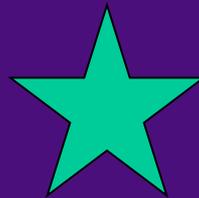


Vicarious Liability and Duty of Candour



Patricia Hitchcock Q.C.

What we knew already

Health service providers such as NHS Trusts and GPs are:

- 1) Vicariously liable for the negligent acts and omissions of their employees, and also
- 2) Directly liable for breaches of their own duty of care, such as system failures

What does DoC add?

- Within 10 working days, provider must:
 - Notify the relevant person
 - Tell her/him the full facts
 - Advise what further enquiries the HSB deems appropriate
 - Apologise
 - Record and keep the notification
 - Provide reasonable support

The Nature of Liability

- Breach of the Duty of Candour is a summary criminal offence, not a civil wrong
- Contrary to Sir Robert Francis' recommendations, no individual duty is imposed on staff members - the offence can be committed by the HSB, but not by any individual

Woodland v Swimming Teachers Association
& Ors [2014] A.C. 537 SC identified 5
principles for when “fair, just and
reasonable” to impose:

1. C is vulnerable: e.g. child, patient, prisoner
2. Antecedent assumption of duty of care

3. C has no control over how D chooses to protect C
4. D has delegated an integral function to 3P
5. 3P negligent in performing that function

Two recent SC cases address the key issues:

1. What relationship must exist between D and the tortfeasor; and
2. what connection must there be between that relationship and the tortious act

to impose VL on D?

Mrs Cox's case

- C was a civilian catering manager in prison kitchen
- Prisoner working under her supervision negligently dropped sack of rice on C's back, injuring her
- Trial judge found insufficient proximity for VL
- CA, reversing trial judge, held MoJ liable; SC agreed

Mr Mohamud's case

- C, a Somali, drove into a garage owned by D
- C asked the kiosk staff to print some documents for him, as a favour
- D's employee Khan refused, with racial abuse
- C left and Khan was told not to follow him
- Khan followed C to the garage forecourt and brutally assaulted him

Mohamud's case (2)

- Trial judge held no VL, as Khan on a folly of his own
- CA dismissed appeal: insufficient connection between act and employment
- SC extensively reviewed law on VL and reversed judgment, widening scope of VL

Extension of doctrine of VL:

Cox confirms that the group of people for whom D can be held responsible will include many temporary and agency staff, volunteers and students as well as employees

Mohamud may have widened “in the course of employment” to include virtually anything done in the role of worker

Correlation with Candour

- Non-disclosure may injure patient physically, psychologically or financially, but
- Candour duty of staff is to employer, not patient; duty to patient is that of HSP and offence unless can show due diligence
- HSB is likely also to be directly liable to C for material non-disclosure causing injury

