

Non-delegable duties: Do they apply to prison healthcare?

Published 14 February 2018

Practice points

- The Ministry of Justice is not subject to a non-delegable duty in respect of the provision of healthcare to prisoners because it has no statutory duty to provide healthcare;
- Therefore it is not liable for alleged failures on the part of the healthcare provider;
- Whether a non-delegable duty applies will depend on close analysis of the underlying legal framework governing the provision of a service;
- Healthcare providers must ensure they have robust systems in place for the provision of follow-up appointments to patients who are imprisoned or in frequent short-term imprisonment.

Non-delegable duties

A non-delegable duty of care is a duty to ensure that care is taken by an agent or subcontractor. The concept came to prominence on the judgment of Lord Sumption in *Woodland v Essex County Council [2013] UKSC 66* which set out the criteria in which a non-delegable duty of care could be found. More recently the concept has been considered in *Armes v Nottinghamshire County Council [2017] 3 WLR 1000*, where a local authority was not found to have a non-delegable duty for foster carers.

Ever since the landmark decision in *Woodland*, Claimant groups have sought to expand the remit of non-delegable duties of care and/or vicarious liability in order to pursue a single or perhaps a more "attractive" entity (due to solvency and/or insurance arrangements).

In a judgment handed down on 12 February 2018, the High Court considers the potential liability of the Ministry of Justice for healthcare provided to prisoners, in the case of *Razumas v Ministry of Justice [2018] EWHC 215 (QB)*.

Razumas v Ministry of Justice

Mr Razumas was involved in a cyclical routine of offending and detention throughout the period of January 2011 to January 2013. Through various identified healthcare failings, his treatment for a soft tissue sarcoma to his left calf was delayed, resulting in the only treatment option being an above-knee amputation. The opportunity for less invasive treatment was lost due to the delay. Mr Razumas went on to develop a metastatic lesion which may also have been avoided and should a further lesion develop, his chance of survival will now be very slim.

Having first approached various healthcare providers for the prisons he was detained in, Mr Razumas decided to pursue the Ministry of Justice alone, alleging both a direct duty of care (an operational duty) and a non-delegable duty of care relating to the provision of healthcare.

Direct duty of care

It was held that the Ministry of Justice did owe Mr Razumas a direct duty of care, albeit the duty was more limited than he had contended and was limited to matters arising out of custody; including access to, but not the delivery of, healthcare.

Non-delegable duty of care

The Claimant argued that the Ministry of Justice owed him a non-delegable duty of care at common law because the five criteria set out by Lord Sumption in *Woodland* were established:

- i. The Claimant was a patient or for some other reason was particularly vulnerable or required the protection of the Defendant against the risk of injury. **He was a prisoner, dependent on the Ministry of Justice for protection against the risk of injury.**
- ii. There was a pre-existing relationship between the parties which placed the Claimant in the custody or care of the Defendant, such as gave rise to a positive duty to protect the Claimant from harm. **He was in the charge and under the**

control of the Ministry of Justice.

iii. The Claimant has no control over how the Defendant performed its obligations. He surrendered complete control over his healthcare and his involvement in his access to secondary care to the Ministry of Justice.

iv. The Defendant delegated to a third party some function which was an integral part of that positive duty. The various functions that failed were integral to the positive duties owed by the Ministry of Justice.

v. The third party was negligent in his performance of the function delegated to him by the Defendant.

The Claimant's arguments failed.

The focus of the Court's Judgment was on criteria iii and iv. The Ministry of Justice's duty was linked to matters of custody which did include access to healthcare but did not extend as far as the treatment itself. The Ministry of Justice had no statutory or common law duty to provide healthcare which was the responsibility of the PCTs and its subcontractors from at least 2003.

As the provision of healthcare was not a function of the duty owed by the Ministry of Justice, criteria iii was not established, it had no control over how medical treatment was delivered. The Ministry of Justice had also not outsourced healthcare, rather the NHS had outsourced its function to the relevant subcontractors and therefore criteria iv was also not established.

GB v Home Office (a case concerning immigration detention centres) was distinguished as the relevant statutory framework placed an obligation on the Ministry of Justice to ensure that each immigration detention centre had a medical practitioner in place. In *GB*, healthcare was a clear function of the Ministry of Justice's duty to patients and was therefore within its control.

The Claimant attempted to argue that a non-delegable duty should apply simply because it was fair, just and reasonable, but this also failed. Here, the Court preferred the rigor of the *Woodland* criteria to the softer policy-driven focus of "fair just and reasonable".

Conclusion

The root of the alleged non-delegable duty must be taken into consideration before it can be established. In *Razumas* there was a clear statutory framework showing that the positive duty to provide healthcare to prisoners passed from the Ministry of Justice to the NHS by 2006 at the latest. The statutory duty retained by the Ministry of Justice did not include the function which the Claimant argued it did, and therefore the *Woodland* criteria were not met, and there was no non-delegable duty of care.

Claimants are likely to continue to approach healthcare providers who are contracted to provide prison healthcare in the event of any alleged negligence. As the Ministry of Justice does not have a non-delegable duty of care it is important that healthcare providers ensure they have robust measures in place to ensure that follow-up appointments are communicated to patients who are imprisoned, or in frequent contact with the prison system (as Mr Razumas was).

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