 1950 a patient suffering from first degree burns to face and neck was accepted as a hospital patient. Two young doctors undertook his treatment. The house surgeon, a medico of two years' standing, decided that to enable the patient's face to be cleaned up, he should be anaesthetized with nitrous oxide gas by means of a mask over his face. The anaesthetist, a girl who had been qualified for five months, undertook this task. The patient had become unconscious or semi-conscious when the house surgeon realized that the mask covered some burnt portions of the face. It was then decided to inject pentothal, a drug of the bartituric group, which the Court found should be administered with great care. The patient having been under gas for three to five minutes the girl anaesthetist injected 10 cubic centimetres of pentothal, the ordinary dose given to a person not previously anaesthetized, in two lots of approximately equal size, the second after an interval which it was held was not great enough. By the time the second lot was injected the patient was dead. In an action by the patient's widow against the anaesthetist and the owner of the hospital, Oliver J. found that the anaesthetist was negligent in the administration of the anaesthetic pentothal in the quantity and over the period in which it was administered, having regard to the fact that the patient was already under the influence of the nitrous oxide. The anaesthetist did not know that pentothal should not be administered until the effects of the nitrous oxide had passed away. As the trial judge said, "She had never heard of it. She never considered it. She did not consider it because she was inexperienced, not

because she was careless." As Denning L.J. pointed out in the Court of Appeal, in answer to the claim of the widow, it would be no defence for the anaesthetist to say she had not sufficient experience to undertake the task. Her negligence lay not in any careless performance of her work, but in undertaking work requiring more knowledge than she in fact had. While perhaps not strictly germane to our subject, it may be observed that exercising his discretion under the statutory provisions enabling one tort-feasor to recover contribution or indemnity from another to the extent that it is just and equitable, the trial judge thought the anaesthetist entitled to complete indemnity against the hospital which was also held to be negligent. Its negligence lay in entrusting the task to so inexperienced a medical officer. A majority of the Court of Appeal, however, thought the anaesthetist should only recover contribution to the extent of 80 per cent, while one member thought the hospital entitled to full indemnity from her. (*Jones v. Manchester Corporation* (1952) 2 Q.B. 852.)

The last case to which I propose to refer illustrates the application of several of the principles earlier mentioned—the determination whether a duty of care to the plaintiff exists, whether that duty has been broken, and whether the damage suffered is regarded in law as consequential on the breach of such a duty.

On 13th October, 1947, two patients, both middle-aged working men, were anaesthetized by Dr. Graham at the Chesterfield and North Derbyshire Royal Hospital prior to undergoing operations of a comparatively minor character. The anaesthetic used in each case was nupercaine, injected into the spine. In each case the patient developed a condition of spastic paraplyia, resulting in permanent paralysis from the waist down. This was due, it was found, to the contamination of the anaesthetic by phenol in which the glass ampoules containing the anaesthetic were stored. The phenol had obtained entrance to the ampoules through cracks in the glass which were so fine that they were not visible on any ordinary inspection.

The circumstances in which this accident occurred were these. The nupercaine was supplied by the makers in ampoules about 5 in. high and 1 in. in diameter, narrowing at the top to a $\frac{1}{4}$ in. neck and then swelling out above the neck. The method of use was for a nurse to file and break the ampoule at the neck, whereupon the anaesthetist inserted the needle of a hypodermic syringe through the neck. The exterior of the ampoules was not sterile,

and there was a danger of accidental contact between the syringe and the ampoule and consequent infection of the needle. In fact cases of infection had occurred. To avoid this, the senior anaesthetist decided to keep the ampoules in phenol and his junior, Dr. Graham, subsequently adopted the same practice. Neither was aware that the ampoules might by being jolted in some way develop the imperceptible cracks which in fact caused the trouble, nor would the general run of competent anaesthetists in 1947 have appreciated the danger. The attention of the profession in England generally was not drawn to the danger till 1951. Dr. Graham did realize the possibility of cracks, though not of the imperceptible variety, and of the consequent danger of penetration of phenol. He did examine each ampoule concerned for cracks before taking any part of its contents with the syringe, but saw none. The method of deeply tinting the phenol or other disinfectant in which ampoules were stored with a distinctive colour to enable detection of possible percolation had been used by the manufacturers of the anaesthetic, was known to analytical chemists and had been used in some hospitals but was not generally known. Dr. Graham had in fact never heard of it.

It was contended that there was negligence on the part of Dr. Graham in not colouring the phenol with a deep dye which would have disclosed the cracks and the percolation. (Negligence here refers of course to the breach by the doctor of an admitted duty of care to his patients.) The trial judge (McNair J.) and the Court of Appeal unanimously rejected this contention. As McNair J. said, by the standard of competence to be imputed to anaesthetics in 1947 Dr. Graham was not negligent in failing to appreciate the risk of percolation of phenol through invisible cracks and it would be quite wrong to find him guilty of negligence in law for not adopting a technique of deep tinting the phenol which might have disclosed the presence of a risk which he, in common with many other competent anaesthetists, did not appreciate as a possibility.

I have to observe again that had Dr. Graham possessed in 1947 the knowledge, not then possessed by the general run of competent anaesthetists, of the possibility of percolation through invisible cracks, it is apparent he would have been held guilty of negligence. His mental condition would have resulted in liability where that of the ordinary reasonably competent anaesthetist would not.

It was also argued that there was negligence on the part of the nursing staff in so handling the ampoules as to cause the cracks whereby the phenol was introduced into the nupercaine with the end result of injury to the plaintiffs. Accordingly, said counsel for the plaintiffs, the hospital was liable. The trial judge refused to find that the cracks through which the phenol penetrated were caused by negligent handling. This finding was attacked in the Court of Appeal. The attack persuaded Denning L.J. that there "must have been carelessness by someone in the hospital", and Somervell L.J. assumed that this was so. But it did not follow that the plaintiff was entitled to succeed. Somervell L.J. pointed out that the duty as such not to negligently mishandle equipment was a duty owed to the hospital. The duty which the nursing staff owed to the plaintiffs, according to His Lordship, was to take reasonable care to see that cracked or faulty ampoules did not reach the operating theatre. As the cracks caused were invisible and the nursing staff had no reason to foresee invisible cracks, the negligent nurse would reasonably assume no harm had been done and let the ampoules go forward. No duty of care to the plaintiffs had been broken.

This aspect of the case thus illustrates the determination of the extent of the duty of care to the plaintiff and of whether that duty has been broken. There are some observations by Denning L.J. on the further question of whether the damage caused was the result of a breach of a duty of care owed to the plaintiffs. It is well known to lawyers that assuming a duty of care to the plaintiff and its breach, for all the direct consequences of that breach, whether foreseeable or not, the defendant is liable. But the chain of direct causation according to Denning L.J. is broken when there is an intervening action which you could not reasonably be expected to foresee or an intervening omission which you could not reasonably expect. I referred earlier to the difficulty in distinguishing between the determination of whether a duty of care to the plaintiff exists and the determination of whether a duty of care actually existing had been broken. Denning L.J. goes further, as it seems with some justification, and says that the three questions, duty, causation and remoteness (i.e. of damage), run continually into one another, and that they are simply three different ways of looking at the same question: "Is the consequence fairly to be regarded as within the risk created by the negligence? If so, the negligent person is liable for it, but otherwise not." His Lordship, apparently assuming

that the nurses owed a duty to the plaintiffs not to handle the ampoules carelessly so as to crack them, applied the test of whether the consequences to the plaintiffs were fairly to be regarded as within the risk created by such handling, answered it by saying that there was such a probability of intervening examination of the ampoules as to limit the risk. The only consequence reasonably to be anticipated (from such cracking as might reasonably be expected) was the loss of some nupercaine, not the paralysis of a patient. The hospital accordingly was not liable.

At the risk of labouring what may by now be the obvious, I observe again that did the negligent nurse whoever she was in fact know of the possibility of invisible cracks, liability might well have ensued.

The decision in this case (*Roe v. Minister of Health* (1954) 2 Q.B. 66) of course was arrived at notwithstanding the sympathy expressed by both Courts for the unfortunate plaintiffs. The words of Denning L.J. in this regard will bear quoting: "It is so easy to be wise after the event and to condemn as negligence what was only a misadventure. . . . 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 benefit 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 in a hard way. Something goes wrong and shows up a weakness, and then it is put right. That is just what happened here. . . ." And again: "These two men have suffered such terrible consequences that there is a natural feeling that they ought to be compensated. But 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."

It is now pertinent to inquire where this survey of the mental content of negligence has led us. It is of course directed to those aspects of negligence which directly concern the members of this Society in their personal capacities. I have accordingly not considered what might be said upon the subject in relation to the

standard of care to be expected of such people as infants, lunatics or drunken persons, conceiving that none of our members fall into any of these categories. I have chosen to illustrate my propositions chiefly by reference to cases in which plaintiffs successfully or unsuccessfully alleged that there had been negligence in the course of their medical treatment. I did so in the hope that those propositions might thereby be at the same time more comprehensible and less arid to our medical members. I might equally well, I hasten to say, have illustrated the propositions by actions for negligence against lawyers.

In the result the mental element in negligence does not loom large. The test of the existence of the duty of care in cases where it is not already established by authority is expressed by reference to the foresight of the ordinary reasonable man. What has in another context been referred to as "the idiosyncratic inferences of a few judicial minds" may affect this otherwise completely objective test, as Lord Macmillan pointed out in a passage quoted above. So far as a contract enters into the matter, there is a wide area in which liability for negligence might be limited by agreement but so far as medicine and the law are concerned is in practice not so limited.

We have seen in considering breach of duty in the case of the youthful anaesthetist that the fact that a member of a profession does his best but falls below the standard of the ordinary reasonably competent practitioner will not absolve him from a charge of negligence. That objective standard must be reached. But it is submitted that the objective standard is a minimum test. Even as a miminum it varies according to the standard of skill professed by the defendant. The specialist surgeon will be judged by the standard of ordinary reasonably competent surgeons and not by that which might be applied to the general practitioner undertaking some surgery. But if that general practitioner decides to chance his hand on a task which he realizes may be beyond him and fails to exercise the ordinary skill of those who normally perform such tasks, he will be negligent. And though the ordinary standard of care and skill be displayed, if the defendant by reason of some special mental equipment of knowledge was reasonably capable of reaching a higher standard and fails to do so, he will be negligent. It is in this regard, it is submitted, that a mental element does exist in negligence; and to this extent those who assert that negligence is a purely objective concept are in error.

Discussion

SIR JOHN NEWMAN MORRIS said that Judge Norris's reference to cases in which a general practitioner might decide to embark upon a task which he realized might be beyond him led him to comment on other possible cases. The general practitioner might, for instance, undertake a task which he thought was within his capacity. In the course of operating he might encounter some problem of which he had no knowledge or experience. Should he then carry on to the best of his ability, or hold the patient under anaesthetic until assistance arrived, or return the patient to the ward so that a second operation can be performed at a later date? A closely related case was that which arose out of the "super specialist". Specialization had developed to a degree where the average specialist surgeon is no longer possessed of sufficient skill to undertake all forms of surgical treatment. Still another case is the case where the surgeon is persuaded by the patient to carry out an operation which he knows to be beyond his competence. He quoted an observation of Lord Justice Denning's, and said that the risk of an action for negligence with its consequent damage to reputation was like a dagger constantly behind the surgeon's shoulder.

In England there were two new aspects of the problem of professional negligence. One was that under the National Health Scheme it was being contended that it was the State's obligation to treat the patient, not merely to provide facilities and personnel, but to provide treatment. There was administrative control of clinical matters which should be the subject of professional decision. The second matter was that under the Legal Aid system the successful defence of an action brought by an impecunious plaintiff with a Legal Aid Certificate imposed an unfair financial burden on the defendant or organizations such as the Medical Defence Union which undertake the defence of such cases.

DR. GUY SPRINGTHORPE said that he wished to propound this question: If the anaesthetist did not know enough about anaesthetics to realize the danger of giving pentathol after nitrous oxide, how could she be blamed for assuming a task for which she was not competent.

JUDGE NORRIS answered this question by saying that in law she was to blame whether she was conscious of her incompetency

or not. She had in fact undertaken something which she was not competent to undertake.

DR. JOHN WILLIAMS said that very difficult problems arose in dealing with patients who had attempted suicide. Such patients were frequently brought to public hospitals and after treatment in the casualty department were sent home. The young doctors in the casualty department had to decide whether the mental condition of the patient was such that he ought to be released to his home instead of being either kept in hospital or sent to a receiving house. He knew of no case in which an action at law had been brought as a result of the subsequent suicide of such a patient after he had been allowed to go home, but it was a matter of anxious concern to those who had to deal with this class of patient.

Mr. R. A. SMITHERS said that one of the mental processes of the mythical reasonable man which had to be taken into consideration was the process of appreciating the situation in which he was placed. The matter to which he referred was that the reasonable man must be considered as answering the question whether he should undertake the particular task or not. Thus a reasonable man might reasonably decide to undertake a task for which he knew he was not fully qualified because it was a task which urgently required performance and there was no one available who was better skilled to perform it.

DR. ELLIS said that mental hospital psychiatrists frequently had to decide whether a certified patient was to be allowed to go home on trial leave. The patient might, while in hospital, be in a proper state to be given leave, but upon release, under the stimulus of drink or in the hostile atmosphere of a family reluctant to receive him, he might well relapse into a condition in which he was a danger to others. He asked whether the psychiatrist could in such circumstances be held responsible for the actions of the patient.

MR. R. A. SMITHERS asked leave to speak a second time. He said a case had come before a former Chief Justice of Victoria, Sir Frederick Mann, in which a mental patient had applied to the Court for release. Whenever released he drank and became dangerous. When his application was heard the medical evidence was that he was sane, which had led Sir Frederick Mann to ask the

medical witness why he should not be released. The reply was that when released he would drink, would be a danger to his wife and might well kill her. The Chief Justice had retorted, "There is a criminal law to look after that".

JUDGE NORRIS in reply said that he had given further consideration to Dr. Williams's question concerning the attempted suicide. It might well be that the doctor had no right to place the patient under restraint. The patient's actions after release were his own actions, and in law the consequence of those actions would probably not be regarded as flowing from the action of the doctor in releasing him.