

### ACTIVITY 3

A patient is admitted into an NHS trust hospital for surgery to repair a hernia. Unfortunately, by mistake, a swab is left inside the patient who has to return to theatre for a second operation. He is now claiming compensation for the additional pain and suffering, and for the extra length of time he was off sick and unable to return to work. It was established that the consultant failed to request that a swab count be taken and, because the theatre was under pressure, the nursing staff did not delay the end of the operation.

Which of the following do you think could be liable to pay compensation?

1. The person who caused the harm to arise?
2. The health authority which purchased the care from the NHS trust?
3. The NHS trust which employed the person in 1 above?
4. The members of the NHS trust board?
5. The immediate managers of the person in 1 above?
6. Any others?

#### *Commentary*

If harm is caused by the negligence of one person (on these facts it could be the consultant surgeon or the senior nurse), that person can be personally sued.

However, this is unlikely to occur because health authorities and trusts now accept responsibility for the negligence of all professional staff whom they employ. Health authorities had previously not been responsible for the actions of medical and dental staff, but this arrangement, which had existed since 1954, ended in 1990 with the acceptance of crown indemnity (this is discussed later in this session). Where an employee is negligent, the employer can be sued because of the employer's indirect liability, known as 'vicarious liability' (see below), for the negligence of an employee whilst acting in the course of employment. Thus, rather than suing 1, the plaintiff would probably sue 3.

Under the provisions of the NHS and Community Care Act 1990, the NHS trust is liable for the negligence of its staff, and therefore the health authority would not be liable to pay compensation. The situation would be different, however, where the health authority had not commissioned specific services from the trust and the plaintiff brings a claim in respect of the non-provision of services. The plaintiff would have to argue that the health authority had failed to fulfil its statutory duty of arranging for the provision of health care.

Members of the trust board are not personally liable for the harm which occurred (see *Speller* section 2.5.4, pp. 48-49), but the board can sue and be sued in its own right as a statutory body. The board, as the employer vicariously liable for the harm caused by the negligence of its employees whilst acting in the course of employment, could be sued in this example.

Managers are personally responsible for their actions but if they have delegated and supervised appropriately and are not at fault, they would not be held responsible in civil law for the negligence of their staff.

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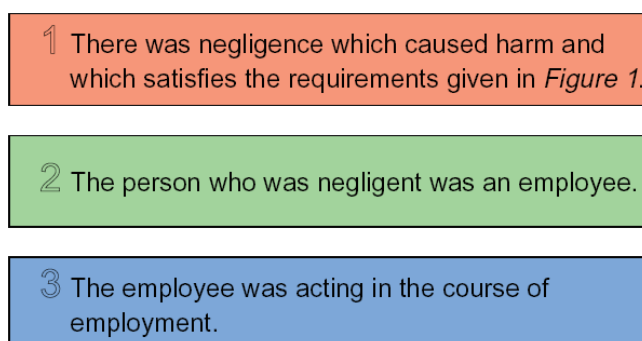
## Direct and vicarious liability

There are two kinds of liability: ‘direct’ and ‘vicarious’. Direct liability is when the employer is *directly* at fault – for example, in failing to employ competent staff or in failing to lay down a safe system of work – and as a result of these failures harm is caused. Vicarious means ‘through another’, or ‘indirect’. The employer can be *indirectly* liable in negligence through the actions of his employees.

Vicarious liability is based on the view that an employer should be answerable to the public for harm which his employees have caused, even if the employer himself is entirely without blame.

**Read *Speller*, section 5.1.3, pp. 109-110.**

To sue the employer, the plaintiff must show the three elements given in *Figure 2*.



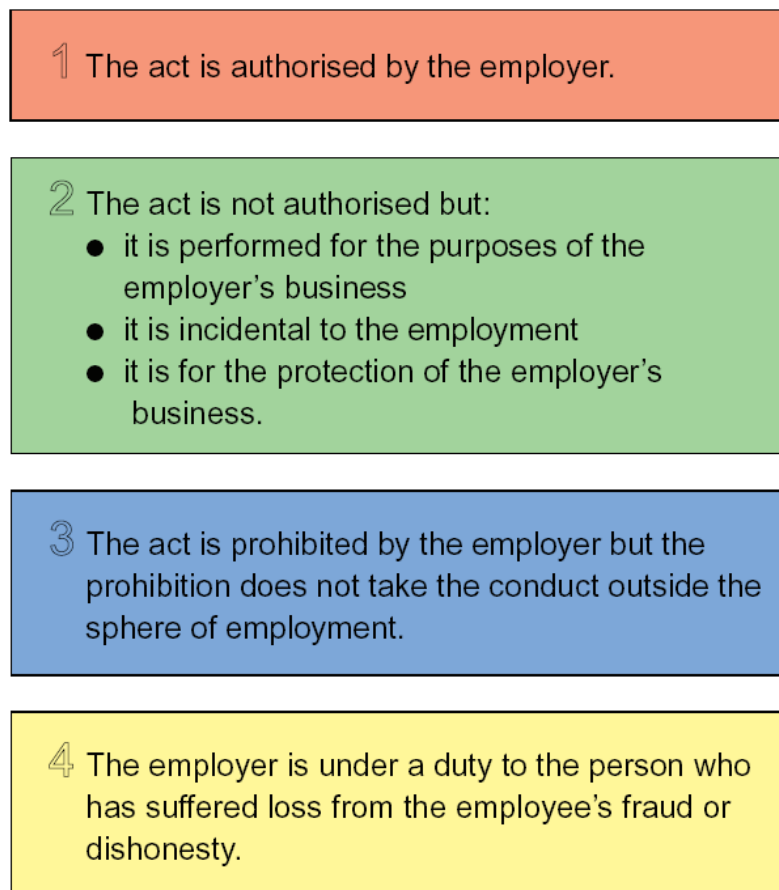
***Figure 2: Vicarious Liability***

**Read the following sections of *Speller*:**

- Section 5.1.4 ‘Health authority staff as employees’, pp. 110-113
- Section 5.1.2 ‘The course of employment’, pp. 108-109.

Note that even acts prohibited by the employer can be regarded as being performed in the course of employment.

The principles for determining whether an action by an employee is in the course of employment, and therefore that the employer is vicariously liable, are given in *Figure 3*.



*Figure 3: Principles for deciding whether an action is in the course of employment*

### **Crown indemnity**

Doctors and dentists used to be responsible for the payment of compensation for their own negligence. However, since 1 January 1990, the health authorities have accepted responsibility for the liability of all their employees, including doctors and dentists. Circular HC(89)34 set out on pp. 113-116 in section 5.1.5 of *Speller* applies. However, where professional staff work as independent practitioners, such as general practitioners, dentists and pharmacists, or where they have private patients, then they are responsible for their own negligence. You may be interested in reading about the situation that arises in the case of private beds within the NHS (*Speller*, pp. 618-620.)

## Court visits

It would be extremely useful for you to visit a court, whether civil or criminal, or to observe an industrial tribunal or professional conduct hearing. There are considerable advantages in going as an observer unconnected with the proceedings so that you can take note of the formalities, procedures, language and the various different persons involved, without being personally caught up in the process.

Such an experience would stand you in very good stead should you subsequently have to go to a hearing or even give evidence as part of your job, when there may be insufficient time to go as an observer beforehand.

## 3: Negligence

Can you remember the four elements in a negligence action? Look back at *Figure 1* to check.

There are two separate stages in an action for compensation for negligence, which are to:

- establish liability
- establish the amount of compensation sought.

This latter task is known as deciding on the *quantum* (Latin for ‘how much’). Most actions brought by patients against health authorities and NHS trusts relate to allegations of negligence by the staff of the hospital. Negligence can arise not only in the actions carried out by staff, but from the following failures:

- to communicate with relevant professionals concerned with the patient’s care
- to communicate warnings about the treatment to the patient
- to inform the patient about the risks of the treatment before consent is given to the treatment
- to observe the ordinary standards of practice.

## The duty of care

All health professionals have a duty of care to their patients, but there may be disputes over the extent of the duty. It would probably not, for example, extend to caring for persons injured in a road accident passed on the way to work, unless, of course, such action was required as part of the contract of employment.

The law does not require people to volunteer their services. There has been some uncertainty over the extent of the duty of care in relation to non-patients. For example, if an informal psychiatric patient leaves the ward contrary to medical advice and injures another person, could the victim hold the hospital liable for those injuries?

### **Standard of care**

Section 6.3.2 of *Speller* explains the standard of care which the courts expect practitioners to follow and what happens when there are different expert views over what action should be taken. It makes it clear that the professional is expected to follow the standard of the reasonable professional who is skilled in a particular art; that where there are different professional views:

“it is not sufficient to establish negligence for the plaintiff to show that there is a body of competent professional opinion which considers that the decision was wrong, if there is also a body of professional opinion, equally competent, supporting the decision as having been reasonable in the circumstances.”

**Maynard v Midlands Regional Health Authority, 1984; quoted in *Speller*, p. 164**

Where professionals depart from the accepted practice for good reasons, it is essential that their records state fully what those reasons are. This information is essential to defend their actions or decisions at a later time should harm arise and the plaintiff claim that the professional failed to follow the accepted practice.

**Read *Speller*, section 6.3.2, pp. 155-166, up to the heading ‘*Res ipsa loquitur*’.**

### ***The Bolam Test***

The Bolam Test states that the law expects the practitioner to practise with the ordinary skill and competence of the type of practice to which he belongs. Thus this test has been used not just in the context of medical care, but also for nurses, professionals supplementary to medicine and also professionals outside health care such as accountants, architects, lawyers and others.

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### **ACTIVITY 4**

Identify one (or more) skill or competency which you perform as part of your professional or managerial duties. Define what you consider is the accepted practice which would not result in harm, such as the procedures you would follow in a particular instance, the information you would give the patient and so on. If you have been able to obtain a copy of any relevant procedures or protocols defining quality of care in your workplace, use them for this activity.