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Reflecting on the evolution of Clinical Negligence and how it  
may develop in the future

Non-  
delegable  
duties of care

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1. Who do we  
claim against?

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2. Who should  
we claim against?



# Who do we claim against?

- 1. Private medicine
  - Bradbury v Paterson, Spire Healthcare, Heart of England NHS Trs
- 2. NHS care generally
  - Dow v Tayside University Hospitals NHS Trust
- 3. NHS GPs
- 4. NHS hospital care
- 5. Combined private and NHS care
  - CAR v Eljamel and NHS Tayside

# Problems

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Unnecessary complication

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Requires pursuers to determine the correct attribution of legal responsibility for fault

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May leave liability with uninsured defender

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Systematically harmful focus on individual clinicians

Who should  
we claim  
against?

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Scottish cases pre-Woodland

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McE v The Reverend Joaeph  
Hendron & Ors, [2007] CSIH 27

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JS v Lothian Health Board  
[2009] CSOH 97

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Campbell v Borders Health  
Board [2011] CSOH 73

# Bell v Alliance Medical Ltd [2015] CSOH 73

- Facts
  - Non-delegable duty on the part of the Health Board accepted
  - On the basis of Supreme Court case of Woodland
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# Woodland v Essex CC [2013] UKSC 66; [2014] AC 537

- Judgments issued by Lord Sumption and Lady Hale (who says she agrees with Lord Sumption).
  - Other three Justices agree with both.
  - Landmark judgment heralding a change in the law?
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- Lord Sumption Paras 7 and 23
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- “7. The second category of non-delegable duty is, however, directly in point. It comprises cases where the common law imposes a duty upon the defendant which has three critical characteristics. First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own. In these cases, the defendant is assuming a liability analogous to that assumed by a person who contracts to do work carefully. The contracting party will normally be taken to contract that the work will be done carefully by whomever he may get to do it: see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848 (Lord Diplock). The analogy with public services is often close, especially in the domain of hospital treatment in the National Health Service or education at a local education authority school, where only the absence of consideration distinguishes them from the private hospital or the fee-paying school performing the same functions under contract. In the law of tort, the same consequence follows where a statute imposes on the defendant personally a positive duty to perform some function or to carry out some operation, but he performs that duty by entrusting the work to some one else for whose proper performance he is legally responsible.”
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- 23. In my view, the time has come to recognise that Lord Greene in *Gold* and Denning LJ in *Cassidy* were correct in identifying the underlying principle, and while I would not necessarily subscribe to every dictum in the Australian cases, in my opinion they are broadly correct in their analysis of the factors that have given rise to non-delegable duties of care. If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features:
  - (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.”
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# Lady Hale

- “34 No-one in this case has seriously questioned that if a hospital patient is injured as a result of a nurse's carelessness it matters whether the nurse is employed by the hospital or by an agency; or if a pupil at school is injured by a teacher it matters whether the teacher is employed by the school or is self-employed. Yet these are not employees of the hospital or school, nor can it be said that their relationship with the school is "akin to employment" in the sense in which the relationship of the individual Christian Brothers to their Order was akin to employment in the case of *Various Claimants v Catholic Child Welfare Society and others* [2012] UKSC 56, [2013] 2 AC 1. The reason why the hospital or school is liable is that the hospital has undertaken to care for the patient, and the school has undertaken to teach the pupil, and that responsibility is not discharged simply by choosing apparently competent people to do it. The hospital or school remains personally responsible to see that care is taken in doing it.”
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# Use of Woodland in England

- Dentistry claims

- *Hughes v Rattan* [2021] EWHC 2023 (QB); [2021]. 181 BMLR 189; [2022] EWCA Civ 107; [2022] 1 WLR 1680

- *Pawley v Whitecross Dental Practice* [2021] EWCA Civ 1827; [2022] 1 WLR 2577.

Eggleton, *Dentists And Doctors: Aligning Rights of Action In Negligence Across The Medical Professions* (Case Comment), *Law Quarterly Review*, 139, 193-199.

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