MEDICAL NEGLIGENCE : COMMON LAW PERSPECTIVE

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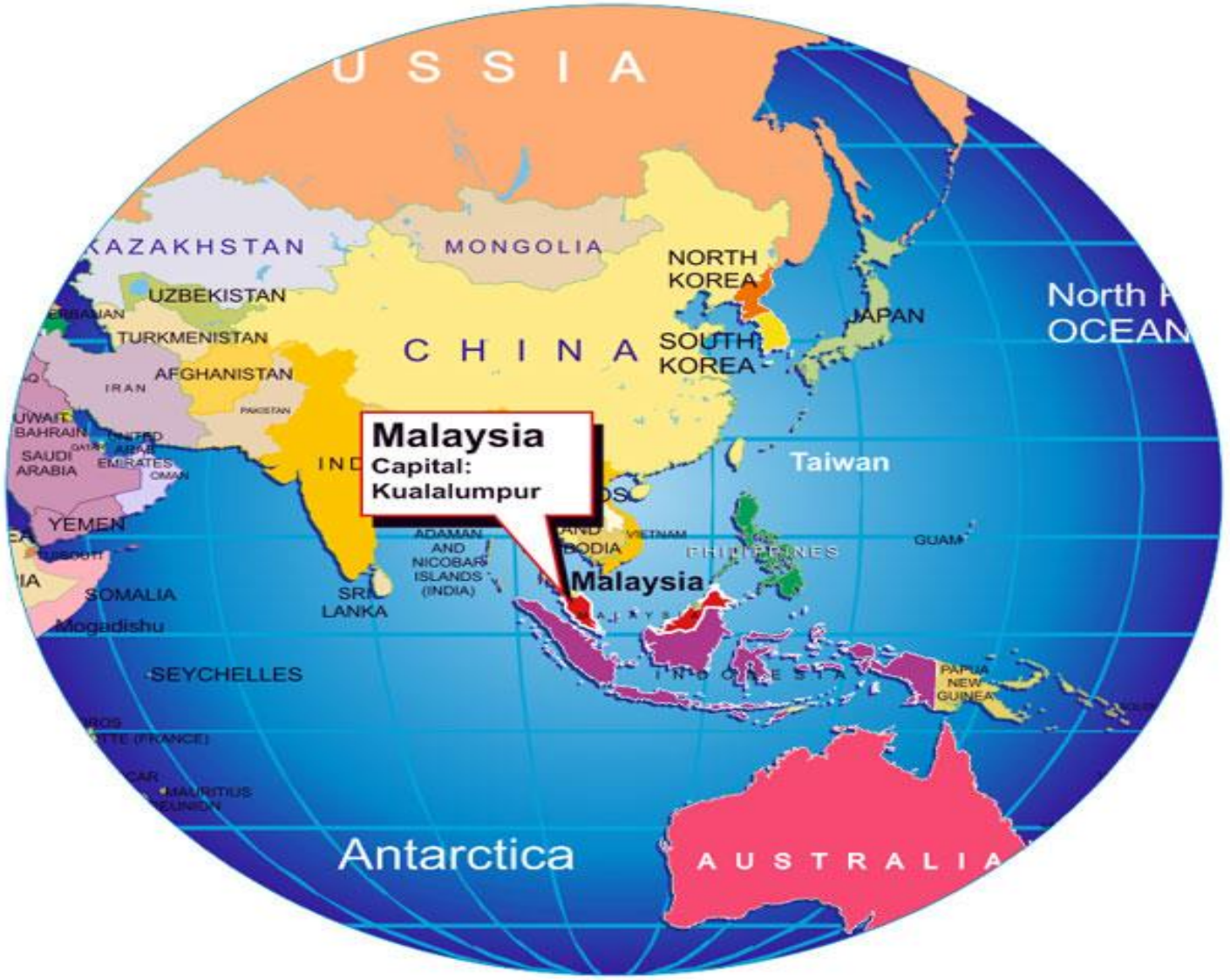
Greetings from Malaysia…



Introduction

Common law is a body of unwritten laws based on legal precedents established by the courts.

Malaysia - Section 3 of the Civil Law Act 1956 - “unless there is any written law in force in Malaysia , the courts shall apply the English common law of England and rules of equity as administered in on 7 April 1956 … subject to qualifications as local circumstances render necessary.”

NEGLIGENCE

- A major and important area in TORT LAW.
- TORT LAW is one of the branches of LAW, for instance, Contract Law, Family Law, Land Law, Constitutional Law, Criminal Law.
- TORT LAW generally and specifically under the tort of negligence protects various interests such as interests in physical integrity, interests in property, psychiatric injuries and economic interests.

DEFINITION OF NEGLIGENCE

- Negligence is the CONDUCT FALLING BELOW THE STANDARD demanded for the protection of others against unreasonable risk of harm – *Prof Fleming*
- Negligence is the omission to do something which a reasonable man, guided upon those consideration which ordinarily regulate the conduct of human affairs would do or doing something which A PRUDENT AND REASONABLE MAN would not do – *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781
- Negligence means MORE THAN HEEDLESS OR CARELESS CONDUCT…it properly connotes the complex concept of DUTY, BREACH AND DAMAGE thereby suffered by the person to whom the duty was owing - *Loghelly Iron & Coal v M'Mullan* [1934] AC 1

NEGLIGENCE IS THE COMMON GROUND FOR MEDICAL NEGLIGENCE CLAIMS –

THE BASIS OF LIABILITY

MEDICAL NEGLIGENCE

- The TORT OF NEGLIGENCE applied in a specific context – applied to those in the medical practice dealing with two most precious commodities, namely, LIFE and HEALTH.

- Burden of proving Medical Negligence is on the person bringing the claim/plaintiff – the person injured - usually the patient – family members bringing claim on behalf of injured patient.

- The person which a claim is being brought against is the defendant – 'the alleged wrongdoer' – usually those who were in the management of care and treatment to the patient

- EVERY PERSON IS INNOCENT UNTIL PROVEN GUILTY

REQUIRED ELEMENTS TO PROVE NEGLIGENCE UNDER THE ENGLISH COMMON LAW

(a) DUTY OF CARE

an existing legal duty on the part of the defendant to the plaintiff to exercise care in such conduct of the defendant as falls within the scope of the duty;

(b) BREACH OF DUTY

failure to conform to the standard of care which the defendant owes the plaintiff;

(c) CAUSATION OR CONSEQUENTIAL DAMAGE

the plaintiff suffers damage as a result of the defendant's breach of duty.

UNDERSTANDING THE REQUIRED ELEMENTS IN PROVING MEDICAL NEGLIGENCE UNDER THE ENGLISH COMMON LAW

ELEMENT 1 - THE DUTY OF CARE

- **Definition: an obligation or a burden imposed by law,** which requires a person to conform to a certain standard of conduct. The existence of such a duty in a given set of circumstances has given rise to what is known in the law of torts as a “duty situation”.

- **A person will owe a duty of care to those who are also within his contemplation who will suffer foreseeable loss and those who are closely n directly affected by his act.**

WHEN DOES A DUTY OF CARE ARISE?

- Obiter dictum of Brett MR in ***Heaven v Pender*** **[1883] 11 QBD 503**
- Lord Atkin in ***Donoghue v Stevenson*** **[1932] AC 562** – formulated the "neighbour principle - concepts of foreseeability of harm and proximity (closely and directly affected).

PATIENT AS DOCTOR'S LEGAL NEIGHBOUR

- If the doctor realises that the patient might be affected by his act, then it automatically establishes the neighbour principle – duty of care arises from the **doc-patient relationship**
- **R v Bateman (1925) 94 LJKB 791at p. 794, Lord Hewart C.J. said: "If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment**

DUTY OF CARE TO STRANGERS

- HOWEVER, without the existence of a relationship, that is, a doctor patient status, there is no duty to act. There is no legal obligation on a doctor to play a **"Good Samaritan"** and render assistance to a stranger.
- **The common law does not require a man to act as the Samaritan did….THE DICTATES OF CHARITY AND COMPASSION DO NOT CONSTITUTE A DUTY OF CARE. The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him." -** ***Hargrave v Goldman (1967)***

STRICT CONFINES OF THE COMMON LAW

Common law – strong reluctance of subjecting persons to such liability to those who fail to help others…if the distress is not caused by him.

Reluctance founded on the jurisprudential distinction between acts and omissions.

Common humanity does not impose positive obligation to assist.

Misfeasance is actionable whereas generally ***non-feasance*** is not.

IT IS A *MORAL DUTY* TO HELP THOSE WHO ARE IN NEED … BUT IS IT A LEGAL DUTY?

Lord Coleridge in ***R v Instan [1893] 1 QB 453*** – "It would not be correct to say that every moral obligation involves a legal duty but **every legal duty is founded on a moral obligation."**

ENGLISH CASE - LORD REID IN HOME OFFICE V DORSET YACHT [1970]

- "...when a person has done nothing to put himself in any relationship with another person in distress or with his property, mere accidental propinquity does not require him to go to that person's assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty."

THEREFORE…THERE IS NO LEGAL OBLIGATION ON A DOCTOR TO PLAY A GOOD SAMARITAN AND RENDER ASSISTANCE TO A STRANGER…UNDER THE ENGLISH COMMON LAW

DUTY TO EMERGENCY PATIENTS

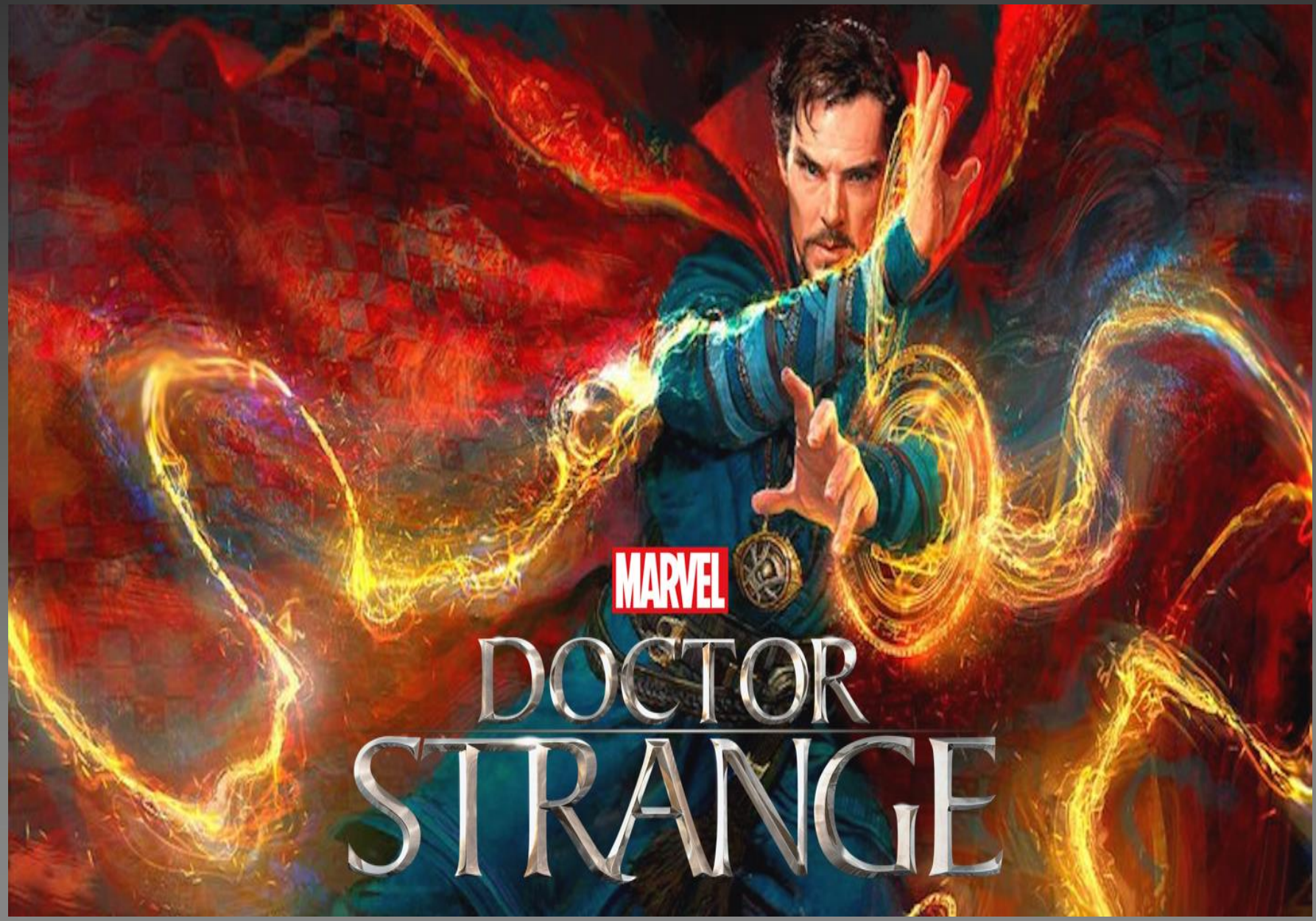
- The common law THEREFORE does not impose a positive duty on a doctor to attend upon a person who is sick, or even in an emergency, if that person is one with whom the doctor is not and has never been in a professional relationship of doctor and patient
- But the doctor may owe duty if work in casualty/emergency department

THE PROBLEM…

- Doctors' ability to help and moral obligation to do so make them vulnerable to expectations of the society.

- **Hippocratic Oath**, the medical professional swears to "act so as to preserve the finest traditions of my calling and experience the joy of healing those who seek my help".

- However, should they render medical assistance to anyone in distress…..**in other words, should they act as good samaritans?**


MARVEL
DOCTOR
STRANGE

Departure by Australia from the English Common Law position

LOWNS V WOODS (1996)

MALAYSIAN CASE-

ANG YEW MENG & ANOR V DR SASHIKANNAN A/L ARUNASALAM & ORS [2011]

- Child came to clinic high fever – doctor in charge out on a break - the only person there was the first defendant, an intern doing attachment at the clinic – parents insistent for first def to examine and treat the child – first def injected Voltaren – arrival at hosp child died - cause of death was myocarditis brought about by acute septicaemic shock (sepsis) from an infection that was likely typhoid
- The court held that the first defendant owed NO DUTY OF CARE TO THE PLAINTIFFS AS THE LAW DID NOT IMPOSE A GENERAL DUTY OF CARE TO BE A GOOD SAMARITAN UNLESS A SPECIAL RELATIONSHIP EXISTED BETWEEN THE PARTIES. However, as soon as the first defendant rendered treatment to the child, he had taken control of the situation and accepted responsibility causing him to owe a duty to the child and his parent to use due diligence, care, knowledge, skill and caution in administering treatment.

DUTY TO THIRD PARTIES

- Doctor's negligence may have serious consequences not only to his patient but others as well.
- In certain circumstances, the doctor may owe duties to persons other than his patient - those coming within the "neighbour principle" formulated by Lord Atkin in *Donoghue v Stevenson.*

VARIOUS SITUATIONS - DUTY OF CARE TO THIRD PARTIES

1	Third party suffering from an identifiable psychiatric injury through witnessing a trauma or its immediate aftermath
2	Third party coming into contact with patients taking prescribed drugs with certain side effects
3	Third party is the unborn child
4	Third party in danger from harm or infectious disease by coming into contact with the patient

2. ELEMENT 2 - BREACH OF DUTY / THE STANDARD OF CARE

- After proving D owe P a duty of care, P must further prove, on a balance of probabilities that the CONDUCT OF THE D FELL BELOW THE REQUIRED STANDARD OF CARE.
- The standard of care, which the law demands of a person in a normal case, has been established to be the standard of "reasonable care" – standard satisfied by the hypothetical REASONABLE MAN.

DOCTORS DUTY ARE DIVIDED INTO 3 – DIFFERENT STANDARD OF CARE FOR DUTY TO WARN – FEDERAL COURT IN THE CASE OF ZULHASMINAR (2017):

1. DUTY TO DIAGNOSE – *Bolam-Bolitho standard*
2. DUTY TO TREAT – *Bolam-Bolitho standard*
3. DUTY TO WARN – Reasonable Prudent Patient standard

DUTY TO DIAGNOSE & TREAT

BOLAM-BOLITHO STANDARD

THE TEST: THE BOLAM PRINCIPLE

- In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time.... I myself would prefer to put it this way, that 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 - ***Bolam v Friern Hospital Management Committee*** [1957] 1 WLR 582 -

ESSENTIAL ELEMENTS UNDER THE BOLAM PRINCIPLE

1. The doctor must have acted in accordance with "accepted medical practice" e.g. *Whitehouse v Jordan* [1981] 1 WLR 246

2. The accepted practice must be regarded as proper by " a responsible body of medical men" skilled in that art

A. ACCEPTED PRACTICE MUST BE CURRENT PRACTICE

- The accepted practice must be the current practice. This requires the defendant to keep up with the latest developments in his field of medicine.- ***Roe v Minister of Health &Anor*** **[1954] 2 QB 66**

B. RESPONSIBLE BODY OF MEDICAL MEN SKILLED IN THAT ART

- What constituted "a responsible body of medical men" and whether this group had to be substantial? – *De Freitas v O' Brien and Connolly* [1993] 4 Med LR 281 - "There was evidence ... that a small number of tertiary specialists could constitute a responsible body of medical opinion.... The issue whether or not to operate could not be determined by counting heads.... a small number of specialists [could constitute] a responsible body [which in fact found] ... the defendant's decision justified."

A CHANGE OF ATTITUDE - BOLITHO V CITY & HACKNEY HA [1997]

- Court not bound to hold D not liable just because a number of medical experts agree with him.
- The word **"responsible"** used by McNair J. in *Bolam* "show[s] 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."**

CONTINUE …*BOLITHO*

- Even tho there exists a body of professional opinion sanctioning D's conduct, D can still be held negligent if "it cannot be demonstrated to the judge's satisfaction that the opinion relied on is reasonable or responsible."
- But court acknowledged that it would be a "rare" or "exceptional" case where judicial intervention will be justified
- Approved in *Penney, Palmer and Cannon v East Kent HA* [2000]

BOLAM TO BE READ WITH BOLITHO

- The Malaysian Federal court case of ***Foo Fio Na v Dr Soo Fook Mun & Anor*** **(2007)…applying Bolitho v City & Hackney Health Authority [1997] 4 All ER 771**

"The court is at liberty to reject medical expert evidence which does not stand up to logical analysis. The court must scrutinise and evaluate the relevant evidence in order to adjudicate the appropriate standard of care."

PRESENT ESSENTIAL ELEMENTS FOR BOLAM-BOLITHO STANDARD

1. The doctor must have acted in accordance with “accepted medical practice”

2. The accepted practice must be regarded as proper by “a responsible body of medical men” skilled in that art

3. The court will decide which medical opinion reaches up to a logical analysis…

BASIC DUTIES IN DUTY TO DIAGNOSE

- Doctor must consider the patient's medical history as the patient may, eg allergic to a particular drug, pre-existing illness – *Chin Keow v Govt of Malaysia* (1967)
- Doctor must ask the patient relevant questions and listen to his account of the illness. *Maynard v West Midlands RHA* [1984] 1 WLR 634
- In cases of doubtful diagnosis, it is good practice for the patient to be referred to a specialist for further consideration of the case. *Gordon v Wilson* [1992] 3 Med LR401

DUTY TO WARN/ DISCLOSE MATERIAL RISKS

REASONABLE

PRUDENT PATIENT TEST

"DOCTOR'S DUTY OF CARE TAKES ITS PRECISE CONTENT FROM THE NEEDS, CONCERNS AND CIRCUMSTANCES OF THE INDIVIDUAL PATIENT"

"PATIENTS ARE NO LONGER PASSIVE RECIPIENTS IN MEDICAL CARE"

– LORD KERR AND LORD REID IN MONTGOMERY V LANARKSHIRE (2015)

GLOBALLY LAW ON INFORMED CONSENT HAS BEEN DEVELOPED THROUGH PATIENT-CENTRED APPROACHES

FEDERAL COURT IN *ZULHASMINAR* (2017)

DOCTOR NEEDS TO DISCLOSE TO THE PATIENT ALL 'MATERIAL RISKS' INHERENT IN A PROPOSED TREATMENT. WHAT IS "MATERIAL" WOULD BE DETERMINED BY THE "PRUDENT PATIENT" TEST WHICH WAS INTRODUCED IN THE UNITED STATES CASE OF CANTERBURY V SPENCE (1972) 464 F. 2D 772 AND LATER ADOPTED IN THE AUSTRALIAN CASE OF ROGERS V WHITAKER (1992) 175 CLR 479.

The Reasonable Prudent Patient Test

THE STANDARD OF CARE DEMANDED BY *ROGERS V WHITAKER*

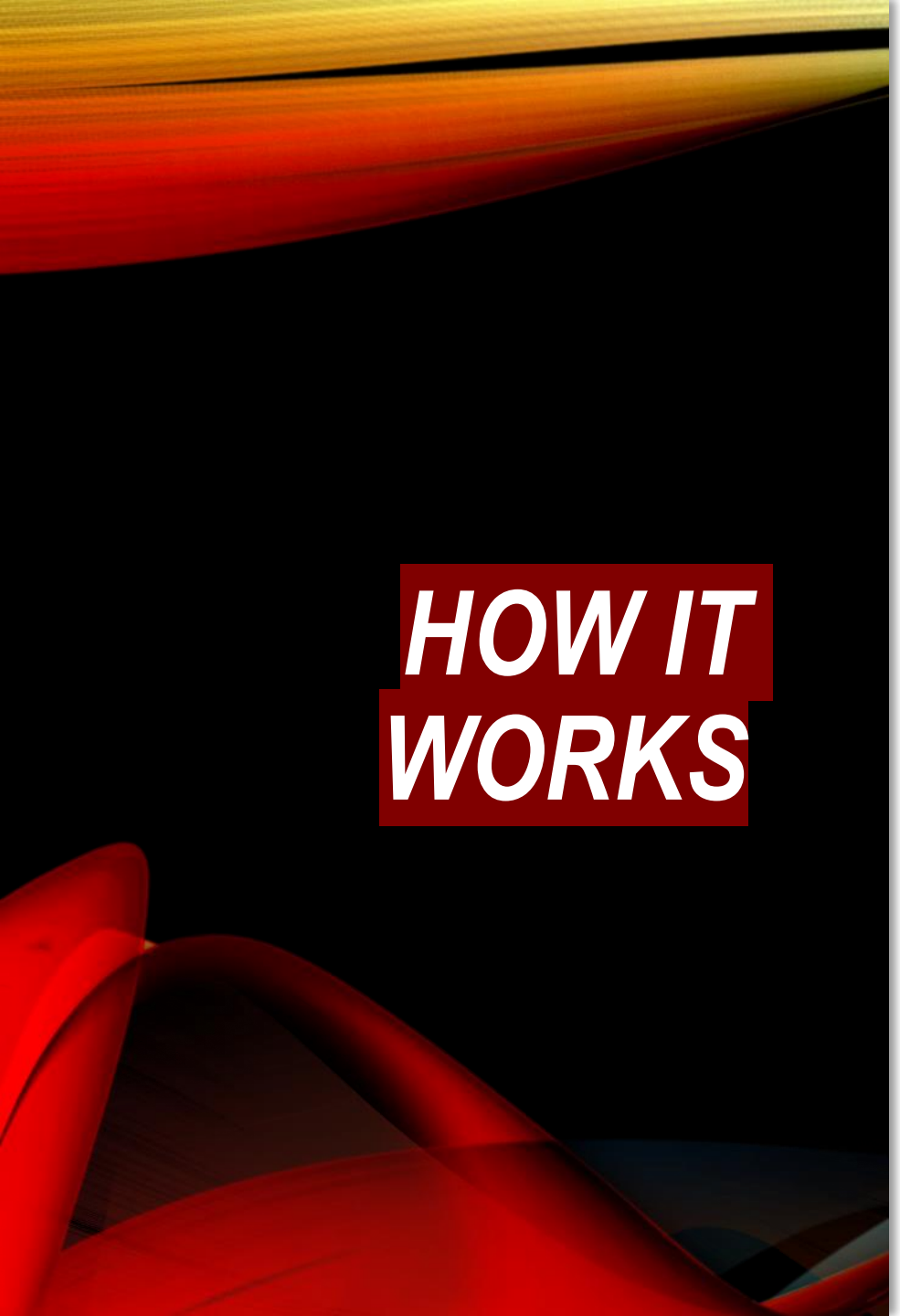
- The standard to be observed by medical practitioners will no longer be determined solely or even primarily by medical practice **as there will no longer be a conclusive force to medical opinion.**
- It is for the courts to judge what standard should be expected from the medical profession taking into account not only medical opinion but **other relevant factors surrounding the circumstances of the patient.**

- The likelihood and gravity of risks
- The desire of the patient for information
- The physical and mental health of the patient
- The need for treatment and alternatives available
- Medical practice at the time
- Nature of the procedure – whether routine or complex

MEDICAL OPINION NO LONGER CONCLUSIVE…OTHER FACTORS SURROUNDING CIRCUMSTANCES OF THE PATIENT NEED TO BE TAKEN INTO ACCOUNT…

DOCTRINE UNDER THE ENGLISH COMMON LAW - *RES IPSA LOQUITOR*

- When an accident occurs in such circumstances that accidents do not normally happen in the absence of negligence, the court has relieved the burden of proving negligence by allowing the plaintiff to invoke the doctrine of *res ipsa loquitor.*



This doctrine permits the court in certain cases to draw an inference of negligence at an early stage in the trial on the basis of **circumstantial evidence of a highly suggestive nature.**

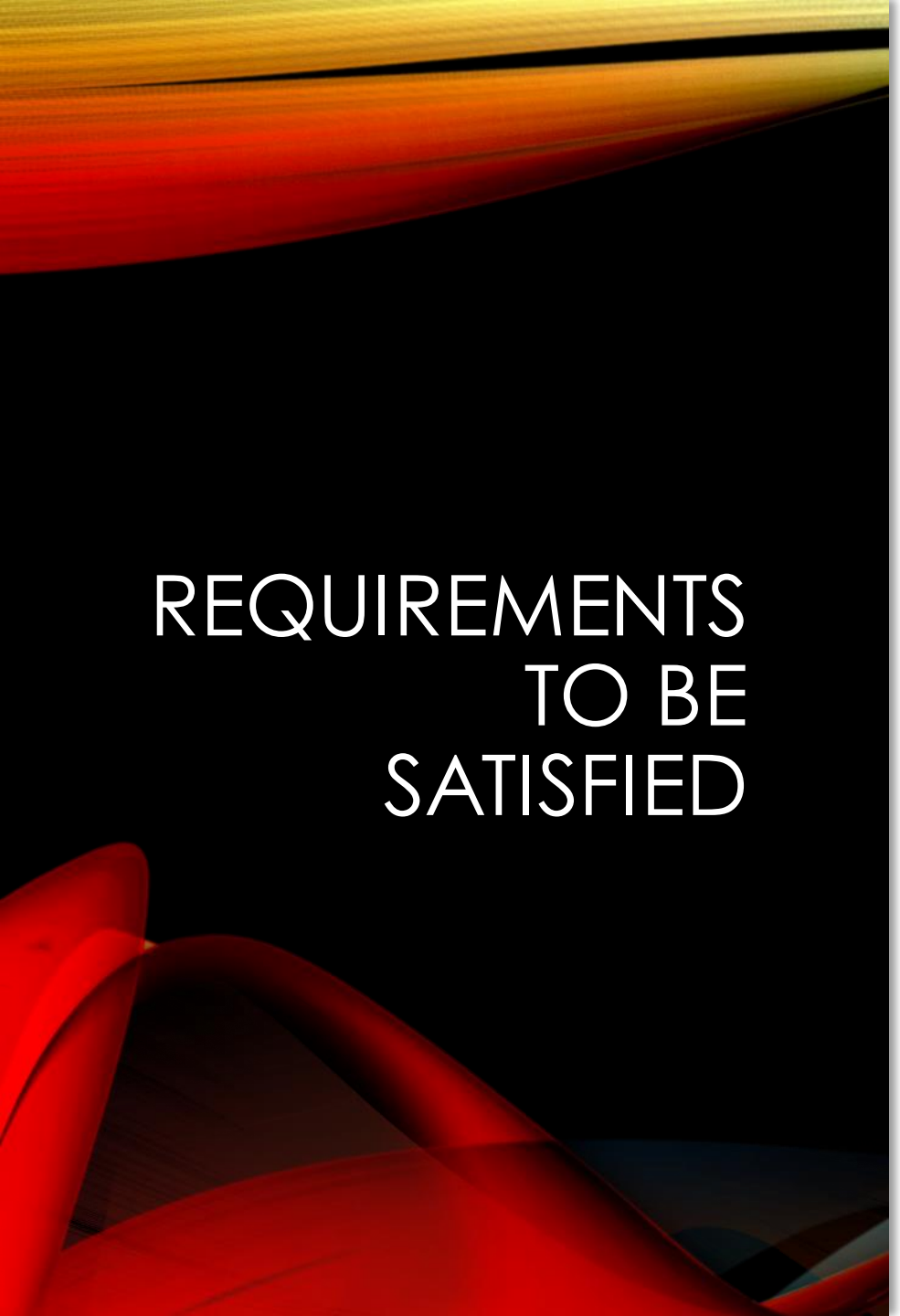
This doctrine relieves the plaintiff, who usually has insufficient knowledge of how the accident occurred, from bringing evidence to show the precise way in which the negligence occurred.

DEFINITION

- literally means **"the thing speak for itself". In legal terms, it means that the fact of the accident by itself is sufficient (in the absence of an explanation by the defendant) to justify the conclusion that most probably the defendant was negligent and that his negligence caused the plaintiff's injury.**
- The doctrine first appears to have surface in *Byrne v Boadle* (1863)
- The classic exposition of the doctrine appeared two years later when the doctrine was laid down succinctly by Erle CJ in *Scott v London and St Katherine Docks* (1865)

ERLE CJ IN ***SCOTT V LONDON AND ST KATHERINE DOCKS* (1865) 3 H & C 596**

"…where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."



REQUIREMENTS TO BE SATISFIED

1. The defendant must be in control of the thing which caused the injury to the plaintiff

2. The accident must be of such nature that it would not have occurred in the ordinary course of events

3. There must be no explanation for the accident as res ipsa loquitor is pertinent only in those cases where the plaintiff cannot prove what did cause the accident

CASSIDY V MINISTRY OF HEALTH [1951] 2 KB 343

- Plaintiff was suffering from Dupuytren's contraction of the third and fourth fingers of his left hand. The hand was operated on and following the operation the hand and arm had to be kept in a rigid splint for eight to fourteen days.
- When the hand was released from the splint it was found to be virtually useless. The two fingers, which had been operated on, were completely stiff and the trouble had spread to the other good fingers as well.

THE JUDGMENT

- The Court of Appeal held that, on the basis that **the hospital was responsible for all those who treated the plaintiff, the facts raised a case of *res ipsa loquitor.***
- **Denning LJ commented:**
- "If the plaintiff had to prove that some particular doctor or nurse was negligent, he would not be able to do it. But he was not put to that impossible task; he says, **'I went into hospital to be cured of two stiff fingers, I have come out with four stiff fingers**, and my hand is useless. That should not have happened if due care had been used. Explain it, if you can. I am quite clearly of opinion that that raises a prima facie case against the hospital authorities."

3. ELEMENT 3 - CAUSATION

There must be a causal link between the defendant's breach of duty and the damage sustained by the plaintiff - for the plaintiff to overcome the issue of causation, he must show that the damage he suffered was caused by the defendant's negligence.

There are two types of Causation:

1. Causation in Fact
2. 2. Causation in Law

CAUSATION IN FACT (WHO IS LIABLE?)

- *The "but for" test* – whether the damage would not have occurred "but for" the defendant's negligence? If yes, the defendant will be liable
- *Cork v Kirby Maclean Ltd* [1952] 2 All ER 402 – if the damage would not have happened but for a particular fault, then that fault is the cause of the damage, if it would have happened just the same, fault or no fault, is not the cause of the damage.

BARNETT V CHELSEA AND KENSINGTON HOSPITAL MANAGEMENT COMMITTEE [1969] 1 QB 428

- **Facts:** A night watch man arrived early in the morning at the defendant's hospital, suffering from nausea after having a cup of tea at work. The nurse telephoned the casualty doctor, who refused to examine the man. The doctor advised for him to go home and consult his GP if he still felt unwell in the morning. The man died five hours later of arsenic poisoning. The doctor and the hospital were sued for negligence.

- **Held:** The defs were not liable. The court accepted that the defs owed the deceased a duty of care and that they had breached that duty by failing to examine him. However, the **breach did not cause his death**. There was evidence that even if he had been examined, it was too late for any treatment to save him. Thus, it could not be said that **but for the defendants' negligence, he would not have died.**

CAUSATION IN LAW/ REMOTENESS OF DAMAGE (HOW MUCH YOU WILL BE LIABLE?)

- The defendant is not liable for all the loss, which flows from his breach of duty of care as the law places limits on the extent of which the plaintiff can recover. The question to be asked is “for how much of the damage is the defendant liable?”
- it must now be considered whether the loss, which the pff sustained, is one, which is recoverable in negligence and not too remote.

THE TEST

- **The foreseeable consequences test: *The Wagon Mound* (No 1) [1961]**
- **Test: the defendant is liable for all the damage of a certain type which is reasonably foreseeable.**
- *The Wagon Mound (No 1)* [1961] AC 388 – In order to recover for damages, the plaintiff must prove that the kind or type of damage which he incurred must be foreseeable. **The kind of damage must be reasonably foreseeable although neither the extent of the damage nor the precise manner of its occurrence need be reasonably foreseeable.**

HUGHES V LORD ADVOCATE [1963] AC 637

- **Facts:** Some workmen negligently left a manhole open in the street, surrounded by paraffin lamps. Two young boys approached the manhole, out of curiosity, and one of the lamps was knocked into the hole. There was a violent explosion in which one of the boys suffered severe burns. Expert evidence indicated that in these circumstances an explosion was unforeseeable, although burns from a conflagration if the lamp was knocked over could be anticipated.

- **Held: The House of Lords held that the damage was not too remote as it was sufficient that the incident was the type, which was foreseeable by a reasonable man although how the incident occurred was not.**

APPLICATION OF THE TEST

- ***Hughes v Lord Advocate* [1963] AC 637** – as long as damage to person is foreseeable, it does not matter that consequences of the damage are unforeseeable. Lord Reid : "A defender is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable."
- Therefore, as long as injury by burning was foreseeable, it did not matter that the method by which the burning occurred was unforeseeable.

EGG SHELL SKULL RULE

- *The defendant must take the victim as he finds him*

- Kennedy J: "if a man is negligently run over or injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or unusually weak heart."

MALAYSIA - LOO CHOOI GAIK V DR LOH LAY SOON [2019] 4 CLJ 281

- Plaintiff had undergone a facial cosmetic operation known as "Bi-Directional Silhouette Futures with Restorable Cones" at the defendant's clinic. After the operation, the plaintiff complained of swelling. Despite taking the antibiotics prescribed, her swelling did not improve. After seeing several doctors, she was diagnosed as having suffered from 'nosomical infection of the skin which was complicated after the procedure' – took new medication and was healed but left with a scar.
- On the issue of causation, the court held that the plaintiff had successfully proved on balance of probabilities that **THERE WAS A CAUSAL LINK BETWEEN THE INJURY SUFFERED AND THE INFECTION OCCURRED AT THE DEFENDANT'S CLINIC DUE TO THE LACK OF STERILITY AT THE DEFENDANT'S PREMISE.**

ISSUES UNDER THE COMMON LAW DOCTRINE OF VICARIOUS LIABILITY

- Modern economic conditions – new challenges to healthcare providers
- More duties and responsibilities with the creation of new rights
- When things go wrong….the **SEARCH FOR A POTENTIAL DEFENDANT**

GENERAL PRINCIPLE

Generally, a person is liable for the consequences of his own acts. However, there are situations in which a person incurs liability as a result not of his own acts but **for the act of others**. This is what is known as vicarious liability.

EMPLOYERS AS POTENTIAL DEFENDANTS

- Healthcare provider as employer, have always been seen as potential defendant worthy of suing financially.
- The fact that they have economically benefitted from the acts of their employees, they should undertake the burden when things go wrong.

THE COMMON LAW DOCTRINE OF VICARIOUS LIABILITY

- imposes liability on employers for the torts committed by his **employees who are acting in the course of employment.**
- all healthcare providers will be vicariously liable for the acts and conducts of their employees such as doctors, nurses, medical attendants provided that the employee was acting **"in the course of employment".**

COMMON LAW AUTHORITIES

In ***Middleton v. Fowler*** **[1969] 1 Salk 282, Holt. J.** said: "No master is chargeable with the acts of his servant, but when he acts in the execution of the authority given by his master, and then the act of the servant is the act of the master."

Lord Mansfield observed in ***Ackworth v Kempe*** **[1778] Dougl at p. 42** that: "for all civil purposes the act of the sheriff's bailiff is the act of the sheriff."

JUSTIFICATIONS FOR THE DOCTRINE

- Employer has bigger and deeper pocket
- Encourages accident prevention by pressuring the employer to ensure that their employees act with regard to the safety of others
- One who takes the benefit must take burden as well
- Loss distribution mechanism

"…THE PRINCIPLE OF VICARIOUS LIABILITY RESTS ON THE FUNDAMENTAL PREMISE THAT THE EMPLOYER IS BEST PLACED, RELATIVE TO EVERYBODY ELSE, TO MANAGE THE RISKS OF HIS BUSINESS ENTERPRISE AND PREVENT WRONGDOING FROM OCCURRING…."

Chan Sek Keong, CJ, 2011, judgment on vicarious liability in the Singapore Court of Appeal in Skandinaviska Enskilda Banken v Asia Pacific Breweries [2011] SGCA 22.

REQUIREMENTS - (1) PROVIDED THEY ARE "EMPLOYEES"

Other requirements include –

(2)They have committed a legal wrong that is actionable in tort law

(3) They have acted in the course of employment

(I) THE DETERMINATION OF EMPLOYEES

How to distinguish between employees and independent contractors – ***Difficulties***

The courts have employed various tests - Control Test, Business integration test, Economic Reality test, Multifactorial test

The employer is only liable for the acts of their employees and not of the independent contractors

WHO IS AN EMPLOYEE?

- A distinction has to be made between an employee and an independent contractor because the employer is only liable for the acts of the employee and not for the independent contractor.
- **Vicarious liability arises from a 'contract of service' and not from 'contract for services' (independent contractor).** Although the distinction may at times be an obvious one but it has caused the courts great difficulties.

TO EXAMINE ALL FACTS – MULTIPLE FACTORS TEST / MULTI-FACTORIAL APPROACH

- The approach which the courts now adopt is to abandon the search for any one factor which will be conclusive in all cases and instead, to **examine all the facts of the particular case.**

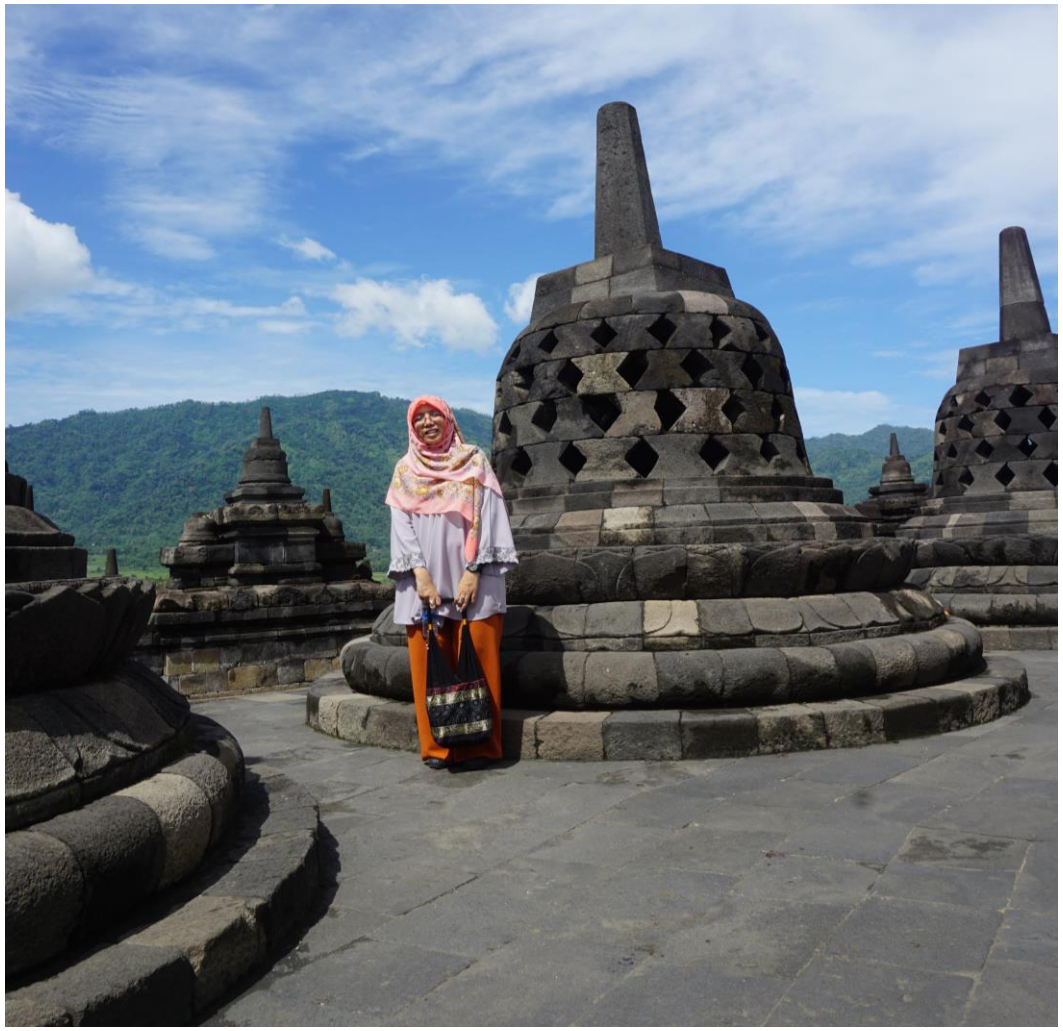
- **Salmond and Heuston in The Law of Torts -**
- "A master is not responsible for a wrongful act done by his servant unless it is done in the course of employment. It is deemed to be so done if it is either (1) **a wrongful act authorized by the master**, or (2) **a wrongful and unauthorized mode of doing some act authorized by the master** ... On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, **but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of employment, but has gone outside of it.**"

THE TORT WAS COMMITTED IN THE COURSE OF EMPLOYMENT

THEREFORE….IN DETERMINING WHETHER EMPLOYEES OR INDEPENDENT CONTRACTORS…

Many factors will be looked at and they are not exhaustive with changes in the labour market…

- **the employment agreement;**
- **the control and power the employer has over the employee;**
- **method of salary payment;**
- **the prerogative of the patient in selecting the particular doctor for treatment.**



THANK YOU

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