Seminar B
Medical, regulatory and disciplinary law

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Dominic Nolan QC

Vicarious Liability in Modern Healthcare

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Topics

1. Increased involvement of private sector in NHS work
2. 'Non-Delegable duties'
3. Commissioning
4. Vicarious Liability
Frontiers of Medical Liability: Anonymous Patient v Ingham, Shah & Ors, 2015, Md.

- Patient attended for colonoscopy
- General anaesthetic
- Set smartphone to record post-operative instructions
- Left recording in theatre

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“...these people are into their medical problems. They need to have medical problems. It’s like they’re holier than thou. Too much internet use.”

“I’m going to mark haemorrhoids even though we don’t see them and probably won’t. I’m just going to take a shot in the dark.”

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Frontiers of Medical Liability: Anonymous Patient v Ingham, Shah & Ors, 2015, Md.

Settled $500,000
$50,000 from anesthesiologist’s employer
Alternative providers are on the rise

Department of Health spending on Non-NHS Providers

Private contractors are becoming more successful at tendering for work

NHS contracts won 2013/14

Private contracts won 2013/14

Some success, some failures
Delegation to the Private Sector

400,000 operations on NHS patients took place in private hospitals in 2013

Delegation to the Private Sector

NHS Trust probably retains liability

Nebulous "non-delegable duty of care"

Gold v Essex CC [1942] 2 KB 293; Cassidy v Ministry of Health [1951] 2 KB 343


Recognised in Woodland v STA [2013] UKSC 66

The test as it stands: Woodland v STA per Lord Sumption:

1. C is a patient or a child, or for some other reason is especially vulnerable or dependant on D's protection
2. An antecedent relationship placing C in D's care or custody, giving rise to a duty of care
3. D has no control over how TP performs obligations
4. Function delegated is an integral part of D's duty
5. Negligence arises from function that D undertook and then delegated
Other sources of guidance: regulators?

- HFEA Guidance 24.6:
  "Where a licensed centre arranges for any part of treatment to take place at another licensed centre, the person responsible at the original centre retains overall responsibility for that treatment."

Delegation where hospital is not treating patient

<table>
<thead>
<tr>
<th>Patient's hospital</th>
<th>Hospital</th>
<th>Private laboratory</th>
</tr>
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<tbody>
<tr>
<td>Refers sample to</td>
<td>Sends for processing to</td>
<td></td>
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Hospital probably not liable
Farraj v King’s Healthcare NHS Trust & An [2009] EWCA Civ 1203
- DNA tissue sent by consultant in Amman to hospital in London
- Hospital sent tissue to a laboratory for processing
- Claimant contended a non-delegable duty
- CA content to assume without deciding one existed
- No liability
- Hospital did not undertake to treat or care for the patient, provided diagnostic and interpretative services for sampling only.
Commissioning Private Sector Services

CCG probably not liable to individual patient

Test in Woodland not met

Standard NHS Contract provides that all contractors must maintain indemnity

If private provider insolvent, possible gap in remedies

However CCGs should obtain a "parent company guarantee"

Possible CCG vulnerability if tender processes not properly followed?

Foundation Trust undertaking Private Sector work

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<td>Income</td>
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</table>
Foundation Trust undertaking Private Sector work / Private Sector clinics

Patient

NHS Foundation Trust / Private sector clinic

Consultant working privately on site

- Send private treatment
- Directs patient to
- Seeks private treatment
- Generally, no liability to the Hospital, however:
  - Are the terms of the contract sufficiently clear?
  - Did Trust ensure that the surgeon was appropriately skilled, and had adequate indemnity?
  - Did Trust arrange for services to be provided by others or undertake to supply the services?
  - Are the terms of the contract sufficiently clear?

- Vicarious liability for non-employees
  - Cox v Ministry of Justice [2016] UKSC 10
  - "The law of vicarious liability is on the move" - Lord Phillips JSC, Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Various v Variou

- Various v Institute of the Brothers of the Christian Schools [2012] UKSC 56
- Various v English Province of Our Lady of Charity [2012] EWCA Civ 938 - "delegable duty"
The Christian Brothers case: Lord Phillips’s Test for Vicarious Liability

Approved and explained in Cox
1. Tort committed as a result of activity being taken by the TP on D’s behalf
2. TP’s activity is likely to be part of the D’s business activity
3. D, by engaging TP to carry on the activity, will have created the risk of the tort committed by the TP

Two more minor factors (Cox: far from decisive):
1. Which parties insured
2. Degree of control

Conclusions

- Position on non-delegable duties and vicarious liability continues to evolve
- Limits remain unclear
- Involving private sector may not (and often does not) not relieve NHS bodies of all liabilities
- Documentary evidence of structure of arrangements key
- Hospitals are vulnerable if private work is done without full and proper systems in place

Causation

Hailsham Chambers Bristol Seminar
21 April 2016
Dominic Nolan QC
The next week
1. Causation of what? – need to identify injury

2. Causation is a relative concept

"[33] ... the real question is, what is the damage for which the defendant under consideration should be held responsible." (underlined emphasis added, italicised emphasis original)

The Landscape - 2

• “But for” – Barnett, Hotson, Wilsher

• No claim for loss of a chance – Gregg v Scott, Wright v Cambridge Medical Group

• Nothing for simply material increase in risk – save for Fairchild (cf. Atomic Veterans)

• Special cases – Fairchild, Chester v Afshar

The Landscape - 3

• Consequences of Fairchild

• Barker v Corus - 2006 Act

• “Trigger” litigation

• Zurich v IEGL

• Heneghan v Manchester Dry Docks Ltd. & ors. [2016] EWCA Civ 86 (15 February 2016)
This far and no further?

- Sienkiewicz v Greif
- Clough v First Choice Holidays
- Loss of a chance

Lord Mance in Sienkiewicz v Greif at [189]:

I also concur with the further remarks of Baroness Hale JSC in her first paragraph and of Lord Brown of Eaton-under-Heywood JSC in his judgment about the impossibility of going back on Fairchild, as well as on the lesson of caution that the history may teach in relation to future invitations to depart from conventional principles of causation.

Lord Hoffmann in Gregg v Scott at [90]:

“... a wholesale adoption of possible rather than probable causation as the criterion of liability would be so radical a change in our law as to amount to a legislative act. It would have enormous consequences for insurance companies and the National Health Service. In company with my noble and learned friends, Lord Phillips ... and Baroness Hale ... I think that any such change should be left to Parliament.” (emphasis added)
Material Contribution to Injury ("MCI")

- Not to be confused with material increase in risk
- Bonnington v Wardlaw Castings (1956)
- Bailey v MoD (2008)
- Mixed results on attempted application of MCI in clinical negligence cases

Williams v Bermuda Hospitals

- Delayed identification and treatment of rupturing appendix causing longer than necessary period of abdominal sepsis. Myocardial ischaemia with complications led to life support on ICU (good recovery)
- Issue was causation of need for ICU etc. - sepsis would have leaked in any event - so "natural causes" was a competing possible cause
- C failed at trial ("but for") but won on appeal in Bermuda under Bailey
- D appealed to Privy Council

Williams v Bermuda Hospitals

- D's appeal failed before PC (Lord Toulson)
- Bonnington applied – didn’t matter that competing possibilities were sequential not simultaneous
- Obiter discussion of Bailey – categorised by Lord Toulson as a "but for" case in circumstances of an "egg shell skull"!
- Note predominance of judicial inference
Judicial Inference in MCI cases

• In Bailey an inference was drawn by the Court as to the effect of the negligence on the Claimant’s ability to resist aspiration of her vomit: see [32] of CA judgment - said to be “a statement of the obvious”.

• Separate inference by Foskett J. at trial (at [60]) that the claimant was still suffering material weakness as at 26 January from a stormy course lasting from 11/12 January to 19 January.

• In Williams Privy Council held (at [42]) that it was entitled “to infer on the balance of probabilities” that the negligent delay made a material contribution to the injury (emphasis added).

John v Central Manchester NHS Foundation Trust
Picken J March 2016

• Initial severe head injury (acute subdural haematoma)

• Negligent delay x 2 (CT scan and transfer to neurosurgical unit) led to unnecessarily prolonged raised intracranial pressure (occurrence, degree and duration of ricp contested but found as fact)

• End result - global cognitive deficit and impairment of executive function

John v Central Manchester NHS Foundation Trust
Picken J March 2016

• 3 potential causes of end result:
  • Original injury
  • Prolonged severe ricp
  • Non-negligent post-operative infection
John v Central Manchester NHS Foundation Trust  
Picken J March 2016

- Held ricp made material contribution to eventual outcome
  - This was in the end conceded
  - Material contribution was established on the evidence and not inference
- D fallback argument was for apportionment - failed
- C was entitled “to recover without deduction”: see [105].

John v Central Manchester NHS Foundation Trust  
Picken J March 2016

- Damages assessment (same judgment)
  - Generals for psla assessed without reference to likely effect of original injury
  - D attempt to apportion past care claim (£25k) dismissed out of hand (other minor aspects treated similarly)
  - Loss of earnings claimed by C and awarded by judge on basis that effect of original injury meant 6 months off work and very limited residual earning capacity in any event by virtue of original injury

Reaney v. University Hospital of North Staffordshire NHS Trust  
Court of Appeal November 2015

- T7 paraplegic hospital patient negligently allowed to develop very severe bedsores with permanent effect
- Significant but relatively modest care need in any event but now needing 2 carers 24/7 (with consequent accommodation need) and much more physio
- Foskett J purporting to follow Edwards-Stuart J in Skloir v Hoycock held that pre-existing need irrelevant in assessing damages attributable to negligence of hospital – which was liable on a “but for” basis – and in any event alternatively on MCI basis
Reaney v. University Hospital of North Staffordshire NHS Trust  
Court of Appeal November 2015

- If relevant need "quantitatively different" ("more of the same") must deduct pre-existing need from claim
- If "qualitatively different" ("different in kind" - see [25]) then no account need be taken of pre-existing need
- Case remitted to Foskett J to re-assess damages

"The claimant is entitled to recover damages from the first defendant for the losses inflicted by him; and from the second defendant for any additional losses inflicted by him. It is true that, if the first defendant is not before the court or is insolvent, the claimant will not be fully compensated for all the losses that he has suffered as a result of the two accidents. But that is not a reason for making each defendant liable for the total loss.……….. In the present case, the question is whether the second tortfeasor is responsible for the consequences of the first injury. To that question, the answer can only be, no. It is true that, but for the first accident, the second accident would have caused the same damage as the first accident. But that is irrelevant. Since the claimant had already suffered that damage, the second defendant did not cause it. This is not a case of concurrent tortfeasors" (emphasis added)

3 points (obiter):
- it is irrelevant whether or not the claimant is actually in receipt of compensation to meet needs arising from the pre-existing injury or condition
- the decision in Sklair was correct if seen as one of causation of the major loss (the need for 24 hour care) which the Court of Appeal in Reaney said could be described as "qualitatively different" to the regime originally contemplated
- Bailey had no relevance to the issue in Reaney. Causation of the relevant injury (severe bedsores) was not in issue. What was in issue was to what needs that injury gave rise or distinct from pre-existing needs. Bailey was not relevant on that question.
Reaney v. University Hospital of North Staffordshire NHS Trust
Court of Appeal November 2015

• If relevant need “quantitatively different” (“more of the same”) must deduct pre-existing need from claim

• If “qualitatively different” (“different in kind” - see [25]) then no account need be taken of pre-existing need

• Easily distinguishable?

• Footnote: Reaney does not appear to have been referred to in John v Central Manchester

Take home

• Loss of a chance most unlikely now

• Battleground will be MCI which as an approach applicable to clin neg is here to stay

• Important to get evidence to support an MCI argument

• Assessment issues will nonetheless arise and must be considered carefully

• All of above set out in detailed article being posted on Chambers website

Thank you