


# Negligence & misconduct

IMPLANTOLOGY YEAR COURSE

MODULE 3 – JULY 2018


STUART ELLIS BDS MFGDP(UK) DPDS MSc



## Aims & Objectives

Aims:

- NOT to be a scaremonger
- How complaints come about and how to stop them
- Who do patients complain to and why
- The Courts and the GDC
- HOW TO AVOID





# NEGLIGENCE



## What is Clinical Negligence?

- From latin '*negligentia*'
- '*Not to pick up*'
- Come under Tort Law
- Tort medieval English for '*injury*'
- Tort – no contract exists
- Easy to accuse – difficult to prove
- Relies on satisfying a chain of '*wrongs*'





## The Chain of Wrongs

Duty of Care

↓


Breach of Duty of Care

↓

Harm occurred

↓

Causation



## The Chain of Wrongs

Alice throws a ball and accidentally hits Brenda in the eye.

## The Chain of Wrongs



Brenda can sue Alice for negligence only if  
Brenda can prove that.....

## The Chain of Wrongs



It was an accident, not intentional

## The Chain of Wrongs



Alice had a Duty of Care to throw the ball  
carefully

## The Chain of Wrongs



Alice breached this DOC, which a  
reasonable person would not have done

## The Chain of Wrongs



The breach of duty directly caused the  
injury

## Duty of Care



## Duty of Care



- Decomposing Scottish snail in 1932
- Drinking ginger beer
- Given to her by a friend
- Bought from a shop
- Found decomposing snail in drink
- Caused GIT illness
- Sued manufacturer – Stevenson
- No contract existed
- Ruling - failed in DOC
- Set foundation for principle of 'negligence'

## Breach of Duty



In general standard compared to a 'reasonable person'

Evolved into 'a reasonable person under the circumstances'

Different definition for professional negligence

Dependent upon professional position, training etc

## Breach of Duty – medical & dental professionals



**A reasonably competent practitioner under similar circumstances and at the same point in time.**

## Breach of Duty – medical & dental professionals



Unlike common negligence requires expert testimony to define 'reasonable' for the type of practitioner (i.e. GDP/specialist), consider 'circumstances' and define accepted practice at the 'historical point in time'

## Defining an 'expert'

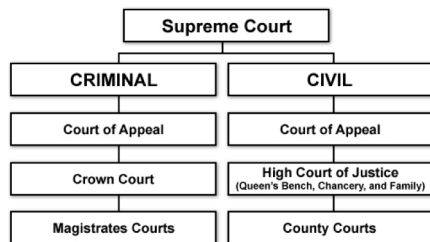


'Somebody who spends his life learning more and more about less and less until eventually he knows everything about nothing.'



## CLINICAL NEGLIGENCE





19



# THE BOLAM TEST

20

## Breach of Duty – Bolam test



- Mr. Bolam was a voluntary mental patient at Friern Hospital (1957)
- Agreed to undergo ECT
- Was not restrained and given no muscle relaxants
- Played about violently
- Suffered nasty injuries including fractured pelvis



## Breach of Duty – Bolam test



Argued negligence because:-

- Not restrained
- Not given muscle relaxants
- Not warned about the risks



## Breach of Duty – Bolam test



Failed because:-

1. Much opinion was against use of drugs
2. Reasonable opinion against restraints
3. Not normal at that time to warn of risks



## Breach of Duty – Bolam test



Justice McNair :-

'He is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a **responsible body of medical men** skilled in that particular art'



## Breach of Duty – Bolam test



Justice McNair :-

‘A man is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view’

## Breach of Duty – Bolam test



Justice McNair :-

‘At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying: “I do not believe in anesthetics, I do not believe in antiseptics, I am going to continue to do my surgery in the way it was done in the 18<sup>th</sup> Century”. That clearly would be wrong’

## Harm



- MUST prove that a loss has been suffered
- MUST prove a pecuniary loss
- If above proved can also claim a non-pecuniary loss (i.e. emotional distress)

## Causation



- General test in many legal systems is the ‘but for..’ test
- Harm must have been caused by the negligent act
- Cause must be direct (remoteness/proximity principal)

## Causation & Remoteness



- The harm must be directly caused by the negligent act
- The harm must have been reasonably foreseeable
- The loss or damage must not be too remote
- Pre-existing factors and contributory factors are taken into account

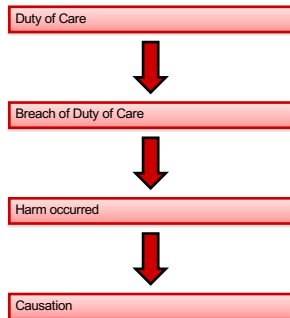
## Causation & Remoteness



A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who makes only a superficial examination, fails to notice a serious joint problem and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury from a rock fall. If he was told by the doctor of the knee problem he would not have gone on the climb and hence would not have been on the mountain at the time of the rock fall.

DOES HE HAVE A CASE?

## The Chain of Wrongs



## CLINICAL NEGLIGENCE

**THE BOLITHO RULING**

Must also be logical and  
defensible

## BOLITHO RULING (1997)



- Mst. Bolitho v City & Hackney HA
- 2 year old child with croup not intubated – became brain damaged
- Lords determined that the responsible body of opinion was logical and defensible

## BOLITHO RULING (1997)

The Courts set the law, not the profession

Even if a dentist is following a body of  
opinion he can still be negligent if that  
opinion is 'logically indefensible'

## BOLITHO RULING (1997)

**Logically indefensible:**

Consider reporting of radiographs etc

**THE REAL WORLD**

## WHY DO PATIENTS COMPLAIN?

1. Went to another dentist
2. Something went wrong after tmt
3. Misdiagnosis
4. Cosmetic expectations not met
5. Because they are barking mad



## Who do they complain to?

1. A solicitor – no win/no fee
2. The regulator
3. Their household insurance company



## THE JACKSON REFORMS 2014



## THE JACKSON REFORMS 2014

$$£3,000 + £2,000 + £1,000 + £6,000 = £1,850$$



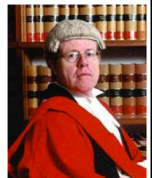
## THE JACKSON REFORMS 2014



LOW VALUE CASES WERE INVOLVING  
DISPROPORTIONATE COSTS

## THE JACKSON REFORMS 2014

1. Costs must be proportionate to the value of the case
2. Costs must be budgeted in advance and shown to the Court
3. Excessive costs are not recoverable





Dental negligence cases post April 2014:



GDC Hearings:



# MISCONDUCT

45



GDC Hearings: No need to establish Causation



GDC Hearings: Risk of harm is sufficient



GDC Hearings: Not just the Bolam standard



## GDC - MISCONDUCT



## GDC – the 'informant'



## GDC – the 'clinical advisor'



## GDC – the 'in-house legal team'



## GDC – the 'Investigating Committee'



## GDC – the 'Professional Conduct Committee'



## GDC – the 'Rule 10'



EXPERT WITNESS



BARRISTER



BACK TO ICC (RULE 10)

## GDC – the 'Prosecution'



## GDC – the 'Balance of Probabilities'



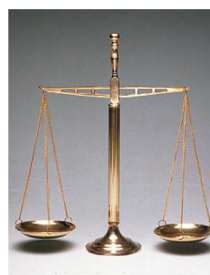
### CRIMINAL

- Recklessness
- Beyond reasonable doubt
- Punishment

### CIVIL

- Negligence
- Balance of probabilities
- Compensation

## GDC – the 'Balance of Probabilities'



> 50% chance

## GDC - MISCONDUCT



### GDC Hit Parade:

- 1.Consent – all alternative options, all risks, anticipated outcome
- 2.Clinical record writing
- 3.Medical history recording
- 4.Reporting on all radiographs
- 5.Not fully assessing implant cases – oral hygiene, perio condition etc
- 6.Not taking adequate radiographs (? CBCT)
- 7.Recording details of LA administration
- 8.Recording consent
- 9.Not carrying out a BPE
- 10.Not recording a diagnosis

## GDC - MISCONDUCT



### GDC Hearing verdict June:

The Committee considered that given the high risk area in which the implant was placed (**lower premolar region**) it would have been expected that you undertake sufficient radiographs in order to determine the position of the inferior alveolar nerve and ascertaining the position of the mental foramen was an important aspect of this.

**LESSON TO LEARN:**

USE MODERN RADIOGRAPHIC TECHNIQUES

- CBCT

**GDC Hearing verdict October:**

The decision as to whether to provide an implant should have taken into account Patient A's periodontal disease.

Although Dr X had recorded BPE scores of 4-4-4 and 4-2-4, that was not an adequate recording of the extent of the periodontal disease

**LESSON TO LEARN:**

- FULLY ASSESS THE PERIODONTAL HEALTH
- TREAT THE PERIODONTAL CONDITION
- IMPLANTS ONLY WHEN/IF STABLE
- PLAN FOR FUTURE TOOTH LOSS
- DISCUSS ALL WITH PT IN ADVANCE

**GDC Hearing verdict October:**

It was satisfied that you did not formulate or record a plan in respect of Patient A's whole upper dentition. These were matters which you should have addressed if you were to embark on the plan in respect of UR7 (implant).

**LESSON TO LEARN:**

- UNDERTAKE A FULL EXAMINATION
- PRODUCE A FULL DENTAL TP
- DO NOT JUST FOCUS ON THE IMPLANT

**GDC Hearing verdict October:**

You immediately persuaded her to accept the socket preservation material as the gum was open. There was therefore no time for any discussion with Patient A to enable her to have an opportunity of making a decision and giving informed consent.

**LESSON TO LEARN:**

- **NEVER TAKE IMMEDIATE CONSENT FOR SURGERY, UNLESS EMERGENCY**
- **ALLOW AT LEAST 2 WEEKS BETWEEN CONSENT AND ELECTIVE SURGERY**

**GDC Hearing verdict October:**

You failed to obtain and/or record Patient A's informed consent, in that you did not, adequately or at all, discuss with the patient and/or record your discussions regarding the proposed treatment as follows:  
(a) the bone graft/socket preservation including:  
(i) the use of an animal-derived bone augmentation material;

**LESSON TO LEARN:**

- **EXPLAIN THE MATERIAL TO BE USED**
- **EXPLAIN IF ANIMAL PRODUCTS**
- **DISCUSS ALTERNATIVE MATERIALS**
- **DISCUSS ALTERNATIVE OPTIONS**
- **DISCUSS RISKS & COST OF EACH OPTION**



- Involve patient in Treatment Planning process
- Set up 'team' approach from very beginning
- Assess patient expectations – cosmetics, pain etc
- Knock it out of them at very beginning!
- Say NO!
- Do not treat the mad ones!!!!
- Explain verbally all reasonable risks and consequences of these risks and discuss the expected outcome
- Back up in writing – sign form attached
- If complications – involve patient



# THE END