IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2010: No. 66

CARLOS MEDEIROS	**Plaintiff**
-v-	
ISLAND CONSTRUCTION SERVICES CO. LTD.	**1st Defendant**
-and-	
ANTWONE LEROY SIMONS	**2nd Defendant**
-and-	
THE BERMUDA HOSPITALS BOARD	**3rd Party**
-and-	
DR STEVEN DORE AND DR. MATTHEW ARNOLD	**4th Parties**

EX TEMPORE JUDGMENT ON PRELIMINARY ISSUE

(in Court)

Date of hearing: January 21-22, 2014

Mr. Jeffrey Elkinson and Mr. Scott Pearman, Conyers Dill & Pearman Ltd., for the Defendants

Mr. Allan Doughty, Trott & Duncan, for the Third Party ("BHB")

Mr. Paul Harshaw, Canterbury Law Ltd., for the First Fourth Party ("Dr. Dore")

Mr. Craig Rothwell, Cox Hallett Wilkinson Ltd., for the Plaintiff

The Preliminary Issue

1. The Court has been asked to determine a preliminary issue which was defined in paragraph 32 of the Affidavit of Larenzo Ratteray and the question was as follows:

    (a) does the Hospital owe a general non-delegable duty of care to patients during the post-operative stage of their treatment;

    (b) if there is no general non-delegable duty, then on the facts of this case:

        (i) did the Hospital owe a non-delegable duty of care to Mr. Medeiros during his post-operative treatment at the Hospital (excluding the surgeries); and
        (ii) did the Hospital owe a non-delegable duty of care to Mr. Medeiros while he was in the ICU (excluding the Surgeries).

The relevant facts

2. The application was initially founded on an agreed Statement of Facts. In the event the Statement was not formally agreed. On the other hand, the only issue which was controversial was that set out at paragraph (9) of the Draft Statement which relates to the question of what costs in relation to the December 2008 surgery was billed by whom. That issue is not in fact pivotal to the present application properly construed.

3. The key legal relationship is the Amended Third Party Notice issued by the Defendants against the BHB and that document makes it clear that the case of the Defendants against the Hospital is one of positive negligence. Mr. Doughty for the Hospital Board sought to transform this pleading into a wholly different beast which, in effect, was making a plea of vicarious liability in circumstances where the surgeon in question was not an employee. But on a simple straightforward reading of the Third Party Notice it is clear that what is alleged is that the BHB was negligent in failing to care for the Plaintiff in various respects with no averments being made whatsoever to the effect that the Board should be liable for the negligence of Dr. Dore, who was the attending surgeon.

4. The other facts which are clearly agreed can be listed as follows:

    (1) Dr. Dore had Hospital Privileges as a surgeon;

    (2) The Plaintiff was first treated by Dr. Dore in the Emergency Department following a March 10, 2006 accident for which the Defendants admitted liability;

    (3) Dr. Dore scheduled hernia repair surgery for December 10, 2008 at the Hospital;

    (4) After the initial surgery took place, the Plaintiff was hospitalised in a General Ward where he was cared for by Dr. Dore supported by other BHB staff. Thereafter on or about December 11, 2008 he was moved to the Intensive

Care Unit at Dr. Dore's direction where he had emergency surgery. Further emergency surgery took place on December 13, 2008.

5. So it is, it seems to me, common ground that the Plaintiff at all material times under the care of the Hospital to some extent albeit that an independent surgeon was the attending medical officer who perhaps had primary care for the Plaintiff.

The legal framework under which the Hospital operates

6. The legal framework under which the Hospital operates was addressed by Mr. Elkinson yesterday. He pointed out that the Board is a statutory corporation under the Bermuda Hospitals Board Act 1970. He referred the Court in particular to the statutory duties which exist under section 6 of the Act. Section 6 (1) states as follows:

> "*6 (1)The Board shall, subject to this Act—*
> ...
>
> *(b)have overall responsibility for the provision of health services.*"

7. Section 6(2) then states:

> "*The Board shall—*
>
> *(a) administer the hospitals and the provision of health services in an efficient manner and in such a way as to promote the welfare of patients;*
>
> (b) *so far as funds at its disposal permit, promptly make available at the hospitals modern methods of treatment of the sick and infirm, and use such methods in the provision of health services…*"

8. The Act contemplates that regulations will be made for the purpose of detailing the way in which the duties of the Board are discharged. And those regulations, consistently with the Act, create a single class of medical staff which class embodies both employed staff and independent staff who have privileges at the Hospital. It is noteworthy that the Board has disciplinary control over independent and employed staff alike.

9. It is true that the Regulations appear to contemplate that the attending physician will have significant responsibility for the care of the patient; but this does not in way support the proposition that when an independent practitioner is involved, the Hospital has no duty of care whatsoever, save for the acts of its employees.

10. The other feature of the relationship between the Hospital and independent practitioners which Mr. Doughty conceded existed in this case is that independent practitioners are required to give the Board an indemnity, framed as "absolute immunity", in respect of, *inter alia*, acts of negligence. The effect of this is, it seems to me, that an independent surgeon is negligent and the Hospital is sued for that

negligence, the Hospital is entitled to be indemnified for that negligence. And so for practical purposes the net position is that the Hospital should not generally be liable for the negligence of an independent practitioner. In the context of the present case it is clear from the Third Party Notice that the case that is made against the Hospital is that it was in breach of a direct duty of care which was owed to the Plaintiff.

The law relating to a non-delegable duty of care

11. The law applicable to this concept of a non-delegable duty of care, which in this jurisdiction is somewhat novel, has been clarified by an imperious judgment by Lord Sumption in the United Kingdom Supreme Court in the case of *Woodland-v- Essex County Council* [2013] UKSC 66, which was decided on October 23, 2013. In my view in light of this highly persuasive authority, it cannot be doubted that in general terms a hospital owes a non-delegable duty of care to its patients irrespective of the fact that one aspect of the care which was being administered has been delegated to a sub-contractor.

12. Lord Sumption indicated that there were five features which were demonstrated by the cases as necessary for the finding of a non-delegable duty of care. He listed these in paragraph 23 of the Court's judgment as follows:

> "*(1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.*
>
> *(2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.*
>
> *(3) The claimant has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.*
>
> *(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.*

(5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him[1]. "

13. In the separate judgment of Lady Hale, which was supported by Lord Clarke, Lord Wilson and Lord Toulson, the following observations were made at paragraph 34:

> "*34. No-one in this case has seriously questioned that if a hospital patient is injured as a result of a nurse's carelessness it matters whether the nurse is employed by the hospital or by an agency; or if a pupil at school is injured by a teacher it matters whether the teacher is employed by the school or is self-employed. Yet these are not employees of the hospital or school, nor can it be said that their relationship with the school is "akin to employment" in the sense in which the relationship of the individual Christian Brothers to their Order was akin to employment in the case of Various Claimants v Catholic Child Welfare Society and others [2012] UKSC 56, [2013] 2 AC 1. The reason why the hospital or school is liable is that the hospital has undertaken to care for the patient, and the school has undertaken to teach the pupil, and that responsibility is not discharged simply by choosing apparently competent people to do it. The hospital or school remains personally responsible to see that care is taken in doing it.*"[2] [emphasis added]

14. The cases which contradict the existence of a general non-delegable duty of care are largely, if not exclusively, cases where what the court is considering is not whether a general non-delegable duty of care exists but whether in fact the hospital should be found to be to be liable. In the present case a number of authorities were relied upon by Mr. Doughty as undermining the existence of the duty of care contended for. One of them was the Ontario case of *Yepremian et al-v- Scarborough General Hospital* (1980) 28 O.R. (2d) 494. Mr. Doughty referred me to page 13 of the transcript. This was a case which considered in essence whether or not a duty of care existed and had been infringed by the hospital. The same applies to other cases, in particular the case of *Ellis-v- Wallsend District Hospital* [1990] 2 Med LR 103, a decision of the Court of Appeal of New South Wales. In this case I was assisted by the following passage in the judgment of Samuels LJ at page 37 of the transcript where he said this:

> "*But the evidence in a particular case may establish that the hospital's undertaking was of a more limited kind. As Morris LJ pointed out in Roe*[3] *(at 89) and (at 91) the nature of an obligation which a hospital has assumed is ultimately a question of fact, a proposition which the Court of*

[1] The Amended Third Party Notice alleges negligent post-operative care while the Plaintiff was in the Hospital. The Defence to the Third Party Notice alleges, *inter alia*, that the First Fourth Party is responsible for any negligence which occurred. It is this deployment of the delegate's negligence as a shield that triggers the need to consider whether the Third Party is nevertheless potentially liable under a non-delegable duty of care.

[2] In other words, the existence of the non-delegable duty primarily depends on whether or not a hospital has undertaken to care for a patient, not on a technical analysis of the relationship between the hospital and the independent medical staff member and/or patient concerned.

[3] *Roe-v-Minister of Health* [1954] 2 QB 66.

Appeal adopted in Albrighton[4]. In the present case, however, it is quite clear that the appellant did not knock at the hospital's door in the sense contemplated by Lord Greene. It was not the hospital's door but the door of the late Dr. Chambers' consulting rooms upon which she knocked, and it was that door which was opened to her and which admitted her to the treatment and advice upon which she thereafter principally relied. I do not think it can be doubted but that it was Dr. Chambers and not the hospital to whom the appellant looked for medical care. The hospital, for reasons which I have already discussed and will not repeat, was merely the place in which surgical procedures which he had recommended and which the appellant had agreed to undergo were performed by Dr. Chambers. The hospital in the present case was exactly what the hospital was not in Albrighton. To reverse Reynolds JA's words in that case (at 562) the hospital here was 'a mere custodial institution designed to provide a place where medical personnel could…treat persons lodged there…' Of course the appellant stood in a 'special protective relationship' to both the hospital and Dr. Chambers, but in respect of different kinds of care. The appellant looked to Dr. Chambers for surgical intervention, and to the hospital for nursing care and perhaps the provision of other medical treatment. In rendering that care and treatment the hospital was no doubt under a non-delegable duty of care which might have been of relevance in certain circumstances. But in the event no question arises concerning matters of that sort.

My conclusion does not impose differential duties on a hospital. Following Kondis a hospital owes an independent non-delegable duty to ensure the treatment it undertakes to provide is performed with reasonable care. The question in every case is the nature of that undertaking."[5] [emphasis added]

15. In my judgment it is not for me at this stage to determine what the "*nature of the undertaking*" of the BHB was in all the circumstances of this case because I do not have all the facts before me. What I have been asked to determine is whether or not a general non-delegable duty of care exists and in these circumstances, it seems to me, it cannot be necessary or appropriate for me to go on to find (with incomplete facts) what the scope of that duty is in the circumstances of the present case.

16. It may be that at the end of the day it is held that, based on the facts in question, that in the circumstances of this case no duty was actually "owed" to this Plaintiff in particular. But that, it seems to me, is a different thing from saying that because of the relationship between the parties a general non-delegable duty of care was owed despite the delegation of the surgical functions to Dr. Dore. What on the facts is necessary to establish a breach of the duty is a matter to be determined at trial[6].

[4] *Albrighton-v-Royal Prince Alfred Hospital* [1980] 2 NSWLR 542.
[5] The claim against the hospital in *Ellis* related solely to the operation and did not even potentially engage the non-delegable duty of care owed by the hospital in relation to the care which it undertook to give.
[6] This narrow framing of the scope of the present preliminary issues trial may not have been obvious when the issue was ordered to be tried but does appear to me to reflect the correct legal approach in light of the authorities eventually placed before the Court.

17. I was also referred by Mr. Harshaw to *Williams-v-The Bermuda Hospitals Board* [2013] SC (Bda) 1 Civ (9 January 2013) (Hellman J-*obiter*). It is significant that he found little difficulty with the proposition that a non-delegable duty of care exists in general terms. At paragraphs 84 to 85 he said this:

> "*84. Those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. See X (Minors) v Bedfordshire County Council [1995] 2 AC 633 HL at 740, per Lord Browne-Wilkinson, with whom the other members of the House agreed. This includes a duty to set up a safe system of operation in relation to what are essentially management as opposed to clinical matters. See Robertson v Nottingham Health Authority [1997] 8 Med LR 1 CA at 13, per Brooke LJ.*
>
> *85. Moreover, there is persuasive authority that English law (and by parity of reasoning Bermudian law) has reached the stage where a hospital generally owes a non-delegable duty to its patients to ensure that they are treated with skill and care regardless of the employment status of the person who is treating them. See Farraj v King's Healthcare NHS Trust [2010] 1 WLR 2139 at 88, per Dyson LJ, with whom the other members of the Court agreed.* "

Conclusion

18. And so for those reasons I resolve the first limb of the preliminary issue in favour of the Defendants.

> [After hearing counsel the Third Party was ordered to pay the costs of the Defendants. No order was made as to the costs of the Fourth Parties or the Plaintiff.]

Dated this 21st day of January 2013

IAN RC KAWALEY CJ