THE STANDARD OF DUTY

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PREFACE

I recalled reading in a local newspaper dated 12th January, 1993, two cases of medical negligence caught my eyes. It reads " An Indian woman suffered severe pain for six years because doctors left a pair of forceps in her abdomen by mistake during pregnancy-related surgery". This report came days after the reported case of a woman who was turned radioactive after doctors left radioactive metal wires in her pelvic tissue after special surgery designed to alleviate the pain of an advance cancerous tumour. Shocking, isn't it?

Such serious malpractice in the medical profession has put the profession under public scrutiny. Therefore, it has come to my interest to write my dissertation on the tort of negligence, ie. medical negligence. It has always been a debatable issue among the medical professionals, scholars and even the laymen on the standard of duty that is expected from the medical practitioners and their servants.

In my essay, I have looked into the standard of duties expected from the medical practitioners and the duty of care owed to their patients. If there is a breach of such duties, on who lies the burden of proof and whether the principle of res ipsa loquitur is really an aid to the patient to prove negligence.

I specifically thank my supervisor, Associate Professor Mohd. Akram b. Mohd. Shair for his guidance and support, and to all my friends who have given their moral support throughout my essay writing.

Last but not least, my special gratitude to my family for their constant love, care and support and for just being there when I need them.

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[1983] 2 All ER 245

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[1981] 1 All ER Rep. 257

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[1967] 1 WLR 813

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[1983] 1 All ER 416

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[1976] 1 All ER 326

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[1932] AC 562

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[1970] 2 MLJ 171

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[1967] 1 AC 617

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1 INTRODUCTION

DEFINATION OF NEGLIGENCE

Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. Therefore, three elements is necessary to constitute negligence:

(a) a legal duty of care
(b) breach of that duty
(c) consequential damage to the plaintiff

Mere negligence in itself is not a cause of action. To give a cause of action there must be negligence which ammounts to a breach of duty towards the plaintiff. Actionable negligence must involve a duty to act with reasonable care towards the plaintiff, a failure, by act or omission, to discharge that duty, and loss occasioned by that failure.

The three elements do not exist separately. In the case of **THOMAS V. QUARTERMAINE**[1], Bowen CJ said:

> " The idea of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect to some care which we are bound by law to exercise towards somebody."[2]

In the celebrated case of **DONOGHUE V. STEVENSON**[3], a manufacturer of ginger beer had sold to a retailer ginger beer in an opaque bottle. The retailer resold it to A, who then gave it to her friend B. B drank it and found a decomposed remains of a snail in it. In consequence she became seriously ill and sued the manufacturer for negligence.

The House of Lords held that the manufacturer owed her a duty to take care that the bottle did not contain noxious matter and that he would be liable in tort if that duty is broken.

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[1] [1887] 18 QBD 685

[2] Ibid. at 694

[3] [1932] AC 562

Lord MacMillan said:

" The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only when there is a duty to take care and when failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. ..... The conditional principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty."[4]

[4] Ibid. at 618 - 619

MEDICAL NEGLIGENCE

Negligence in the medical field refers to a breach of a duty to take reasonable care towards the patient, and as a result of that breach, the patient suffers damage.

In order to succeed in an action for medical negligence, a patient must establish the following:-

(a) that a duty of care was owed by the doctor to the patient;
(b) that the doctor was in breach of the appropriate standard of care imposed by the law;
(c) that the breach of duty caused the patient harm or injury recognized by the law as meriting compensation
(d) that the extent and quantum of the loss that has flowed from the breach of duty is recoverable in law.

The duty in the medical context is not based on foreseeability of harm, but rather it rises out of the doctor and patient relationship. Due care is to be taken not only once the treatment is commenced but also a duty to initiate the treatment, ie. to take all reasonable steps necessary for the health of the patient.

It is not a duty that arises from an activity undertaken. An engineer or architect owe a contractual duty to his client and tort duties to any person he can foresee suffering from physical damage as a result of his negligent work. The legal duty which is imposed on the doctor to exercise due skill and care only arises when there is a doctor/patient relationship. If a doctor passes the scene of an accident in which a person has been injured and is in need of urgent medical attention, he is not held to be negligent for not rendering any assistance, as no doctor/patient relationship has been established and in consequence the doctor owes the patient no legal duty. But, if the doctor goes to the assistance of a person injured in an accident, a doctor/patient relationship is at once established. A doctor has a duty to exercise reasonable skill and care regardless of whether or not his services are being given gratuitously.

The duty which arose from the doctor-patient relationship does not only stop there. In the case of **MCLOUGHLIN V. O'BRIAN**[5], when the negligent treatment causes the death of a patient, that liability may extend to a member of the deceased's immediate family who is present at or soon after the death and suffers nervous shock.

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[5] [1983] 1 AC 410

This duty to others also applies to cases where there was a negligent in the prescription of drugs which leads foreseeably to epileptic or similar attacks. A person who is injured in the cause of trying to help the patient when he had endangered himself in the course of such attack, is able to recover damages from the physician who negligently prescribed the drugs.

WHO CAN BE LIABLE

Often you hear of a hospital staff who is negligent in the course of his duty, the hospital authority is likely to refuse to shoulder the blame.

The plaintiff has to show that the negligence complained of was a result of an act or an omission of an employee of the defendant. An employee is one who is engaged upon a contract of service. The negligence complained of must be within the course of the employee's employment.

Therefore, a hospital authority is liable for the negligence of any one of its staff. But if the doctor has been selected or employed by the patient, the hospital authority is not liable of the doctor's negligence. A private clinic is responsible for the negligence of its resident staff. And a general practitioner (GP) is liable for his own negligence and also for the acts of anyone he employs.

In the case of **HILLYER V. ST. BARTHOLOMEW'S HOSPITAL**[6], the hospital was held not to be responsible if any surgeons, doctors or nurses had acted negligently in matters of professional care or skill, even though they are responsible for the exercise of due care in selecting its professional staff.

In this case, the plaintiff brought an action against the governors of a hospital for damages for injuries of the inner upper part of his both arms, alleged to have been caused to him during an operation by the negligence of some members of the hospital staff.

The Court of Appeal concluded that a hospital undertook certain duties toward a patient, ie. the only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff. The nurses and other attendants assisting at an operation cease for the time being to be the servants of the defendants, in as much as they take their orders during that period from the operating surgeon alone, and not from the hospital authorities.[7]

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[6] [1909] 2 KB 820

[7] Ibid. at 826

But this law was given a different light and more appropriate to modern social needs in the case of **CASSIDY V. MINISTRY OF HEALTH**[8], the plaintiff suffered from a contraction of the third and fourth fingers of his left hand. A doctor, who was a full-time assistant medical officer of the hospital, confirmed the diagnosis and recommended an operation, which he had personally performed. After the operation,the plaintiff underwent a treatment under the care of the doctor, a house surgeon and the hospital's nursing staff, all of whom where employed under contact of service. After the treatment, it was found that his hand had been rendered useless.

The trial judge dismissed his action for damages for negligent treatment which he brought against the hospital on the ground that he had failed to prove any negligence.

Somervell LJ said that the hospital is liable for the acts of permanent staff, ie. those who were employed to provide the patient with nursing and medical treatment, but not for the acts of a visiting or consulting surgeon or physician. Even though the plaintiff could not pinpoint the employee who had been negligent, there had clearly been negligence by one or more employees of the hospital.

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[8] [1951] 2 KB 343

Lord Denning LJ directed that the hospital was under a duty to take reasonable care of all patients, whether private or not. That duty would be discharged through their staff and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him.

He further said:

" I take it to be clear law as well as good sense that where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for service."[9]

Lord Denning LJ had again stressed his point in the case of **ROE V. MINISTER OF HEALTH**[10], where two men went to a minor operation on the same day. Each were given a special anaesthetic by a visiting doctor, and in consequence they became paralysed from the waist down.

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[9] Ibid. at 363

[10] [1954] 2 QB 66

If we were to follow the majority view in **CASSIDY's** case, the visiting doctor was not a person for whose acts the hospital could be held liable. But Lord Denning said:

> " I think that the hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors, but also for the anaesthetists and surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole-time or part-time. The hospital authorities are responsible for all of them. The reason is because , even if they are not servants, they are the agents of the hospital to give the treatment. The only exception is the case of consultants and anaesthetists selected and employed by the patient himself."[11]

[11] Ibid. at 82

2 THE STANDARD OF CARE

THE STANDARD OF SKILL AND CARE

The standard of care, in its basic form, is that care which a reasonable man would take in the circumstances.

As a general rule, persons who are engaged in professions requiring special skill or expertise are required not only to exercise reasonable care but must also exercise the standard of skill expected from persons of such profession.

In R V. BATEMAN[1], there was an appeal by a medical practitioner against his conviction for manslaughter, arising out of the death of a patient. Lord Hewart CJ said that if a person holds himself out as possessing special skill and knowledge, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his discretion and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment.

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[1] [1925] 94 LJKB 791

Whether reasonable skill or care has been exercised in a particular case is a matter considered in relation to the facts of each individual case but a number of conclusions from the decisions of the courts may be drawn.

The best known and most often quoted defination of the standard of care required from the medical practitioners is Mc Nair's direction to the jury in **BOLAM V. FRIERN HOSPITAL MANAGEMENT COMMITTEE**[2], commonly known as "the Bolam Test".

The plaintiff contended that the defendants were vicariously liable for the carelessness of a doctor who administered electro-convulsive therapy to the plaintiff without administering a relaxant drug or without restraining the convulsive movements of the plaintiff by manual control. The plaintiff suffered a fractured jaw as a consequence. He brought an action against the defendents in negligence.

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[2] [1957] 1 WLR 582

Mc Nair J in directing the jury said:

" But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill ; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."[3]

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[3] Id. at 586

In **WHITEHOUSE V. JORDAN**[4], the House of Lords held that the **Bolam** test was applicable to medical treatment. Lord Edmund-Davies said:

> " To say that a surgeon committed an error of clinical judgement is wholly ambigious, for, while some such errors may be completely consistent with the due exercise of professional skill, other acts or omissions in the course of exercising 'clinical judgement' maybe so glaringly below proper standards as to make a finding of negligence inevitable."[5]

Is an error of clinical judgement a negligent? Lord Denning in the Court of Appeal[6], said that in a professional man, an error of judgement is not negligent. The test is whether the average and competent and careful practitioner would make the sort of mistake that you yourself might have made. If the answer is in the affirmative, even after doing the best he could, then it is not negligent.

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[4] [1981] 1 WLR 246

[5] Id. at 257

[6] WHITEHOUSE V. JORDAN [1980] 1 All ER 650, at 658