Module 3: Professional Liability

Has there been execution negligence in provisioning the treatment?
Failure to warn scenarios: - Advice negligence – failing to disclose material risks of misadventure associated with a course of treatment or a medical procedure, even when that procedure is carried out with due care or skill - Negligence in execution of procedure – carrying out a medical procedure with less than reasonable care and skill - Negligent misdiagnosis/non diagnosis – failing to diagnose a patient as a result of a lack of reasonable care and skill (e.g. *O'Shea*) - Refusing to treat a patient – exception to the usual rule that there is no duty to assist a stranger (e.g. *Lowns v Woods*) - Failure to monitor or adequately manage a patient – e.g. failing to recommend blood tests to check for elevated tumour markers (e.g. *Finch v Rogers*) or failing to adequately manage the patient (prescription medication, therapies) (e.g. *Rufo v Hosking*)
General principles – *S5B CLA*
- A person is not negligent in failing to take precautions against a risk of harm unless the risk was foreseeable (a risk of which the person knew or ought to have known), the risk was not insignificant, and in the circumstances, a reasonable person in their position would have taken those precautions - In determining whether a reasonable person would have taken those precautions, court considers the probability that the harm would occur if care were not taken, the likely seriousness of the harm, the burden of taking precautions to avoid the risk of harm, and the social utility of the activity that creates the risk of harm
Is a duty of care owed?
- A duty is owed between a doctor and a patient. Medical practitioner's duty of care is a single comprehensive duty to exercise reasonable care and skill in the provision of professional advice and treatment including examination, diagnosis, treatment, and the provision of information – *Rogers v Whitaker* - Possible duty of care to sexual partner of immediate patient
Has the doctor breached their duty of care through negligence in the execution of a medical procedure?
- Per *Bolam*, a patient could argue that the doctor breached their duty of care because the medical procedure was carried out with less than reasonable care and skill - Negligence is based on whether the act was negligent at the time, not by looking retrospectively – *Roe v Minister of Health*   o Patient was paralysed from administration of spinal anaesthetic by injection, was common method at the time. Contamination of the ampule, cracks not visible to the eye. Doctor not negligent, did not know that there could be undetectable cracks, and it was not negligent for him to not know it at the time

Has the doctor breached their duty of care through misdiagnosis? – Duty of care to not misdiagnose

- Golden rule for cancer – worst possible outcome needs to be excluded. Where cancer is a possibility, a diagnosis of cancer should be excluded through rigorous initial investigation, even if chances are unlikely – *O'Shea*
  o In this case, there was a need for thorough investigation of recurrent post coital bleeding, experts said a reasonable doctor would have done a colonoscopy and referred the patient, and pap smears are known to have false negatives
- Doctors may have a positive obligation to refer patients to specialists – *O'Shea*
  o Here dr failed to refer after reports of post coital bleeding, which is not what a prudent doctor would have done
- Standard of care of a reasonably prudent doctor – *O'Shea*
  o Should do what a reasonably prudent doctor would have done if faced with the circumstances. Court will accept expert evidence about the practice of doctors to assess breach
  o In this case, should have referred, and not waited for pap smear results
- Causation – must show that due care being taken at the critical dates could have resulted in a better outcome – *O'Shea*
  o Where the doctor has failed to adequately diagnose until too late, the patient must show that if a timely diagnosis had been made, treatment would have been successful or the damage would have been limited
  o Expert evidence showed that if the tumour had been treated 4-5 months earlier it might have been cured

Has the doctor breached their duty of care by failing to treat a stranger? Duty to treat strangers

- A doctor may be subject to a negligence claim if they fail to attend to a non-patient in need. However, something beyond foreseeability of harm is required – *Lowns*
  o In this case, child suffered a seizure, 9 year old sister knocked on doctor's door, he refused to attend. Was not a patient. If he had attended, he could have injected Valium to stop the seizure. Ambulance came, delay meant that she suffered brain damage
  o DoC was owed
  o Foreseeability of harm alone was insufficient but together with sufficient proximity can establish the existence of a duty to attend
- More flexible salient features approach is now taken: *Caltex*
  o Proximity
  o Nature/degree of control exercised by D
  o Extend of reliance by P on D
  o Degree of vulnerability
  o D's knowledge
  o Potential indeterminacy of liability

3.3 Liability of Hospitals and Organisations

Note the difference between:

- DoC owed by Dr to Patient
- Duty of hospital to provide adequately trained or supervised staff and to ensure its servants discharge their functions adequately (i.e. vicarious liability)
- DoC owed directly by a hospital to ensure that patients are treated with reasonable care and skill

Hospital vicarious liability for tortious conduct by employees and others

Is the hospital's relationship with the doctor such that the hospital is vicariously liable for the doctor's negligence?

- Note that this is not limited to negligent execution – applies to advice negligence, failure to disclose etc
- General rule: hospitals are liable for the negligent acts of their servants/permanent medical staff, but not visiting or consultant doctors who are independent contractors – *Cassidy*
  o Somerville LJ in *Roe v Minister of Health* made the distinction between permanent staff (servants) and visiting or consultant doctors (independent contractors)
  o Denning LJ in *Roe v Minister of Health* said hospitals liable for negligence of all staff regardless of whether contractor or permanent, unless they are selected and paid by the patient – existence of a contract is the determining thing
  o Morris LJ in *Roe v Minister of Health* said depends on the undertaking of the hospital in the circumstances – were the defendants engaged by the hospitals to do what the hospital itself was undertaking to do
- Look at the evidence and what it shows about the relationship between the hospital and the doctors. This involves taking into account: - *Albrighton v RPAH*
  o Doctors' activities within the hospital
  o Doctors' use of and compliance with hospital forms and routines
  o Operation of hospital bylaws
  o Note that uncontrollability of the manner in which the doctor performs the task does not preclude finding of vicarious liability
  o In this case: two honorary doctors, who were absorbed within the structures and authority of the hospital. Their duties were determined by the board, they were subject to bylaws and instructions of board, rules of hospital. They were considered employees/servants
- In *Rooty Hill v Gunther* the doctor and medical centre having the same representative and insurance policy suggested that centre was responsible. Doctors produced medical reports on paper using the letterhead of the medical centre – showed that they were more absorbed into the business of the medical centre as opposed to independent contractor work
- Whether a hospital is vicariously liable depends on whether the medical officer can be said to engaged in their own business (albeit in hospital premise, making use of hospital staff and facilities) or the business of the hospital. It is a question of fact looking at all the surrounding circumstances – *Ellis v Wallsend*
  o Honorary consultant surgeon treated some patients who applied directly to the hospital for relief in return for being granted operating privileges, nursing care and accommodation in respect of his own patients that he would book into the hospital

- Operating privileges with quid pro quo, received no remuneration from hospital
- He was not an employee, he carried on his own medical practice at all relevant times

- Question of whether the patient knocked on the hospital's door before being referred to the doctor, or the doctor's door before being admitted to the hospital – *Sherry*

Damages

- If dr is vicariously liable, the hospital will be liable to pay, not the doctor
- If there is no vicarious liability or direct liability of the hospital, the doctor will be directly liable

Insurance?

- Generally a hospital will insure itself for the negligent acts of its servants
- Employee doctors will also have insurance to cover legal fees but the insurance contract will exclude cover for acts that the doctor did as an employee, but they could also get full cover, in which case the employer will be able to claim against the insurance of the employed doctor
- An employer that is vicariously liable cannot claim indemnity against an employee (*s 3)* but they may be able to claim against the employee's insurance (which is not regulated but envisaged in *s 6)*
- If an employee commits a tort for which their employer is also liable, the employee is not liable to compensate or pay any contribution to the employer in respect of the liability, and the employer is liable to compensate the employee in respect of liability incurred by the employee for the tort, unless the employee is otherwise entitled to an indemnity in respect of that liability – *Employees Liability Act s3(1)*
- If an employer is proceeded against for the tort of their employee and the employee is entitled under insurance to be compensated in respect of liability that the employee may incur in respect of the tort, the employer is subrogated to the rights of the employee under that policy in respect of the liability incurred by the employer arising from the commission of the tort - *s 6*
    - Aka employer can stand in the shoes of the employee and claim the benefit of insurance cover
- Does not apply if tort was serious and wilful misconduct or conduct not related to employment – *s 5*

Hospital's direct liability to ensure patients are treated with reasonable care/skill

Is the hospital's relationship with the patient such that the hospital owed a non-delegable duty of care to the patient?

- Hospital has a non-delegable duty to provide reasonable care to patients admitted to the hospital (based on its undertaking to provide medical care for the patient) which it cannot fulfil simply by delegating to a servant – *Albrighton v RPAH*
    - Hospital by admitting the patient could be regarded as undertaking that it would take reasonable care to provide for all their medical needs, and whatever legal duties were imposed upon those who treated diagnosed and cared for her needs from time to time, there was an **overriding and continuing duty upon the hospital as an organisation**
    - Hospital's duty does not disappear simply because the medical practitioner is an independent contractor

- Exception: hospital does not owe a non-delegable duty with respect to treatment performed by doctors not on behalf of the hospital – *Ellis v Wallsend*
    - E.g. by an honorary surgeon. Only where the patient knocks on the door of the hospital
    - Not where the patient knocks on the door of a doctor who happens to treat patients at the hospital
    - In *Ellis*, patient went to dr for surgery, and the hospital for nursing care and other medical treatment. In rendering that care and treatment the hospital was no doubt under a non-delegable duty which might have been relevant
- Hospital in *Sherry* breached its non-delegable duty, factors taken into account:
    - Evidence of professional guidelines about appropriate staffing levels in the ICU not being met
        - Though the standards were not mandatory, it still went toward what a reasonable level of medical cover in an ICU would be
    - Dr Walsh often needed to help in Emergency despite not being assigned to it
    - He had been working for 14 hours
    - Causation in *Sherry*: proper personal observation and clinical monitoring was not possible by Dr Walsh by reason of excessive duties, had he been able to conduct proper monitoring he likely would have observed signs of deterioration and would have been present when change in air entry occurred, paid more attention and ordered x-ray etc
    - Hospital was vicariously liable for failings of nurses for failing to call him
    - Hospital was vicariously liable for actions of Dr Walsh
        - He breached DoC by failing to observe/act on signs of blood loss, when he misdiagnosed him with pneumothorax when it was haemothorax
        - Likely to be an employee not independent contractor – did not matter that he had some independence in terms of the treatment administered

What is the standard of care that applies to hospitals in their non-delegable duty of care?

- A body corporate is a person for the purposes of the *CLA*. As such, a hospital is a person. *S5O* of the *CLA* determines the standard of care – *Coffey v Murrumbidgee*
- A hospital's non delegable duty can extend beyond the failings of individuals if there is a failure of the institution itself – *Sherry*