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LEGAL TOPIC: MEDICAL NEGLIGENCE – AN OVERVIEW

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A) INTRODUCTION

Although it is now quite settled that a Medical Practitioner is not obligated or even expected, to achieve success in every case he treats, it has nonetheless been established that he is obligated and expected, and has a duty, to exercise reasonable skill and care in his treatment of each and every patient. Where however, a medical professional performs his job in a way that deviates from the "accepted medical standard of care," resulting in avoidable harm or injury to a patient, that patient may proceed to initiate Legal Action against the medical professional for Medical Negligence.

Medical Negligence may therefore be defined as the improper or unskilled treatment of a patient by a healthcare professional which results in harm, injury or even death to a patient. Some examples of medical negligence include but are not limited to; providing a patient with incorrect medication, giving improper medical advice, providing negligent prenatal care or performing the wrong type of surgery.

B) WHAT IS REQUIRED TO PROVE MEDICAL NEGLIGENCE

Proving medical negligence is similar to most other forms of Negligence. Thus, in order to succeed in any Medical Negligence claim, the Claimant must prove the following:

1. That a duty of care was owed by the medical personnel to the patient;
2. That the medical professional breached that duty of care;
3. That the patient suffered a compensable injury; and
4. The injury was caused as a direct result of the breach of duty.

C) THE DUTY OF CARE

"The Bolam Test"

The duty of care owed by a medical professional to a patient whom he treats is set out in the case of **Bolam v Friern Hospital Management Committee (1957) 1 WLR 582** in what is known as "The Bolam Test".

The case of **Bolam v Friern Hospital Management Committee (1957) 1 WLR 582** has outlined the standard of care required of a doctor or any other person professing some skill or competence. In the said case, McNair J explained that a medical professional will not by guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art.

According to the local case of **CV2009-02051 In the matter of the Supreme Court of Judicature Act and In the matter of the Compensation for Injuries Act between Karen Tesheira (the Executrix of the Estate of Russell Tesheira) v Gulf View Medical Centre Limited v Crisen Jendra Roopchand**, the rationale of the Bolam test is to limit the liability of the medical profession from actions in negligence if their conduct ascribes to a practice that is accepted as proper by a responsible body of the medical profession skilled in that area of expertise. While the Court must insist on due and reasonable care for the patient it would not condemn the misadventure; but similarly the Bolam test cannot act as a shield for the bravado or the cavalier.

The case of **Bolitho v City and Hackney Health Authority [1997] 4 All E.R. 771** however narrowed the scope of the Bolam Test, stating that the Court must be satisfied that the body of Opinion relied upon has a logical basis. Lord Browne-Wilkinson in the said case explained;

> *"…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 opinion that the defendant's treatment or diagnosis accorded with sound medical practice. In the Bolam case … Mc Nair J stated that the defendant had to have acted in accordance with the practice accepted as proper by a reasonable body of medical men … Later he referred to a standard of practice recognised as proper*

by a competent reasonable body of opinion" ... He went on to state, "Again, in the passage which I have cited from Maynard's case, Lord Scarman refers to a respectable body of professional opinion. The use of these adjectives- responsible, reasonable and respectable- all show that the court has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such opinion has a logical basis. In particular, in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter."

D) BREACH OF DUTY

In Medical Negligence cases, the Claimant bears the burden of proving that the medical professional departed from the normal and usual practice of general practitioners and therefore breached the duty of care owed to the patient.

In the case of **Hunter and Hanley (1955) SC 200** the action was against a medical practitioner, who had administered an injection to a patient. During the course of that procedure the hypodermic needle broke in the patient. The issue and question raised was whether the practitioner failed or departed from the normal and usual practice of general practitioners. the Lord President said in the judgment:

To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. There is clearly a heavy onus on a pursuer to establish these three facts, and without all three his case will fail.

E) CAUSATION

The Claimant must not only prove that an injury was sustained but it must be shown that the injury sustained was as a direct result of the medical negligence on the part of the medical professional in his treatment and management of the Claimant.

It must also be noted that a Hospital will be liable for the acts of negligence of its professional servants which occurred during the course of their employment. In **Cassidy v Ministry of Health [1951] 1 ALL ER 5** Lord Denning explained inter alia, that whenever hospital authorities accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. Lord Denning explained further that hospital authorities,

cannot, of course do it by themselves. They have no ears to listen through a stethoscope and no hands to hold the surgeon's knife. They must do it by the staff which they employ; and if the staff is negligent in giving treatment, they are just as liable for their negligence as is anyone else who employs others to do his duties for him.

F) INJURY AND LOSS

In every medical negligence claim, a patient must show that he/she has suffered actual loss or injury as a result of the actions or inactions of the medical professional that would entitle the patient to an award of Damages or Compensation.

G) LIMITATION PERIOD

In Trinidad and Tobago, in accordance with the Limitation of Certain Actions Act Chapter 7:09, a Medical Negligence claim shall not be initiated after the expiry of four (4) years from the date on which the cause of action accrued.