ASSOCIATION OF
COMMUNITY HEALTH COUNCILS
FOR ENGLAND & WALES

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Malcolm Alexander
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29 June 1998

Dear Malcolm

Re: Commencement of Duty of Care

Please find enclosed, a copy of the report detailing the legal situation governing doctors' duty of care to their patients. This has been prepared by Antonia Ford, who is currently working with me on a voluntary basis. As you will note, the law is not specific about the precise moment that this duty comes into existence, but I hope that most of your queries in this area are addressed.

If you have any further questions, please do not hesitate to contact me.

Yours sincerely,

Marion Chester

Legal Officer

cc Ms Barnes, South Thames Regional Association of CHCs

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Commencement of duty of care

Introduction

To maintain an action for negligence against a doctor the plaintiff must establish that (a) the doctor owed a duty of care and (b) the duty was breached and (c) harm was suffered as a result of the breach. Usually the existence of a duty of care between a doctor and patient is easy to establish. Lord Hewart CJ detailed the essence of this duty:

> 'If a person holds himself out as possessing special skills and knowledge, and he is consulted, as possessing such skills and knowledge, by or on behalf of a patient, he owes a duty to the patient to use caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his discretion and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment.'[1]

Clearly, using this model, an undertaking by the doctor must occur before a duty of care can exist[2]. The exact point this duty arises is not always clear, but its existence is crucial in assessing the liability of both the doctor and hospital. GPs' relationships with patients are controlled by the National Health Service (General Medical Services) Regulations 1992. However, doctors working in NHS hospitals do not fall within these Regulations. It is therefore necessary to turn to the common law position.

Emergency Situations

Even in an emergency, doctors must give an undertaking to care for the individual before a duty in law arises. Doctors are under no initial legal obligation to act in an emergency[3] [4] even if professional[5], contractual or ethical obligations exist. If the individual is already under the care of a doctor when an emergency occurs, for example during an operation, a duty already exists. Similarly I Kennedy & A Grubb write:

> 'When a doctor has held himself out as undertaking to treat individuals requiring emergency care, for example, by being on duty in an Accident and Emergency Department of a hospital, he will be deemed to have undertaken to provide emergency care once he is aware of the need for it.'[6]

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[1] R v Bateman [1925] 94 LJKB 791

[2] Re F (a Mental Patient: Sterilisation) [1990] 2 AC 1, [1989] 2 All ER 545 (HL) - established that doctor - patient relationships may arise without a request by the patient.

[3] F v Berkshire Health Authority 2 All ER 545-567

[4] Exceptions for GP's in paragraph 4(1)(h) of Terms of Service issued under National Health Service (General Medical Services) Regulations 1992

[5] General Medical Councils - Good Medical Practice para. 4, UKCC Guidelines for professional practice.

[6] Medical Law Text & Materials, Butterworths Edition 2

There is no case law directly on this issue although *Barnett v Chelsea and Kensington Hospital Management Committee*[7] does address some of the issues. In this case three night watchman presented themselves at a casualty department suffering from prolonged vomiting. The watchmen informed a nurse of their ailment who, in turn, consulted the casualty officer over the phone. Without examining the individuals, the doctor said that they should go home and consult their own doctors. One man later died from arsenic poisoning and his wife and executrix brought an action. In the judgement Neild J asked 'Is there on these facts shown to be created a relationship between the three watchmen and the hospital staff such as gives rise to a duty of care'. He went on to conclude:

> 'There was here such a close direct relationship between the hospital and the watchmen that there was imposed on the hospital a duty of care which they owed to the watchmen. Thus I have no doubt that [the doctor] and [the nurse] were under a duty of care to the deceased ...'.

This case, although not complete authority, does give some insight into the type of actions by health care professionals that may initiate a duty of care in the eyes of court. For a more satisfactory conclusion the individual facts must be considered and applied to the underlying principles.

Accident & Emergency Departments (A&E)

In this particular case the hospital maintains that a duty of care does not arise until the individual is entered onto the PAS[8] computer system. This is due to the belief that neither the doctor nor the hospital have undertaken to treat until this moment. However in *Barnett v Chelsea and Kensington Health Management Committee*[9] it is made clear that an action that qualifies as an undertaking in law need not include actual observation or treatment. It is sufficient that a doctor, holding themselves out to be 'possessing special skills and knowledge'[10] gives advice on the course of action to take. It must be assumed that before an individual is admitted, a qualified healthcare professional must carry out an examination to assess whether admission is necessary. At the very least that healthcare professional must be aware of the individual and the ailment that they suffer. In fact, a duty to act is established by the patients' charter and modified by a new standard effective from 1 October 1997. This standard being:

> 'If you go to an accident and emergency department needing immediate treatment you will be cared for at once. Otherwise you will be assessed by a doctor or trained nurse within 15 minutes of arrival.
>
> Following assessment you will be given a priority category which will be communicated to you. This priority will determine the urgency with which you will be treated.'

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7 [1969] 1 QB 428

8 This system is used by hospital administration to document the admissions of patients in the Accident and Emergency department

9 See footnote 8

10 See footnote 1

If there is a duty to examine a patient within 15 minutes of arrival for category assessment there must be a duty to exercise this assessment with the reasonable skill expected of a doctor or qualified nurse. It is therefore reasonable to assume that the examining healthcare professional has undertaken to correctly assess the individual, thus producing a doctor patient relationship. This conclusion, however, leaves 15 minutes where the individual may not be within the scope of such a relationship. Do the hospital and its employees have a duty of care to an individual from the moment that person walks into casualty? The hospital has a duty of care not to cause personal injury, loss or damage to any lawful visitor[11], but occupiers liability does not extend to the specialised ~~the~~ skills required in the medical profession and is of no help in this situation.

The patients charter identifies two distinct assessment situations: (i) those in need of immediate medical attention and (ii) all other patients needing treatment. It can be argued that the individual who makes that initial assessment concerning the immediacy of treatment creates a duty of care. If this initial assessment was carried out negligently and something went wrong in the 15 minutes before the category assessment, the hospital would have breached the duty of care.

Consultants

Likewise the legal duties of a consultant arise out of an undertaking to treat an individual. Again the exact time that this duty arises is essential for assessing liability. It can be argued that when a consultant (in this case a psychiatrist) is approached by a GP, or other medical practitioner requesting advice about treatment, that creates a duty of care. *R v Bateman*[12] is authority that a doctor need not be consulted directly by the patient[13] and as seen in *Barnett v Chelsea and Kensington Hospital Management Committee,*[14] advice over the telephone is sufficient to create a doctor-patient relationship. It is a more tenuous argument to say that by agreeing to accept the patient for consultation a doctor creates a duty of care. However analogies can be draw between Barnett or the duties that bind GP's when patients are accepted onto their practice books.

Conclusion

In conclusion it would seem obvious that a duty of care arises earlier than the hospital maintains. There is no doubt that a duty of care arises when the categorisation assessment has taken place or the 15 minutes maximum waiting time has elapsed. Additionally there is strong argument that the duty arises when the individual's requirement for urgent treatment is assessed, as it is at this point that the hospital becomes aware of the individual and their basic requirement for treatment.

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[11] A restricted duty also exists towards trespassers

[12] See footnote 1

[13] ' If a person holds himself out as possessing special skills and knowledge, and he is consulted, as possessing such skills and knowledge, by or on behalf of a patient, he owes a duty to the patient to use caution in undertaking the treatment.....'

[14] See footnote 8