A brief refresher on negligence and vicarious liability for the health care professional

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Introduction

The purpose of this article is to provide a brief update about the law of torts in Australia for the health care professional (HCP). The law of torts is where negligence is located. This article will cover the concepts of duty of care, standards of care and breaching of those standards. Also discussed will be damages and defenses likely to be to seen, and vicarious liability, inclusive of agency nursing. This article will argue that agency nurses, in some circumstances, can fall within the concept of vicarious liability when engaged to provide nursing services by a hospital[1].

For a HCP to be found liable under a suit of negligence, it is necessary for the plaintiffs to show that the HCP was at fault. The success of a negligence action depends on the plaintiff proving all elements of the negligence on the balance of probabilities, which is the burden of proof in civil claims[2]. These elements are that there was a duty of care owed by a HCP, that there was a breach of that duty which fell below the standard of care required, that the negligent act or omission caused the damage, and that the damages were not too remote and reasonably foreseeable[3].

Duty of care

The HCP/health care institution and patient relationship is one which the courts have readily recognised as relationship that gives rise to a duty of care[4]. As per Lord Atkin in *Donoghue v Stevenson*[5], *"(patients) are so closely affected by a (HCP's) act that he ought reasonably to have them in contemplation as being so affected"*. As the majority judgement stated in *Rogers v Whitaker*[6]:

> *The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment.*

Even though the above quote mentions medical practitioners per se, the courts have held that the duty is also applicable to other HCPs, such as nurses, physiotherapists, psychologists etc. Generally speaking, the relationship between a HCP and her/his patients, the plaintiff, contains the requisite sufficient 'proximity' between the parties. This means that there is a pre-existing relationship, which gives rise to a duty, such as that between nurse and patient, teacher and student etc; the plaintiff (the patient), is within a class of person in the 'contemplation' or thoughts of a HCP as a person likely to be injured by a failure by a HCP to take care[7]. This can be evidenced by the provision of care to the plaintiffs by the HCP as her/his treating nurse, such as providing counts of instruments and consumables in the operating theatre, taking observations and using other clinical skills, and administering medication etc.

Standard of care

Bolam v Friern Hospital Management Committee[8] is regarded as the case law that determines the standard of care to test whether a HCP has been negligent:

> *...in the case of a medical man, negligence means failure to act in accordance with the standards of reasonable competent medical men at the time...*[9].

This test does not require that the HCP *"possess the highest expert skill"*[8] but instead:

> *The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill*[10].

The courts in Australia have held that the determination of the standard and a decision whether that standard has been breached lies with the courts and not the professional group, according to the reasonable standards demanded by law[11]. This was confirmed by the High Court in *Naxis v Western General Hospital*[12].

The courts have also held that the standard of care will need to be considered in light of the standards of practice at the time the incident occurred. As Lord Denning stated in *Roe v Minister of Health*: *"We must not look at the 1947 accident with 1954 spectacles"*[13,14]. This means that the courts will not hold a HCP liable if, at the time of the incident, it was not known that there was a potential for damage or injury. It will not be the standard at the time of the trial, but will depend on what information existed at the relevant time[15].

It is incumbent upon HCPs to take into account the professional standards and policy laid down by their registering board (i.e. the Nurses Board of Victoria), professional colleges (i.e. ANF or Royal College of Nursing Australia guidelines), the respective health departments, their employer and any other professional body such as Australian Confederation of Operating Room Nurses or the Australian Day Surgery Nurses Association. Any documentation or policy released by the above bodies, such as the *Best Practice Guidelines for Ambulatory Surgery and Procedures* can be received as evidence to be included in the evidential mix, coupled with expert evidence, to determine negligence by the courts.

Other documents that the courts may likely receive into evidence as what is the appropriate standard of care, is the *Code of Professional Conduct for Nurses in Australia* developed by the Australian Nursing Council. This Code is a set of expected nursing standards of nursing conduct, which identified minimum requirements for conduct in the nursing profession.