CA on appeal from Mr Justice Thomas before Morritt LJ; Sedley LJ; Sir Christopher Staughton. 20th July 2000

JUDGMENT : LORD JUSTICE SEDLEY:

1. The claimants were in October 1991 the tenants of a terrace house, 103 Jubilee Road, New Tredegar. They occupied it with their three children aged seven, four and three. The terrace had been built, as its name suggests, in the latter years of the 19th century, and the council had succeeded the colliery-owner and the National Coal Board as lessor. The house had two storeys fronting on to the street. The drop from the first floor window to the pavement was about 10 feet. At the back, because of the slope of the valley, the basement formed a third storey and the drop was correspondingly much greater.

2. Mr and Mrs Adams had become the tenants late in 1990 or early in 1991 by an agreed exchange with the previous tenant, Mrs Janet Jones. During Mrs Jones tenancy, in 1989, the council had replaced the windows in the terrace with hardwood-framed windows of standard design as part of a refurbishment of all its 9000 dwellings.

3. The window used for the bedrooms at 103 Jubilee Road was of type F1. It varied in its dimensions according to the size of the window aperture. Double glazing with toughened glass was used throughout. The frame was divided by a mullion. One side had a large fixed pane and a small fanlight sash at the top. The other had a small fixed light at the foot, surmounted by a hinged window which opened outwards in the vertical plane. Its handle was equipped with a lock operated by a removable key. Although there was debate at trial about its dimensions and its hinges, the single important fact about it is that it was sufficient in both front bedrooms to afford a means of escape in case of fire, provided it was able to be opened.

4. Not long after moving in Mr Adams had realised that the main bedroom window, which was unlocked, was a safety hazard for the children. Since no key had been left by Mrs Jones, he obtained either one or a pair from his brother in law who lived down the road and locked all the lockable windows. The key or keys were from then on hung on a shoelace on the keyrack in the kitchen.

5. There were no smoke alarms in the house.

6. On the night of 14-15 October 1991 Mr Adams, who was in some discomfort, was sleeping downstairs. He woke at about 7 a.m. to find that the staircase was on fire. He alerted his wife, who was sleeping upstairs with the children. He tried to reach them but the smoke and flame drove him back, and when he went outside for air the door with its Yale lock slammed shut on him. Mrs Adams tried desperately to save the children. Unable to unlock either of the front bedroom windows, she finally managed to smash a hole in the glass of one but was lacerated by the jagged edges and fell out, suffering severe injuries. The three children died in the fire.

7. It was agreed indeed it was almost self-evident that if Mrs Adams had been able to open the window she and the children would in all probability have escaped.

8. These are the essentials of an account which is set out in careful and sympathetic detail in the judgment of Thomas J who at Cardiff in February 1999 heard the claimants action against the local authority at common law and under the Fatal Accidents Act 1976 for damages for negligence and breach of statutory duty. In a reserved judgment given on 23 April 1999 and limited by agreement to the question of liability he held that there had been no breach of duty by the council. It is against this conclusion, with the permission of Aldous LJ, that Mr and Mrs Adams now appeal. As often happens, the larger number of issues canvassed at trial has been refined to the single issue now before the court; and that issue itself has been refined in the course of argument before us.

9. A local authority as a provider and refurbisher of housing has a legal duty to design and build with due regard to the safety of occupiers and visitors: **Rimmer v Liverpool City Council** [1985] QB 1. This being so, it is common ground that the question is the same at common law and under s. 4 of the Defective Premises Act 1972: had the council in deciding to install hardwood windows of the F1 design taken such care as was reasonable in the circumstances to ensure that those living at 103 Jubilee Terrace were safe from personal injury? In the light of the facts I have set out, this translates

into whether in providing a catch with a removable key instead of a button release on the only sashes capable of permitting escape in the event of fire the council had failed in its duty of care.

10. The judge considered a good deal of evidence about how the council had come to choose and install a window of type F1. The findings which matter for this appeal are, however, simply these. The technical assistant, Mr McCarthy, who measured up the premises did not consider British Standard 5588 which concerned fire precautions and is more fully described below. He did have in mind the need for the windows to be large enough to provide escape from fire, but his senior building surveyor, Mr Hayes, assumed that the specifics of escape from fire would be handled by the building control department. Neither the fire service nor the police were consulted. It was a member of the housing department staff who evidently without any outside input--decided that locks with removable keys should be fitted to the new windows.

11. The question which the judge set out to answer was posed by him in this way: Was proper skill and care exercised in balancing the various factors relevant to the design of the window so that the house was reasonably safe from personal injury to those who lived in or visited it?

12. From the facts which I have set out, it is plain that the answer to this question is No. Nobody in the council ever considered whether a removable key created a risk that the window would not be able to be opened in an emergency or, therefore, balanced it against the possible drawbacks of a button release. A breach of the duty established in **Rimmer v Liverpoool City Council** had plainly occurred. The crucial remaining question was therefore causation: if due consideration had been given to the relevant factors, would it more probably than not have resulted in the choice of a button release? It will have been for the claimants to establish that it would have done.

13. Instead of turning to this question, however, the judge was persuaded by Mr Murphy QC for the council to adopt the **Bolam** test: the standard of the ordinary skilled man exercising and professing to have that special skill Such a person is not guilty of negligence if he is acting in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art [H]e 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 (per McNair J, **Bolam v Friern Barnet HMC** [1957] 1 WLR 582).

14. Applying this test, the judge first summarised his conclusion in this way: On the evidence before me and having regard in particular to the position in 1989 when the windows were designed, I consider that the council exercised the skill of a competent designer of windows and designed the windows so that the house was reasonably safe from personal injury to those who lived in or visited it. Later in his judgment the judge accepted the evidence of the councils expert witness Mr Burne and concluded: I am satisfied that the decision to provide a lock with a removable key was a decision that a competent designer would have made in 1989/1990.

15. The first of these passages is, with respect, untenable for the reason I have given: no design skills at all were applied to the choice of window lock. The reason for acquitting the council of negligence must in the circumstances be found, if anywhere, in the second passage, which is expressed in classic **Bolam** terms.

16. The reason why the Bolam test has no relevance to a case such as this is that its purpose is to enable the court to determine whether a person professing and purporting to exercise a particular skill has exercised it with sufficient competence to escape a charge of negligence. In the present case the problem is that nobody in the council purported to exercise the relevant design skill. Had they done so, the judges conclusion that the Council exercised the skill of a competent designer of windows might, in the light of the expert evidence which he accepted, have been conclusive. But a defendant which has failed altogether to set about exercising a professional skill cannot expect to be judged by the court as if it had exercised it: the court cannot proceed as if an educated choice was made when it knows that it was not. Instead it will avoid injustice by deciding whether the eventual choice, albeit inexpertly made, made any difference to the outcome. But this is a question of probability, not of professional competence.

17. Before this court Mr Murphy has not sought to defend the use of the **Bolam** test. The pity is that by successfully relying on it before the judge he has left this court without a finding on the issue of causation. The judge did, it is true, hold himself satisfied that the decision to provide a lock with a removable key was a decision that a competent designer would have made in 1989/1990; but in the light of the question which had set himself, as well as of the cautious phrasing of the answer, this cannot be taken as meaning more than that a decision to use such a device, if taken after evaluating the pros and cons, would have lain within the range of non-negligent choices. It thus begs the real question.

18. It may seem a paradox that a defendant who without deliberation has adopted an expedient which might have been commended by a professional adviser, had one been consulted, should nevertheless be able to be held negligent if harm results from it. I do not think that it is. No defendant becomes liable purely because of such a failure. The burden remains upon the claimant to show that more probably than not professional advice, if taken, would have prevented the harm. This seems to me entirely fair: it requires those who allege that neglect has caused harm to prove it, but it denies to those whose neglect has been a failure to obtain specialist advice the right to be judged as if they had done the very thing which they have neglected to do. It would be a true and worse paradox, with serious public policy implications, if those who owed a duty of care requiring professional judgment for its discharge could act more or less at random and then, if harm resulted, defend themselves by showing that even though proper advice would almost certainly have obviated the harm a minor school of expert opinion existed which would, if consulted, have sanctioned the course taken by them.

19. It seems to me, with great respect, that the problem situations posed by Sir Christopher Staughton, whose judgment I have had the privilege of reading in draft, are susceptible of a simple and principled answer without resort to **Bolam**. The medical student who delivers a baby in an emergency will be excused for errors for which a consultant obstetrician might have been excused on Bolam grounds, not because the **Bolam** doctrine extends to him but precisely because he has never professed an obstetricians skills. Like the driver who has to decide whether to pass an amber traffic light or the skipper who has to decide whether to tell his passengers to swim for the shore (and also, no doubt, like any modern good Samaritan), he will be judged not by the standard of a hypothetical expert who was not there to be consulted but by the standards of a reasonable individual faced with an emergency. By contrast, and in unhappy disagreement with Sir Christopher, I believe it to be precisely a requirement of the Bolam test that the defendant should have considered and reflected upon the alternative courses available and made a conscious choice between them. To illustrate why this is so, suppose first a difficult heart operation performed by a cardiac surgeon and having a bad outcome. It is only if the surgeon has elected to do something which both lies beyond the range of accepted good practice and has probably contributed to the poor outcome that he or she will ordinarily be held liable in negligence. Here, therefore, evidence directed to the **Bolam** test will generally be relevant. Next, suppose the same operation with the same outcome, performed this time by a general practitioner. As a defendant the general practitioner cannot be treated as entitled to the margin of judgment available to a cardiac surgeon, since by definition he or she is unqualified to exercise such judgment. But the patient will still have to prove both that the general practitioner did something risky or overlooked something relevant and that the patients ultimate condition was caused or contributed to by it. The decision of this court to which Sir Christopher refers, **J.D.Williams & Co Ltd v Michael Hyde and Associates Ltd** (6th July 2000), exemplifies this analysis in relation to architects negligence.

20. So it is necessary in my view for this court to decide, if it can, the question of causation on the ordinary balance of probability. This said, the judges view of causation would in the nature of things have been almost wholly inferential; so that we are barely worse placed than he was to decide, as we must, whether it is probable that if the councils officers had applied their minds to the available window catches in the light of the relevant safety and security factors, they would have opted for a button release device on the front bedroom windows at 103 Jubilee Terrace (and no doubt in all similar council dwellings).

21. Although, as the judge recorded, it was common ground that a smoke alarm would have improved the chances of escape, the absence of a smoke alarm was not urged before us by Mr Williams QC for the claimants as a discrete head of negligence. Its relevance, as Mr Murphy in turn accepted, is that the want of the early warning which a smoke alarm would have afforded made it the more necessary that anyone trapped upstairs by fire should be able to escape through a window. In other words, this was something which tended to elevate the standard of care necessary to comply with the duty.

22. This was the more so in the light of the message, though not the detail, of BS 5588 (Fire Precautions in the Design, Construction and Use of Buildings) which, though not legally binding, was as the judge held relevant to the choice of window type. The 1984 version of BS 5588, even though its geometric specifications do not affect the present issue, spelt out clearly the need for smoke alarms and for escape routes through upstairs windows. Strangely, the standard says nothing about the relative safety of different types of window catch. Manifestly, however, a window which cannot be opened in an emergency is of no use as an escape route. Manifestly, too, the possibility of needing to escape from an upstairs window is the greater if there is no smoke alarm.

23. On the other hand, everybody including Mr and Mrs Adams agreed that it was necessary that the window should be able to be locked for the childrens safety. To have a removable key but leave it in the lock would be self- defeating; so that removal of the key was predictable, indeed essential, if a lockable catch was to be used. There was also available on the market a window fastener operated by a push button. This, while able to be opened by an older child, was pretty much proof against younger children. It would, however, not stop an intruder. Both catches were available without (it appears) any cost differential. Both sides architectural experts told the judge that this was the case. The councils expert said both were equally common; the claimants expert (whom the judge evidently preferred on this point) that while the key type was no safer it was more common because insurers liked it.

24. What then, on the evidence, would have happened if an officer or more probably two or three officers of the council had sat down in 1989 to decide, in the light of the foregoing, what window catches to specify?

25. First they would have recognised that at least one upstairs front window large enough to admit an adult must be readily openable in the event of fire. Secondly, they would have recognised without difficulty the need to prevent children from falling out and intruders from getting in. Next, therefore, they would have considered which of the available catches best met these needs.

26. In relation to the type with the removable key, the officers would have appreciated instantly that a small child could readily turn the key, open the window and fall out unless the key was removed and kept out of reach. So they would have asked themselves whether, given the likelihood that in the event of fire the key would not be within easy reach of the window, a button catch was not safer. Thus far, it seems to me, we are looking not at mere probabilities but at near-certainties.

27. The council officers would also have appreciated that the button catch was proof against younger children, but not against older children or burglars. With or without police advice, burglars would have been quickly put aside as a serious risk in relation to the street side of Jubilee Terrace: as Mr Williams points out (and the courts themselves have an extensive, if vicarious, knowledge of burglars habits) no burglar was likely to put up a ladder in the street and smash a window of strengthened double-glazing in full view of the neighbours. Children, for their part, behave more sensibly and are less prone to fall and be hurt as they get older and become able to open a button catch. Moreover, indeed an older child who is determined to open such a window is just as likely to go and fetch the key as to press the button. None of this requires specialised knowledge or research; simply a few minutes reflection and posssibly a word with the local crime prevention officer.

28. The clear probability is therefore that the councils officers would have arrived without too much difficulty at the conclusion that while the windows of the ground floors and backs of their terraced houses might well need lockable catches with keys that could be kept out the way of burglars, to put such catches on the front upstairs windows would tend to aggravate the risk of being trapped by fire

without any major gain in child safety or house security. There is no suggestion that the consequent differential specifications, especially for a large-scale purchaser such as the council, would have presented any problem of supply or cost.

29. It would finally have been essential for the councils officers to consider the alternative handles in the light of the fire risks, not least because householders would tend to think more about the daily risks of accidents to small children than about the grave but remoter risks of fire. The fire risks were patent: they were that if a fire started downstairs or on the stairs, in the absence of a smoke alarm there would be no warning until smoke or flame gave it; that at such a point those upstairs would probably have to escape from a window; that it would be both difficult and dangerous to break the strengthened glass; and that a catch on the main front upstairs sashes which an adult or indeed an older child could open swiftly and reliably was therefore essential. If these risks were not appreciated, it was because of the councils elementary omission to obtain a fire officers advice. We know from the unchallenged evidence given below that such advice would have drawn attention to them.

30. Mr Murphy, relying upon an unreported decision of this court, Issit v LB Tower Hamlets (6 December 1983) which was shown to Thomas J though not to us, urges that a council is entitled to plan on the assumption that parents will act reasonably and responsibly. No doubt that is right. But reasonable and responsible parents and the judge had no criticism whatever of Mr and Mrs Adams as parents may take different courses. The judge found nothing irresponsible about keeping the window keys downstairs and away from three small children. With hindsight, no doubt, Mr and Mrs Adams have reproached themselves time and again for not finding a safe place for the keys in the front bedrooms; but any council officer considering in prospect what might happen to a window key once it was taken out of the lock by a responsible parent would have realised that it might in consequence not be readily to hand in the event of a fire.

31. The judges findings are entirely consonant with this view. He remarked that the fire officers preference for a keeping a key close to the window overlooked the risk that a child would use it to climb out; and later he said: I accept Mrs Adams evidence that she would not have left the keys upstairs in case the children might have opened the window. However, I accept the evidence of Mr Hayes that the advantage of a removable key is to stop a child opening the window and to prevent a person opening the window from outside if the glass was broken; he considered that the location of the keys was a matter for the occupier. That was in my judgment a reasonable view to take: it was reasonable for the council to leave to the occupier the decision whether to lock the windows and what arrangements to make about keys. In other words, the council realised (or would have done had it reflected on it) that the keys to lockable window catches would be removed by responsible parents and might be kept anywhere in the house.

32. Where I respectfully think the judge erred was in going on to discount entirely the absence of smoke alarms. He said: *"in my view that fact that there was no smoke alarm made no difference to this decision because the council were entitled to rely on the householder to decide whether or not to use the locks and if he did so, where to put the keys. The presence or absence of a smoke alarm would, if a factor at all, be a factor influencing the householders decision."* Once it was accepted, as the judge did accept, that householders might without behaving irresponsibly remove the window keys and keep them elsewhere in the house, the risk of becoming trapped upstairs by fire became sharper. That risk was further enhanced, for the reasons I have given, if there were no smoke alarms.

33. Mr Williams did not need to pitch his case as high as initially he did by submitting that in these circumstances only one solution the button catch could sensibly have been adopted had the council made a considered judgment about the catches on the upper front windows. The judges finding, albeit founded upon a false premise of law, was to the contrary. But for the reasons set out above Mr Williams has satisfied me that such consideration, properly given, would much more probably than not have resulted in a decision to fit button catches to the upper front windows of houses such as 103 Jubilee Terrace..

34. That a competent professional judgment might have gone in favour of key- operated catches is, for the reasons I have given, nothing to the point. Since no such consideration was given to the matter, as in

pursuance of the councils duty of care it should have been, and since the probability is that it would have favoured button catches, the claimants are in my judgment entitled to succeed. They have established both negligence and causation. I would allow this appeal accordingly and direct that the case be remitted, failing agreement, for the assessment of damages.

SIR CHRISTOPHER STAUGHTON

35. It is with genuine regret that I reach a different conclusion from Sedley L.J. in this tragic case.

36. The Appellants in the forefront of their argument before this court maintained that the judge was wrong to rely on the test stated by McNair J. in Bolam v. Friern Hospital Management Committee (1957) 1 WLR 582, although there is no hint that this was in issue in the judgment of Thomas J. or in the Appellants written outline before this court. Sedley L.J. takes the view that the Bolam test has no relevance to a case such as this. So I must state my own view of that test and how it is relevant, although we are told that it is currently also under consideration in another appeal before this court.

37. There are many occasions amongst the changes and chances of this mortal life when a reasonable man may adopt either of two courses without being thought negligent. I can give two examples: a driver has nearly reached a traffic light when it changes to amber, but he knows that there is another car close behind him which might not be able to stop; the driver could nevertheless stop suddenly, or he could continue to cross the junction at the risk of colliding with another vehicle. Or the owner of a pleasure boat some distance from the shore finds that it is shipping water rapidly; he can tell the passengers (who are all children) to swim for the shore if they can or tell them to await for a possible rescue. The circumstances may be such that in each case neither of the two possible courses would be negligent. (I hasten to add that I am not expressing any view of the law in either case. They are merely illustrations.)#

38. In that sort of case the court would be well able to judge for itself whether one course or the other was negligent, or neither of them. That would be so whether the trial was by judge alone, or by jury as in Bolams case. But when professional skill is involved, the judge or jury may not be qualified to decide without assistance. I assume that the professional, like the driver or the owner of the boat in my examples, has to choose between two courses of action, even if one of them is doing nothing.

39. McNair J. in Bolams case (at p. 587) first cited Lord President Clyde in Hunter v. Hanley (1955) SLT 213: " In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion 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." McNair J. then said: "I myself would prefer to put it this way, that he 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. I do not think there is much difference in sense. It is just a different way of expressing the same thought. 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".

40. There are, of course, circumstances in which a practice commonly adopted by some professional people may nevertheless be regarded as negligent. As Lord Browne-Wilkinson said in Bolitho v. City of Hackney Health Authority (1998) AC 232 at p. 243, the Bolam doctrine does not apply if the body of opinion is not responsible. Equally, it does not apply if the body of opinion, even though universally held, is not reasonable. The doctrine is not a licence for professionals to take obvious risks which can be guarded against.

41. Another qualification may be that tentatively suggested by Lloyd L.J. in Gold v. Haringey Health Authority (1988) QB 481 at p. 490: "If the giving of contraceptive advice required no special skill, then I could see an argument that the Bolam test should not apply." I would agree with that proposition, but I would add the words in accordance with its terms. I say that because, as I have sought to show, the Bolam test is no more than an adaptation of common sense to the special case of skills which are somewhat arcane. At common law and in common sense a defendant is not negligent if he has

adopted one of two courses, when the man on the Clapham omnibus would say that neither was negligent although in his opinion the other was to be preferred. The same applies in the case of professional skills, except that the judge or jury have to accept the opinion of a body of responsible practitioners unless it is unreasonable.

42. The key question is whether the Bolam test still applies, although the particular defendant did not in fact have the qualifications of a professional in the relevant field of activity, and although he did not go through the process of reasoning which a qualified professional would consider before making a choice. I know of no authority that the benefit of the Bolam test should be refused in either of those cases. Nor do I think that it should be refused. To take an example which might be said to be extreme, suppose that a first year medical student were asked to deliver a baby in an emergency on an aeroplane; despite his inexperience he adopted a course which would have been approved by a respectable body of qualified opinion. Would he be liable in negligence merely because there was a safer course which he might have adopted, although a consultant obstetrician would be excused in the same circumstances under the Bolam test? That cannot be the right answer. So too in circumstances where there is no emergency I consider that a general practitioner would not be negligent if his treatment reached a standard which was approved by a responsible body of opinion in the case of a consultant. The Bolam test is not the monopoly of the expert.

43. Nor can it be a requirement of the Bolam test that the defendant should have considered and reflected upon the alternative courses available and made a conscious choice between them. Seeing that, upon the hypothesis which is inherent in the problem, a respectable body of professionals have been and are in favour of each course, I do not see that the defendant is required to go through the same thought process in order to deserve the support of those who favour the course which he chooses. The consultant who naturally chooses one method out of long experience is as much entitled to rely on the Bolam doctrine as one who sits down in his chair and goes through the whole process of choice again.

44. But all this is somewhat theoretical. We must examine the facts of the particular case. In the event I rather doubt whether it is necessary for the Council to rely at all on the Bolam case for the decision of the judge to be upheld.

45. By the end of the trial certain points were clear. First, the designer of windows for a residential property has a number of factors to take into account. Two only are of primary importance in this case the need to provide a means of escape or rescue in case of fire, and the need to prevent children climbing or falling out of windows. Those are directly opposed to each other. A third factor is the need for a property to be protected against burglars or thieves. That is unlikely to be a consideration in the case of the upper storey of a terraced house facing across a street to other houses. It may be that a Council is entitled to give some preference to windows being of the same design at the back and front of their houses, and on the ground as well as upper floors. But that is not a consideration which has featured in the case; the protection of property can be left out of account.

46. The caring parent will, I suspect, be more concerned about the immediate danger of children falling through or out of a window, as opposed to the more remote prospect of a major fire in the house. That is particularly the case in a house such as 103 Jubilee Road, where the window sills on the top floor were only 14 inches above the floor. But parents, designers of windows and everyone else will of course be concerned about fire as well as the mischievous activities of children. A balance between those two considerations must be found.

47. That, as it seems to me, is what this case was about. In the light of those considerations, was it wrong (or negligent) to provide lockable windows with removable keys, as opposed to locks of the push-button type which could be opened by an older child but were difficult for a younger child to open? There had at the start been complaints of the size of the window openings, the type of hinges and glass used, the failure to repair electrical faults (until the pre-trial hearing), and to some extent the failure of the Council to provide keys to the windows. None of those matters, as it turns out, was critical to the decision which the judge had to make. What was critical was the type of locks.

48. Fasteners which were to be lockable by means of a removable key were in very common use in 1989, as the judge found. He added "However there was also available in the market, though in less common use at the time, a lockable window fastener without a removable key" The judges summary of the expert evidence and his conclusion were as follows: "On the evidence, I am satisfied that it was clearly necessary, given the height of the sill, to design the windows so that those who occupied the houses could if they wish lock the windows if they considered it necessary for the safety of their children or as a protection against intruders. The ultimate issue was whether the designer was negligent, given the other design decisions, to specify a lock with a removable key." Mr Fairbank, a retired Divisional Fire Officer for Mid Glamorgan, gave evidence that the key should always be fixed in the lock as seconds could in the event of a fire make a difference, but this does not address the potential risk of young children using such a key to open the widow and the fact that a lock with a removable key is more secure from entry by intruders.

    Mr Fred Woods evidence was that he would have been hesitant about providing a lock with a removable key and would not have done so in the circumstances of this case; Mr Roy Barker also would not; he was concerned with the risk of misplacing the key. However Mr Scott Young, Mr Robert Howard and Mr Burne took a different view and considered it was a reasonable compromise of the design factors to provide a removable key.

    I accept the evidence of the latter and I am satisfied that the decision to provide a lock with a removable key was a decision that a competent designer would have made in 1989/1990. Indeed the evidence was that a number of local authorities designed windows with removable keys and with the other features of these windows. I was particularly impressed with Mr Burnes evidence that it was a question of balancing the risk of children climbing or falling out of windows (which was lessened through the use of a removable key) and providing a ready means of escape in the event of fire by a readily openable window with a button release. He considered that the right balance, given the other design decisions, had been struck by specifying a removable key.

    The judge had earlier described Mr Burne as a consulting engineer who also had some experience of designing local authority housing and considerable experience in relation to accidents involving fires and persons falling out of windows. It is not said that Thomas J. was not entitled, on the evidence, to reach the conclusion he did that a competent designer in 1989/1990 could have provided for a lock with a removable key.

49. What is said is, in effect, that the Council did not take the right steps on the way to the completion of their design. They did not take any advice from the fire service, or the police, or anyone else outside the Council; they did not consider BS 5588 (1984); no one in their Technical Services Department specifically looked at the design in respect of fire, although the use of windows as a secondary means of escape was considered. However, BS 5588 had nothing to say about the relative safety of types of window catch; it was concerned with the size of openings, but that is no longer material in this case.

50. To concentrate on those matters, and hold the Council negligent on those grounds, seems to me to prefer form to substance. (A temptation to do that is sometimes apparent in the world of health and safety.) The efforts of the Councils team produced a design which was not a negligent design. It was one which skilled and careful people had produced in the majority of cases up and down the country. In those circumstances there was in my judgment no negligence in their failure to consult with others or in the other matters relied on. An ordinary builder who is asked to make a window of new design, or to insert window locks recommended by the Local Crime Prevention Officer, is not negligent if he produces a product which is acceptable by the standards of the day. I do not see that reasonable skill and care means something different for the Councils Technical Services Department.

51. There remains the question of a smoke alarm. It was not argued that provision of a smoke alarm was a free-standing duty upon the Council. There had been no mention of smoke alarms in BS 5588 (1984), but they did appear in the 1990 version and its draft published in 1987. As a requirement for the construction of new buildings they first featured in the 1992 building regulations. What is said is that the absence of a smoke alarm made it the more desirable that there should be a means of escape from the top floor. But that was plainly and obviously desirable in any event. The question was whether

and how that means of escape should be guarded against misuse by children. Thomas J. said on this topic Nor do I consider that the features of the design placed on the Council an obligation to install a smoke alarm; absent the fitting of the replacement windows, there was no basis for contending that the Council were under a duty to install a smoke alarm and I cannot accept that the features of the design of the replacement windows were such that they created such a duty.

52. Accordingly I would uphold the judges conclusion that there was no breach of duty by the Council in a material respect. That makes it unnecessary to consider at length the question of causation whether the Council would have arrived at a different design if they had consulted a police officer and the fire service or other outsiders, considered BS 5588 (1984), and reviewed the design specifically in respect of fire. The judge made no finding on that question; perhaps he was not asked to do so. But in case I am wrong on the topic of breach of duty, I must look at causation.

53. I cannot readily reach any conclusion as to what the officers of the Council would have done if they had taken those steps. Like most judges they presumably know something about the habits of children and the problems faced by parents. Most parents if a key were needed on the top floor to open windows of escape, would keep one there, if possible in a place not accessible to children; some might not. Children at an early age learn to find what their parents wish to hide, to reach things that are supposed to be beyond their reach. The dexterity required to reach a key and use it may or may not be less than that needed to operate a push-button lock. Overall, the risk of death or serious injury from one cause or another for children in houses with key operated window locks may or may not be greater than the risk for children where there are button operated locks. I cannot determine these uncertainties.

54. In my judgment the most that can be said is that the Councils decision is likely to have been, if all possible enquiries had been made, that which was evidently the decision taken by the majority of people in this country at the time to have locks operated by a removable key, if there were to be locks at all. Seeing that it was not an unreasonable view to take, I would hold that in any event the Councils failure to consult with others did not cause the deaths of the children or the injuries to Mrs Adams. I would dismiss this appeal.

LORD JUSTICE MORRITT:

55. The relevant facts of this tragic case have been described by both Sedley LJ and Sir Christopher Staughton and I do not need to repeat them. But their judgments, which I have had the advantage of reading in draft, disclose an acute difference of opinion as to the proper outcome of this appeal. To explain the conclusion to which I have come I find it necessary to return to basic principles, however elementary they may be.

56. A claim in negligence will only succeed if the claimant establishes that the defendant owed him a duty of care, was in breach of that duty by failing to use care to the requisite standard and, in consequence, sustained damage. It is not disputed that the Council owed the Adams a duty of care. The duty was owed to them not as tenants but as persons reasonably to be expected to be affected by the provision of the relevant windows. In the circumstances the duty was to take such care in the design and installation of the windows as was reasonable in all the circumstances to ensure that the Adams family or any other occupants of 103 Jubilee Terrace were reasonably safe from personal injury. **Rimmer v Liverpool City Council** [1985] QB 1. Damage of the most extreme and serious kind was sustained by the Adams family. The issues, then, are (1) whether the Council failed to show the care the relevant standard of care required and if not (2) whether the loss sustained by the Adams family was caused by that failure.

57. It would be an oversimplification to suggest that the standard of care to be observed is that of the reasonable man for there are many factors which have to be considered. For example, to follow the common practice of those engaged in a particular operation is, if the practice is reasonable, not negligent. But in many occupations there is more than one way of safely performing a particular operation. In those cases to follow either practice will not be negligent provided that that which was followed was both reasonable and in common use. Allied to this consideration is the problem which arises for the court when the operations to be considered are beyond the usual experiences of the

reasonable man. In those circumstances the judge must rely on expert evidence to inform himself whether the practice of a particular profession or calling is both reasonable and in common use. It is to both of these problems that I understand the well known dictum of McNair J in **Bolam v Friern Hospital Management Committee** [1957] 1 WLR 582 to be directed. That dictum applies to all who exercise or profess to exercise a particular skill or calling, not only medical practitioners. **Gold v Haringey HA** [1988] QB 481, 489. Further its application does not depend on the actual possession of the relevant qualification. Emergencies apart if the act in question can only safely be done by a person with the necessary skill to do it then the standard of care to be shown is that appropriate to one possessing that skill. Charlesworth on Negligence 9th Edition para. 6-38.

58. In the design and provision of the windows for 103 Jubilee Road, as well as for other properties of both the Council and others, there is a conflict between the need to provide a means of escape or rescue in the case of fire and the need to prevent children climbing or falling out of the window. The judge concluded, and it is not disputed, that the ultimate issue was whether the designer was negligent, given the other design decisions, to specify a lock with a removable key rather than a button lock. The judge found that in 1989/90 it was, and remains, very common for houses to have lockable windows with removable keys on the first floor. He accepted the evidence of a local surveyor (Mr Scott Young), an architect (Mr Robert Howard) and a consulting engineer (Mr Burne) that the decision to provide a lock with a removable key was a decision that a competent designer would have made at that time. It was on that basis that the judge concluded that the Council was not in breach of its duty of care and, therefore, not liable.

59. It is suggested that in referring to **Bolam v Friern Hospital Management Committee** [1957] 1 WLR 582 the judge fell into error because the Council never did weigh the competing considerations before installing windows with locks with removable keys rather than windows with button locks. But if this criticism is well founded it means that a defendant who has performed the balancing exercise and has installed windows with removable keys will escape liability but a defendant who has installed the same windows without having previously carried out the balancing exercise will not. This appears to me to be illogical for the alleged liability arises, if at all, from the installation of the windows, not the thought processes which preceded it.

60. If the Council had selected windows with button locks it is more likely than not that Mrs Adams would have been able to lead her children to safety and would not herself have sustained the injuries she did. But, on the findings of the judge, a council using reasonable skill and care might select either a button lock or a lock with a removable key. In those circumstances the question is whether the failure to make a conscious choice between two alternative non-negligent courses of action only one of which could lead to the damage in fact sustained can constitute a breach of the duty owed by the council to the Adams family in this case. If that is the correct way to analyse the problem then the answer is obvious; liability does not depend on hindsight.

61. In my view such a failure cannot give rise to liability. The experienced surgeon may act in a particular way out of habit or from intuition. If his choice gives rise to damage to his patient he is sued for causing the damage by that action not for failing to sit down and think about it in advance. If his action satisfies the **Bolam** test he is not liable; if it does not then he is liable however long and carefully he thought in advance about what to do. So in this case, the council is to be judged according to the standards of the reasonably skilful window designer and installer. Such a person would be entitled to the benefit of the Bolam test whether or not he had sat down and considered exactly which sort of lock to provide. The council is not to be made liable for selecting the same lock just because it did not make a reasoned choice.

62. Accordingly I consider that the judge was right in the conclusion to which he came. I agree with Sir Christopher Staughton and his reasons for dismissing the appeal.

63. In these circumstances it is unnecessary to reach any conclusion on the issue of causation. That issue depends on the description of the duty. If it is formulated in the way Sedley LJ has adopted then I can understand his conclusion on causation. But I consider, with the greatest of respect, that that formulation is fallacious. In those circumstances I prefer not to express any view on the issue of

causation lest it be thought, because of the assumption on which it must proceed, to cast doubt on the widespread practice, as found by the judge, of providing windows with locks with removable keys. I would dismiss this appeal on the single ground that the Council was not in breach of its duty of care.

64. **Order:** Application dismissed. Appellants to pay the costs of the Council not to be enforced without the leave of the court. Leave to appeal refused. (Order does not form part of approved judgment.)