MEDICAL – CLINICAL NEGLIGENCE

Professional negligence refers to negligence actions involving professional malpractice. Clinical negligence involves all those within the medical profession such as doctors, nurses, dentists, pharmacists, etc.

FUNCTIONS AND GROWTH OF PROFESSIONAL NEGLIGENCE CLAIMS

* Increased expectations of patients
* Developments of medical science
* Knowledge of rights/law
* Assistance with claims
* Increased pressure on doctors
* Influences from abroad

Types of action

* Criminal – R v Adomako – if a breach of duty of care has caused death and the breach was so gross as to justify a criminal conviction.
* Civil – clinical negligence action ie professional negligence against the clinician/trust/PCT
* Regulatory eg complaints procedure to GMC/NHS

**D OF C:**

1. Medical profession and duty – R v Bateman/Cassidy v Ministry of Health – d of c owed once doctor reserves responsibility.
2. When does duty arise? Kayfunev v Abbey National plc – did not examine patient so no d of c. Duties and emergencies – Barnett v Chelsea – d of c provided it is their patient.
4. D of c on hospitals – wilsher v Essex AHA (can owe a patient a non-delegable d of c to provide properly skilled medical staff and an adequately equipped hospital); Bull v Devon AHA (bad management of resources so liable); Garcia v St Mary’s NHS trust (ct should be weary of making judgments on resource allocation).
6. Duty to patients who harm themselves? No duty exists - Chants v Camden & Islington Health Authority – policy decisions, so not liable for breach of statutory duty to provide after care services.
7. Duty to write prescriptions clearly? Duty to write clearly and duty on pharmacist to check if cannot decipher - Prendergast v Same & Dec.
8. Duty and third parties? General rule is no d of c; Goodwill v British Pregnancy Advisory Service – d did owe a d of c to future sexual partners in giving contraceptive advice ie too remote.
9. Wrongful life? McFarlane v Tayside Health Board – claim could be brought for EL, pregnancy, but not for bringing up child.

**BREACH/STANDARD OF CARE**

*A doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a reasonable body of medical men and practice accepted at the time.*

**Breach of duty:**

1. Material cause of harm
2. No duty exists
3. Duty owed but not breached
4. Duty owed but breach cannot be causally linked
5. Duty owed but breach is too remote

**Burden of proof:**

1. Type or kind of damage
2. Causation in Fact: *‘But for’ test* – ie ‘but for’ negligence the c’s injury/loss would not have been caused – Wilsher – test is whether on the balance of probabilities that the harm was caused by the negligence. Barnett - Doctor was not liable due to ‘but for’ test as patient would have died of poisoning even if patient had been examined.
3. Causation in law: can medical treatment ever be novus actus interveniens? Robinson v post office

**Remoteness**

1. Once causation has been proven it is necessary for the c to establish that the damage suffered was not too remote. This is a question of law for the court to decide and so in some cases, the d may have caused the damage in fact, but in law, such damage is too remote to be recoverable.

2. The test is of reasonable foreseeability – the test states that if the c can prove that his damage is reasonably foreseeable such damage is recoverable – wager round (no1).

3. *1. Type of kind of damage – a d will only be liable for damage if it is reasonably foreseeable – wide view of turgerson v jw Roberts. There is no need to foresee the exact method by which damage occurs. 2. Extent of damage – the d is liable for the full extent of the damage even if this is more excessive than that normally expected. The thin skull rule states you take your victim as you find them. It does not matter if the c had a condition which aggravates the damage – page stepney. Also d takes c’s financial health as he finds it – ladjen v o’connor. 3. So long as the type of damage is foreseeable, it will not be too remote even if the chances of it happening are minimal.

**Burden of proof** *Res Ipsa Loquita (the fact speaks for itself). Prima Facie requires doctor to explain why incident happened.

**Criticisms/Challenges to Bolam Test:**

1. Defendant friendly – statistics of success against doctors is low.
2. Choice between several bodies of opinions – Maynard v West Midlands
3. Does it impose too heavy a burden on C’s?
4. Allows medical profession to set own standards.
5. What is a reasonable body of opinion? Rogers v Whitaker
6. Doctors are reluctant to deviate from standard practice, which can be negative – Hucks v Cole

**Burden of proof**

1. Relieves judges from choosing between experts
2. Discourages excessive litigation
3. Allows doctors to practice innovative medicine.