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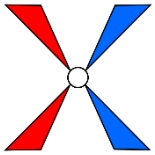

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, as the surgeon had died by the time of the trial. The operation carried with it a 1% risk of damage to the spinal cord and a 1-2% risk of damage to the nerve roots. The surgeon had apparently told the plaintiff about the risk of damage to the nerve roots but not of that to the spinal cord. The operation was carried out without negligence by the surgeon but the plaintiff was severely disabled as a result of damage to her spinal cord. Sidaway v Board of Governors of the Bethlem Royal Hospital [1985] AC 871 The House of Lords held that the surgeon had followed approved practice of neuro-surgeons in not disclosing the risk of damage to the spinal cord and was not negligent. The majority of the House (Lord Scarman dissenting) was prepared to accept a modified version of the Bolam test for the giving of information. The major modification was that where the judge thought that disclosure of a particular risk was obviously necessary but it was not medical pactice to disclose, then following standard practice would not avoid liability. The example given was a 10% risk of a stroke. If medical practice was not to disclose the risk, then a court would probably declare practice to be wrong. Lord Scarman rejected current medical practice as the test for what a patient needs to know and asserted the patient's right to know based on self-determination. He thought the doctor should be liable where the risk is such that a prudent person, in the patient's position, would have regarded it as significant. A doctor would have a defence of therapeutic privilege, if disclosure would have posed a serious threat of psychological detriment to the patient. The position where the patient specifically asks questions is not clear. In Sidaway, Lord Bridge said there was a duty to answer as truthfully and fully as the questioner requires. However, in Blyth v Bloomsbury Health Authority (1987), the Court of Appeal said there was no duty to pass on all the information available to the hospital. The reply would be satisfactory if it conformed to standard practice. Finally, it should be noted, that even if the plaintiff manages to overcome the hurdle of proving a duty existed to give him the information, he must still establish **causation**. This requires him to prove that if the information had been given, his decision as to treatment would have been different. **Causation** **The plaintiff** must prove that **his damage** would not have occurred, but for the defendant's breach of duty. (See "**Causation** and remoteness", p. 73.) In practice, medical negligence cases present problems in **causation**, as medical science may not be able to identify

the precise cause **of** **the plaintiff's damage**

. **The plaintiff** was born three months prematurely. **He** suffered from retrolental fibroplasia (RLF). This is an incurable condition of the retina which caused almost total blindness. **He** sued the defendants on the ground that **his RLF** **was caused by an excess of oxygen in his bloodstream**, **due to lack of proper skill and care in the management of his oxygen supply**. The first allegation was that **a misplaced catheter gave misleading readings of oxygen pressure**. The trial judge found this amounted to negligence. The second allegation was that **medical staff allowed the oxygen level to remain above the accepted safety level**. The trial judge relied on the causation test in McGhee v NCB (1973). Wilsher v Essex Area Health Authority

	[1988] 1 All ER 871 The House of Lords allowed the defendant's appeal with the result that the case had to go back for a retrial eleven years after the plaintiff had suffered damage. The problem was in the conflict of medical evidence as to the cause of RLF. It can be caused by a high level of oxygen in premature babies, but it can occur without artificial administration of oxygen. The trial judge had found that the plaintiff's exposure to high levels of oxygen had materially increased the risk of suffering RLF and the defendants had to show on the balance of probabilities that the exposure did not cause the RLF. The House of Lords held that the onus of proving causation lies on the plaintiff. Where the plaintiff is unable to establish what the cause of his injuries was, then the action will fail. Torts Based on Land 15 Trespass to land INTRODUCTION Trespass to land is an unjustifiable interference with the possession of land. It is important to note that, for historical reasons, the tort is committed against possession and not ownership of land. As this is a form of trespass the injury must be direct rather than consequential. The latter form of interference may give rise to liability in nuisance. The captain of an oil tanker ran the ship aground and in order to save the ship and the crew large quantities of oil were discharged. The oil was carried by the tide onto the shore. The court held that necessity was a defence to the claim in trespass and nuisance. Two judges in the House of Lords thought that the damage was consequential, not direct, and therefore not capable of constituting a trespass. Esso Petroleum Co Ltd v Southport Corporation [1956] AC 218 The tort is actionable per se and the plaintiff need not show any damage to the land as a result of the defendant's act. The remedy sought will in any case often be an injunction to prevent any repetition of