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Particular Delicts

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We have now explored the legal rules that determine when a person can and cannot raise an action in the law of delict. Some delicts have names (nominate delicts), and these are the subject of this chapter. In many respects they follow the same rules as have already been discussed in the last two chapters.

Professional negligence

A professional person must attain the standard of care which would be expected of a reasonably competent member of his profession. This means that the standard will be higher than that expected of the ordinary man. If the professional person does not have the expected level of expertise or experience, yet gives the impression to the world that he does, he will be held to that higher standard in the event of an action for negligence being raised against him.

In order for a pursuer to succeed in an action for professional negligence he must show three things:

- 1 There was a normal practice for the profession; AND
- 2 The defender did not follow the normal practice; AND
- 3 The course followed by the defender would not have been followed by any other member of the profession of ordinary skill, acting with ordinary care.

The case of *Hunter v Hanley* 1955 S.C. 200 laid down these tests.

The facts of the case were as follows: the defender was giving the pursuer the 12th of a series of injections of penicillin when the hypodermic needle

snapped, causing injury to the pursuer. It was the pursuer's contention that the type of needle used was not strong enough, and that "any doctor possessing a fair and average knowledge of his profession would have known this."

In order to succeed, the pursuer must establish all three parts; failure to prove any one dooms the case.

Liability for the delicts of others

The normal rule is that a person is liable for his own delicts and cannot usually be made liable for the delicts of others. There are exceptions:

■ **Joint and several liability**

This will arise where two or more people are responsible for the same delict (joint wrongdoers). In this situation, the pursuer can choose which of several defenders to sue, or the pursuer can sue them all. The court can apportion damages between the parties, according to liability, and defenders who have been successfully sued may be able to recover damages from the others. This statutory rule is found in s.3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

■ **Vicarious liability**

In some, limited, circumstances, when one person commits a delict, liability can be imposed on someone who was not involved and is, therefore, not at fault. The actual perpetrator is jointly and severally liable with the person who is vicariously liable. (Vicarious means in place of another.) There are some public policy justifications for vicarious liability, as will be seen. While the party who is found liable vicariously for the delict of another person can pursue a remedy against that person, generally this does not happen, as often a claim can be made on insurance.

It is important to note that parents are not vicariously liable for the delicts of their children, but may be found to have exercised insufficient control over them, resulting in harm to others, and this can give rise to legal claims in the law of delict against the parents, whose liability is direct and not vicarious.

There are three relationships where vicarious liability may arise:

Principal and agent

As will be seen in Chapter 11, an agency relationship comes into being where one person is authorised to act for another. A principal will be vicariously liable for the delicts of his agent where he expressly authorised the act in question, or where the agent was acting within the scope of his implied authority. If the delict happens in neither of these situations, the agent will be personally liable.

Independent contractors

The general rule is that a person is *not* vicariously liable for the actions of an independent contractor he has hired. However, if the person engaging the independent contractor has full control of what the contractor does, and how he does it, then that 'employer' may incur vicarious liability, and the case law suggests that a person who commissions work from an independent contractor may have vicarious liability, if the work involves extra-hazardous acts.

Employers and employees

Employers are generally liable for the delicts of their employees, if the pursuer can establish two things:

- 1 The relationship between the person who committed the delict and the defender is genuinely that of employer and employee. In some situations it may not be clear if the wrongdoer is an employee or an independent contractor, and the courts will apply an objective test to determine the reality. The names the parties use to describe their relationship are not conclusive. If an employee has been seconded to another employer on a temporary basis, the original employer will remain vicariously liable, unless it can be shown that full control of the employee has passed to the new employer.
- 2 The delict was committed during the course of the employee's employment. The words 'course of employment' can be widely interpreted. The employee will be acting in the course of his employment if he doing work he is authorised to do, even if he is doing it in an unauthorised or prohibited way. A case which illustrates this is *Rose v Plenty* [1976] 1 All E.R. 97.