

Non-Delegable Duties of Care: A Review of Recent Developments in the Law

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The recent case of *Hopkins v (1) Akramy (2) Badger Group (3) NHS Commissioning Board* [2020] EWHC 3445 (QB) considered whether an NHS Primary Care Trust owed a non-delegable duty of care with regard to healthcare services provided by a third party. HHJ Melissa Clarke, sitting as a Judge of the High Court, held that it did not. An in-depth analysis of the case by Philip Godfrey on our Clinical Negligence Blog can be found [here](#). To read the full judgment, click [here](#).

This blog post provides an overview of the legal considerations in this area and a summary of the various scenarios in which a non-delegable duty of care may arise either at common law or by statute.

The Non-Delegable Duty of Care

Where a duty of care is owed, in general terms it can be delegated. The exception to this is where the nature of the relationship is sufficient to render the duty owed a personal one, such that either by statute or common law the Courts recognise it should not be capable of delegation.

The classic example of the non-delegable duty of care is the special relationship between employer and employee. It is trite law that the duty of care of an employer is non-delegable: *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57 and *McDermid v Nash Dredging* [1987] AC 906.

It is also well-established that the duty owed by a hospital trust to patients having treatment in their hospital is non-delegable, such that it would not matter whether the treatment was provided by an employee or a contractor: *Cassidy v Ministry of Health* [1951] 2 KB 343.

A number of cases have considered other situations in which a non-delegable duty of care may be owed.

Statute vs Common Law

In *Hopkins*, HHJ Clarke stressed the distinction between a statutory duty of care and a common law duty of care. Where a statute contemplates that a duty is delegable, the common law cannot override that: [40]. Accordingly, the first 'port of call' will be to carefully examine the statutory provision that it is alleged gives rise to the non-delegable duty.

Statutory Non-Delegable Duties of Care

A continuing theme in the interpretation of whether a statutory duty is delegable is the distinction between cases where there was a duty to provide a service personally (in which case the duty would be non-delegable, as in *Woodland v Swimming Teachers Association* [2014] AC 537) and where the duty was to arrange for services to be provided (such as in *Myton*, below).

- *Myton v Woods* (1980) 79 LGR 28 – a local authority did not owe a non-delegable duty of care under ss. 39 and 55 of the Education Act 1944 with regard to the negligent actions of a taxi driver. The duty on the local authority was to “make such arrangements for the provision of transport [...] for the purpose of facilitating the attendance of pupils at schools.” By arranging the taxi transport, the Local Authority had discharged its duty. The distinction was drawn between a duty to arrange and a duty to provide the service.
- *Armes v Nottinghamshire County Council* [2018] AC 355 – a local authority did not owe a statutory non-delegable duty of care under s. 21 of the Children Act 1980 to ensure that children in its care placed with foster carers were treated with reasonable care.

- *Hopkins v (1) Akramy (2) Badger Group (3) NHS Commissioning Board* [2020] EWHC 3445 (QB) – a PCT did not owe a non-delegable duty of care with regard to services provided by a third-party clinic pursuant to s. 83 of the NHS Act 2006. The Act specifically enabled the Trust to delegate the provision of services.

Common Law Non-Delegable Duties of Care

In *Woodland v Swimming Teachers Association* [2014] AC 537, the Supreme Court held that it would be fair, just and reasonable to impose a non-delegable duty of care at common law upon a school for the provision of a swimming lesson by an independent contractor. Lord Sumption JSC identified the following five factors at [23] as being relevant to the existence of a common law non-delegable duty of care:

1. The Claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.
2. There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the Claimant in the actual custody, charge or care of the Defendant, and (ii) from which it is possible to impute to the Defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the Claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.
3. The Claimant has no control over how the Defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.
4. The Defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the Defendant's custody or care of the Claimant and the element of control that goes with it.
5. The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the Defendant and delegated by the Defendant to him.

A number of cases have considered the existence of a common law non-delegable duty of care, including:

- *A (a child) v Ministry of Defence* [2005] QB 183 – the Ministry of Defence was not responsible at common law for the care provided to service personnel and their dependents in Germany. The Defendant had put in place measures for such treatment at German hospitals, which had previously been provided by British military hospitals. The treatment was arranged by the Army but was not provided by it.
- *Farrar v King's Healthcare NHS Trust* [2010] 1 WLR 2139 – the Defendant NHS Trust did not owe a non-delegable duty of care for the testing of a tissue sample that was sent to an independent laboratory.
- *GB v Home Office* [2015] EWHC 819 (QB) – the Claimant was detained by the Defendant at the Yarl's Wood Immigration Removal Centre, which was run by a private contractor. While there, a private GP prescribed anti-malarial medication which the Claimant alleged caused her to suffer a severe psychotic reaction. Taking into account the prescriptive rules and statutory regime, Coulson J held that the Defendant owed to the Claimant a non-delegable duty of care at common law.
- *Razumas v Ministry of Justice* [2018] EWHC 215 (QB) – the Ministry of Justice did not owe a common law non-delegable duty of care to a prisoner for health services, which were provided (at that time) by the Primary Care Trust.

There are further examples of non-delegable duties of care with regard to dangerous operations on the highway (see *Penny v Wimbledon* [1899] 2 QB 72), particularly hazardous operations, the escape of fire, and under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330.

Conclusion

The cases in which a non-delegable duty of care will be imposed upon a Defendant are highly fact-specific. There is a

mixture of common law legacy duties (such as *Penny v Wimbledon*), well-established personal duties (such as employers) and relationships where a particularly high degree of care is called for (such as *Woodland* and *GB v Home Office*).

The circumstances in which a Court will find a non-delegable statutory duty of care would appear to be limited, and will depend in large measure on the interpretation of the statute.

Practitioners in this area need to be aware of these legal principles.

For Claimants, a non-delegable duty of care can provide a route to compensating the victim of a tort when the true tortfeasor does not have the means to satisfy a Judgment, and thus provide the only possible route to making recovery.

For Defendants, proper analysis needs to be levelled at any accusation outside of the well-established fields that a duty of care was non-delegable. This is important where, in most cases, the Defendant to such a claim will be innocent of any wrongdoing themselves.

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