

## ST PHILIPS CLINICAL NEGLIGENCE GROUP



26 January 2018



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## Legal Update



Petar Starcevic



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## Duty of care – patient confidentiality

- *ABC v St George's Healthcare NHS Trust* [2015] EWHC 1394;
- Duty to inform C of another patient's condition;
- Breach Art.8 ECHR right to respect for private & family life;
- Claim struck out, subject to appeal.



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## Duty of care – patient information

- *Darnley v Croydon Healthcare Services NHS Trust* [2015] EWHC 2301 (under appeal);
- Duty of unqualified receptionist to give accurate information on wait times;
- Information on wait times is a courtesy and no duty to provide accurate information as to waiting time.



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## The non-delegable duty of care

*Woodlands v Swimming Teachers Association* [2014] AC 537, duty to ensure care is taken:

- *C is a patient or child or otherwise especially dependent upon D for protection against the risk of injury;*
- *Relationship between C and D prior to injury which placed C in D's custody or care from which positive duty to protect C from harm is imputed, commonly D has control over C;*
- *C has no control over how D performs that duty;*
- *D has delegated some function to a third party in discharge of duty;*
- *Third party has been negligent in performance of function.*



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## Non-delegable duty of care

*NA v Nottinghamshire CC* [2016] QB 739 CA:

- Non-delegable duty does not arise in the context of LA placing child with foster carers, who then abused the child;
- Case turned on close consideration of LA's statutory duties to children in care;
- Potential relevance in cases of private medical care where D may purport to limit its contractual duty to merely introducing C to a competent clinician or clinic.



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## Vicarious liability

*Institute of Christian Brothers* [2013] 2AC 1:

Principles for vicarious liability beyond employees:

- Tort as a result of activity by T on behalf of D;
- T's activity likely to be part of business of D;
- By engaging T to carry out activity D has created the risk of the tort by T.

Above are general principles extending vicarious liability to relationships akin to that of employer and employee.



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## Vicarious liability

*Cox v Ministry of Justice* [2016] AC 660:

- *Christian Brothers* case explained;
- Heard alongside *Mahmud v Morrisons Supermarkets*;
- No vicarious liability for tort by recognisably independent business of T's or a third party;
- Vicarious liability upheld for negligence of prisoner working in a kitchen;
- Relevant to private medical care & treatment where provider engages therapist or surgeon.



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## Secondary Victims

*Alcock v Chief Constable West Yorkshire Police* [1992] AC 310:

- Particularly close relationship of love and affection;
- Proximity in time and space to the incident or its immediate aftermath;
- A sufficiently horrifying event.

Older clinical negligence cases:

- *Sion v Hampstead HA* (1994);
- *North Glamorgan NHS Trust v Walters* (2003).



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## Secondary Victims

*Taylor v A Novo* [2014] QB 150 CA:

- H suffers accident at work, 3 weeks later he dies after developing PE;
- His wife C witnesses death and brings claim as secondary victim;
- Held: H's death not part of event since separated in time from original accident and injury;
- Restrictions on recovery of secondary victims is based on policy and an extension to these circumstances going too far.



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## Secondary Victims

In clinical context there can often be separation between breach of duty and manifestation of insidious complication.

- *Morgan v Somerset Partnership NHS Trust* (2016): No liability to secondary victim for negligence resulting in discovery of second suicide attempt 6 days later.
- *Wild v Southend University Hospital* (2016): C becoming aware of baby's death after baby had already died in womb.



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## Secondary Victims

Recent trend in finding that succumbing to injury or disease whilst under hospital care is not a sufficiently horrifying event:

- *Shorter v Surrey & Sussex Healthcare NHS Trust* [2015] EWHC 614, seeing victim in distress on hospital trolley and later on life support;
- *Liverpool Women's Hospital v Ronayne* [2015] EWCA Civ 588, wife's deterioration in hospital over a period of 36 hours following negligent surgery;
- *Owers v Medway NHS Foundation Trust* [2015] EWHC 2063, witnessing wife's deterioration in hospital following earlier failure to diagnose stroke;
- *Wells v University Hospital Southampton* [2015] EWHC 2376, father witnessing baby's delivery and unsuccessful attempts to resuscitate.



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## Causation

*Bailey v MoD* [2008] EWCA Civ 803:

where medical science cannot establish the probability that "but for" an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the "but for" test is modified, and the claimant will succeed.

- Is "material contribution" an alternative to "but for test"?
- When is material contribution sufficient as a concurrent cause to an indivisible injury?
- Is material contribution sufficient in the case of consecutive factors contributing to an indivisible injury?



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## Causation

*Williams v Bermuda Hospitals Board* [2016] AC 888:

- Consecutive and cumulative delays to treatment of burst appendix led to a poor outcome;
- Material contribution is always sufficient to prove causation of an indivisible injury;
- Consecutive causes can also be sufficient as a material contribution;
- Bailey is properly understood not as a departure from the but for test, rather an application of the but for test with material contribution of the breach of duty being sufficient;



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## Causation

Limits on the Bermuda Hospitals test of causation:

- A claim will fail if C can only show that the injury was probably caused by one of a number of different causes one of which is attributable to D's breach (para.40 judgment);
- It is not sufficient merely to show that D's breach of duty materially increased the risk of injury, it must be proved that breach made a material contribution to the actual cause (except in Fairchild type cases);
- Note para.48 judgment as to "doubling of risk" and when actual cause may be inferred where it is known that a particular act/omission is likely to have a particular effect.



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## Causation

In summary:

- The "but for" test remains;
- As part of that test material contribution to an indivisible injury will always be sufficient;
- Consecutive causes to an indivisible injury and this includes delays in treatment;
- The result is that causation in clinical negligence cases is likely to be somewhat easier.



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