

## THE LAW

There is no such thing as a pure accident. If medical treatment has caused injury then there must be a reason why it happened. Generally speaking, if the reason was foreseeable and avoidable then there may well have been negligence but it will depend upon the individual circumstances of the case.

For example, if a child goes into hospital to have her tonsils removed and ends up with brain damage this may have happened for a number of reasons. If the reason was that she had an unusual reaction to an anaesthetic drug which could not have been foreseen despite all the proper precautions having been taken beforehand, then there will be no negligence and therefore no claim. On the other hand, if the reason was that she was deprived of oxygen because the anaesthetist incorrectly positioned the tube which was needed to supply oxygen to her lungs whilst she was unconscious during the operation, then there will have been negligence and a claim can be made because a mistake of that nature could and should have been prevented.

There are in fact three essential elements that it is necessary to prove before a claim for clinical negligence can succeed:

- That the doctor owed a duty of care to the patient,
- That he or she breached that duty,
- That the patient suffered injury which was caused by that breach of duty

### The duty of care

We all have a legal duty to exercise reasonable care at all times so as to avoid the likelihood that our actions will cause injury to other people. Because of this "duty of care" we all have a legal liability to pay compensation to anybody whom we have injured as a result of our careless or negligent acts but only if the injured person was somebody to whom the law requires us to owe the duty of care. Therefore, for example, if a garage services your car and leaves the brakes in a dangerous condition so that they do not work properly, they would have to compensate you if the car crashed because of the defective brakes. However, they would probably not have to pay compensation to a thief who stole the car from you and was then hurt when the car crashed.

It is clear that all doctors owe a duty to their patients to exercise reasonable care in carrying out their professional skills. Difficulties can sometimes arise when a doctor voluntarily provides medical assistance as a "good samaritan" but in most clinical negligence cases establishing that your doctor owed you a duty of care is not likely to be a problem.

### Breach of the duty of care

However, whilst there is rarely any dispute that a doctor owes a duty of care to a patient, it is generally more difficult to establish that a breach of that duty has occurred in any particular case and a great deal of our time in each individual case is spent grappling with this problem.

In the case of Bolam -v- Friern Hospital Management Committee 1 which went to court in 1957 the test for establishing a breach of the standard of care in a clinical negligence case was set out. It has become known as the Bolam test and is well known although much misunderstood. The Judge set the test as follows:-

"The test is the standard of the ordinary skilled man exercising and professing to have that special skill. So the man need not possess the highest expert skills;"

This is clear enough and hardly needs further definition but the Judge went on to say:

"A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art..."

It is these additional words that have caused much misunderstanding and problems for potential Claimants because it suggests that the medical profession sets its own standards. Many people mistakenly believe that it exonerates a doctor who makes a mistake that any doctor is capable of making.

It does not. A mistake is still a mistake and will always be a breach of the doctors duty of care.

This misunderstanding was corrected by the House of Lords in 1998 who ruled in the case of Bolitho -v City and Hackney Health Authority 2 :-

"The court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice. ....The court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis".

This all means that in order to prove that a doctor has breached the required standard of care in your case, we will have to show either that there really is no other responsible body of doctors in the country who would regard the treatment as acceptable or if there are, then the practice does not withstand logical analysis.

The legal term for a breach of the required standard of care is "breach of duty" but that is not in itself sufficient for the claim to succeed. It is also necessary to prove "causation".

## Causation

If we cannot establish that there has been a breach of duty then there can be no liability and the claim will fail at that stage but if a breach is established we need to go on to the next hurdle, which is to show that but for that breach of duty you would not have suffered your injury. In other words we have to show that the mistake made by the doctor actually caused your injury and that it was not some fluke of nature. This is "causation".

It is often difficult to prove causation in clinical negligence cases because in most cases the Claimants were seeking medical treatment for something that was already wrong with them. That, of course, is why they were patients in the first place. Therefore, we have to consider what the position would have been had there been no negligence. In many cases defence experts will argue that the patient was doomed from the start and the mistake made no difference to the eventual outcome. We have to show that that is not right.

The appropriate test to be applied in deciding whether or not an injury was caused by a breach of the duty of care is the "balance of probabilities", i.e. more likely that not. We do not have to establish anything to a scientific standard nor "beyond all reasonable doubt". The court is concerned to establish the most likely explanation. Therefore, if there is a 51% probability that the injury was caused by the breach of duty and a 49% possibility that there was some other cause, then the court will conclude that it was caused by the breach. In other words, if there are a number of competing possible causes but one is more probable than any of the others, then the court will accept that as the cause.

It is also unnecessary for us to establish that the breach of duty was the sole cause (or even the main cause) of the injury. It is sufficient for us to establish that the breach made a material (i.e something more than just a purely nominal) contribution towards the injury even if there are other additional contributing causes.

## References

Bolam -v- Friern Hospital Management Committee (1957) 2AER 118).

Bolitho -v- City & Hackney Health Authority (1998) Lloyds Rep Med 26.