Journal of Contemporary Health Law & Policy (1985-2015)

Volume 10 | Issue 1 Article 15

1994

Liability of Medical Institutions for the Negligence of Independent Contractors Practicing on Their Premises

John Dwight Ingram

LIABILITY OF MEDICAL INSTITUTIONS FOR THE NEGLIGENCE OF INDEPENDENT CONTRACTORS PRACTICING ON THEIR PREMISES

*John Dwight Ingram**

I. HISTORY OF LIABILITY OF HOSPITALS[1]

Traditionally, hospitals were immune from suit under the doctrine of charitable immunity.[2] They were immune because they were charitable organizations and provided care to the community. The "public and private donations that supported the . . . hospital constituted a trust fund which could not be diverted."[3] Two reasons were usually advanced to support the rule of nonliability of a charitable hospital for the negligence of its physicians and nurses in the treatment of patients.[4] First, "[o]ne who seeks and accepts charity must be deemed to have waived any right to damages for injuries suffered through the negligence of his benefactor's servants."[5] Second, the doctrine of *respondeat superior* did not apply because medical professionals, "even though employed by the hospital, . . . were . . . independent contractors rather than employees because of [their] skill . . . and the [hospital's] lack of control . . . over their work."[6]

---

* A.B., 1950 Harvard University; J.D., 1966, John Marshall Law School; Professor of Law, John Marshall Law School.

The valuable assistance of my very capable Research Assistants, Christina Lazich Anderson, Heather McArdle Brooks, and Patricia Ann Holland is gratefully acknowledged.

1. In the interest of brevity and convenience I will use the word "hospital" throughout this article as a generic word including all institutional health care providers, such as nursing and retirement homes, health maintenance organizations (HMOs), and preferred provider organizations (PPOs).

2. Powers v. Massachusetts Homeopathic Hosp., 109 F. 294, 295 (1st Cir.), *cert. denied*, 183 U.S. 695 (1901); Evans v. Lawrence & Mem. Associated Hosp., 50 A.2d 443, 444 (Conn. 1946).

3. Bing v. Thunig, 143 N.E.2d 3, 5 (N.Y. 1957).

4. *Id.*

5. *Id.* This basis was questionable because, as the court noted, the rule also included paying patients and private profit-making hospitals. *Id.* at 5-6.

6. *Id.* at 6. This basis was also questionable because, as the *Bing* court pointed out,

The protection of charitable immunity for hospitals began to disappear in the middle of this century. As the New York Court of Appeals stated in *Bing v. Thunig*[7] in 1957, "[p]resent-day hospitals . . . do far more than furnish facilities for treatment."[8] They employ professionals and a variety of others and "charge patients for medical care and treatment."[9] Those who avail themselves of the facilities of a hospital look to the *hospital* for treatment, and do not expect hospital employees to act on their own.[10] The court concluded that the rule of nonliability for hospitals was "out of tune with the life about us . . . [and] should be discarded."[11]

With the demise of charitable immunity for hospitals, liability could be imposed on the basis of either *respondeat superior* (vicarious, indirect liability) or "corporate negligence" (direct liability). Liability based on *respondeat superior* makes a hospital liable for the negligent acts of its agents/servants/employees acting within the scope of their employment.[12] The "corporate negligence" basis for liability is that the hospital owes a duty of care to its patients in the selection and supervision of both employees and independent contractors who provide medical treatment in the hospital.[13]

The traditional justification for imposing vicarious liability on employers was that the employers had the right to control the method by which the work was done, and should therefore ensure that the work was being done carefully and properly.[14] The corollary of this was that one who employed an "independent contractor," as to whom the employer exercised control only with regard to the *result* to be achieved and not the

---

respondeat superior was generally applied to such highly skilled employees "as airplane pilots, locomotive engineers, [and] chemists." *Id.*

7. 143 N.E.2d 3 (N.Y. 1957).

8. *Id.* at 8.

9. *Id.*

10. *Id.*

11. *Id.* at 9. While the court was undoubtedly giving proper recognition to changes in medical practice and in societal attitudes, it is quite likely that the court was also motivated by the increasing desire to find a "deeper pocket" from which to compensate those injured by medical malpractice. G. Keith Phoenix & Anne L. Schlueter, *Hospital Liability for the Acts of Independent Contractors: The Ostensible Agency Doctrine*, 30 ST. LOUIS U. L.J. 875, 877 n.18 (1986).

12. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 501 (5th ed. 1984).

13. *See generally* Mitchell County Hosp. Auth. v. Joiner, 189 S.E.2d 412 (Ga. 1972) (hospital is liable for negligence if it allows physician staff privileges when it knows or should know physician is incompetent); Darling v. Charleston Community Mem. Hosp., 211 N.E.2d 253 (Ill. 1965), *cert. denied*, 383 U.S. 946 (1966).

14. KEETON ET AL., *supra* note 12, at 500.

method of achieving it, would not be vicariously liable for the negligent acts of the independent contractor.[15] Because physicians exercise professional skills and discretion, and are usually not subject to any control by hospital administrators as to their methods, they were generally held to be independent contractors for whose negligent acts the hospital incurred no vicarious liability.[16]

II. Apparent Agency

During the second half of the twentieth Century dramatic changes have occurred in the health care industry. What once was impossible or at least miraculous has become commonplace and almost mundane. Society's attitude toward the health care industry has changed concurrently, and the increased emphasis on "consumerism"[17] has led to increased demands by patients for extraordinary, if not perfect, results from the performance of medical professionals. In order to reduce their potential liability for negligent treatment, many hospitals have entered into contracts with non-employee physicians to supply some services to patients that had previously been supplied by salaried employees of the hospital.[18] The departments where this has most commonly taken place are radiology, pathology, clinical laboratories, and emergency room.[19]

Most of these hospital-physician contracts expressly state that the physician is an independent contractor, and in fact he[20] usually is, since he does not receive a salary and the hospital has no right to control the *method* of providing his professional services. Despite the actuality of the relationship, many courts in recent years have held hospitals liable for the negligence of non-salaried physicians where a patient would reasonably

15. *Id.* at 509.

16. *See* Runyan v. Goodrum, 228 S.W. 397, 400 (Ark. 1921) (applying independent status to X-ray specialist hired by physicians and surgeons); *see also* William C. Anderson, III & Marilee Clausing, *The Expansion of Hospital Liability in Illinois: The Use and Abuse of Apparent Agency*, 19 Loy. U. L.J. 1197, 1205-06 (1988).

17. "Consumerism" is encouraged by Ralph Nader and others.

18. Reducing potential liability is not the only reason, though it is perhaps the most important one. Other reasons include reduction of administrative expenses, tax and financial advantages for the physicians, and the desire for increased professional control by the physicians.

19. H. Ward Classen, *Hospital Liability for Independent Contractors: Where Do We Go From Here?*, 40 Ark. L. Rev. 469, 471 n.7 (1987).

20. When the gender for a personal pronoun could be either male or female, I use the masculine pronoun generically, due to habit and my masculine personal orientation. By doing so I avoid the rather awkward "he or she" and the grammatically incorrect "they." I trust that female authors will balance the scales on the other side.

believe that the physician was subject to the control of the hospital, and the patient relied on such an appearance created by the hospital.[21] These courts are applying the long-established theory of apparent (or ostensible) authority, sometimes called agency by estoppel.[22]

The elements which most courts have required are:

> 1) the patient must reasonably believe that the nonemployee physician is operating under the hospital's authority; 2) this mistaken belief must have been generated by the hospital's act or omission; and 3) the patient must have relied upon this representation. If these elements are satisfied, the hospital is estopped from denying that the physician was its agent.[23]

Courts that apply the theory of ostensible agency to the hospital situation recognize that patients frequently enter a hospital to receive care and treatment from the hospital as an institution, and often do not know or seek to know the identity or status of the medical professionals who will supply that treatment.

Most courts that have considered this issue in recent years have held "that independent contractor status of a particular treating physician is not a bar to the hospital's liability for malpractice."[24] There are still some, however, which continue to focus on the lack of control of hospital over physician, and believe that the "independent relationship . . . militates strongly against extension of a hospital's vicarious liability to physicians who are not actual agents or employees of the hospital."[25]

---

21. Northern Trust Co. v. Saint Francis Hosp., 522 N.E.2d 699, 704 (Ill. App. Ct. 1988).

22. As I will discuss in Part III *infra*, apparent agency and agency by estoppel are not identical. Apparent or ostensible agency does not require a causal relationship between the principal's conduct and the third party's reliance, and may not even require *any* reliance. For there to be agency by estoppel, the third party must not only rely on the appearance created by the principal but must also change his position to his detriment.

23. Claire G. Combs, *Hospital Vicarious Liability for the Negligence of Independent Contractors and Staff Physicians: Criticisms of Ostensible Agency Doctrine in Ohio*, 56 U. CIN. L. REV. 711, 714-15 (1987).

24. Martell v. Saint Charles Hosp., 523 N.Y.S.2d 342, 350 (Sup. Ct. 1987) (citing cases from 16 jurisdictions standing for the cited proposition).

25. Gilbert v. Frank, 599 N.E.2d 143, 148 (Ill. App. Ct. 1992). *See also* Hale v. Sheikholeslam, 724 F.2d 1205, 1207-08 (5th Cir. 1984); Banks v. Saint Mary's Hosp. & Medical Ctr., 558 F. Supp. 1334, 1338 (D. Colo. 1983); Stewart v. Midani, 525 F. Supp. 843 (N.D. Ga. 1981); Badeaux v. East Jefferson Gen. Hosp., 364 So. 2d 1348, 1351 (La. Ct. App. 1978); Rucker v. High Point Mem. Hosp., 202 S.E.2d 610, 617 (N.C. Ct. App. 1974), *aff'd*, 206 S.E.2d 196 (N.C. 1974); Berarducci v. Rhode Island Hosp., 459 A.2d 963, 964 (R.I. 1983).

III. Agency by Estoppel: Reliance on What?

A. Patient Would Have Refused Treatment

Courts that apply estoppel in the traditional way require that the plaintiff plead and prove that, had he known that the physician treating him was an independent contractor and not an agent or employee of the hospital, he would have refused treatment by the physician and/or sought treatment elsewhere.[26] As the Ohio Supreme Court stated in *Albain v. Flower Hospital*,[27] under a strict view of agency by estoppel, "the question is whether the plaintiff relied on the ostensible agency relationship, *not* whether the plaintiff relied on the reputation of the hospital."[28] The court further pointed out that patients usually rely on the reputation of the hospital and the presumed skills of its physicians, rather than their employment status.[29] This is especially true in emergency situations, where there is no opportunity for informed choice or "shopping around," and the choice of hospital and physicians is often not even made by the patient himself.[30] In jurisdictions using this approach, the hospital will not be held vicariously liable unless there is evidence that the patient would have refused care and treatment by the physician if the patient had known the physician was not an employee of the hospital.[31]

There are several serious flaws in the use of this approach to agency by estoppel. In most cases patients neither know nor care whether physicians providing medical services in a hospital are employees or independent contractors. It would be a rare case if a patient actually refused treatment by a physician because of his employment status. In fact, some patients probably *know* that in most hospitals today the radiologists, anesthesiologists, pathologists, emergency room physicians, and probably others are independent contractors. These patients would thus be barred from claiming reliance on any appearance of an employer-employee relationship.[32]

26. Sztorc v. Northwest Hosp., 496 N.E.2d 1200, 1202 (Ill. App. Ct. 1986) (considering whether plaintiff would have acted differently if she'd known radiologists were independent contractors); Gasbarra v. Saint James Hosp., 406 N.E.2d 544, 555 (Ill. App. Ct. 1979) (plaintiff may have relied on appearance of emergency room doctors being agents of hospital, but it did not appear that she would have taken any other action had she been informed that emergency room doctors were not employees of hospital).

27. 553 N.E.2d 1038 (Ohio 1990).

28. *Id.* at 1049-50.

29. *Id.* at 1050 n.12.

30. *Id.*

31. *See id.* at 1050.

32. Martell v. Saint Charles Hosp., 523 N.Y.S.2d 342, 351 (Sup. Ct. 1987).

It is well known among attorneys who practice in the medical malpractice field that a plaintiff who has been well prepared for a deposition or trial will "routinely testify . . . that had [he] known a certain physician was not the agent or employee of the defendant hospital, [he] would have gone elsewhere for [his] care."[33] While this testimony may be believed in some cases and result in vicarious liability for the hospital defendant, the credibility of such testimony should be seriously doubted. The patient needed treatment. He went to the particular hospital either because his personal physician sent him there for tests or treatment, or because it was an emergency. If he had refused treatment by a physician because that physician was an independent contractor, where would he have gone? It is highly probable that a physician providing the same services at any other hospital in the vicinity would also be an independent contractor.[34]

In jurisdictions applying this strict test for agency by estoppel, the hospital will avoid vicarious liability in all cases except those few where the former patient is a very well prepared and convincing liar. Use of this test simply ignores the realities of the usual patient-physician-hospital relationships in the contemporary world of health care.

B. Patient Relied on the Hospital's Reputation

Most courts that hold hospitals vicariously liable for the negligence of physicians, who are in fact independent contractors but who appear to the patient to be agents or employees of the hospital, do not require any action or inaction by the patient in reliance on the apparent employment status. Unless the hospital informs the patient of the absence of an employer-employee relationship with certain physicians, or the patient otherwise knows that there is no such relationship,[35] the patient may reasonably assume that all physicians providing treatment in the hospital are under the supervision and control of the hospital.[36] Except for care and treatment provided by a patient's personal physician, or by a surgeon or specialist as to whom the patient has made a specific choice,[37] most pa-

33. Anderson & Clausing, *supra* note 16, at 1226.

34. *Id.* at 1226-27.

35. Stewart v. Midani, 525 F. Supp. 843, 853 (N.D. Ga. 1981).

36. One can hardly imagine a hospital announcing that some or all of its physicians are completely independent contractors, and that it does not supervise or take responsibility for their performance in any way! Gamble v. United States, 648 F. Supp. 438, 442 (N.D. Ohio 1986).

37. *See, e.g.*, Weldon v. Seminole Mun. Hosp., 709 P.2d 1058, 1060 (Okla. 1985). In such case, the hospital is merely the situs of treatment by a personally selected physician. The patient does not look to the hospital to provide the treatment.

tients consider themselves to be patients of the hospital itself. They rely on the hospital to select and supervise competent physicians to provide every medical service the patient needs.[38]

In their advertising, public relations, fund-raising campaigns and the like, hospitals hold themselves out as highly qualified and trustworthy providers of a wide range of medical care. Patients who use hospital facilities assume "that the hospital exerts some measure of control over the medical activities taking place there."[39] "It would be absurd to require . . . a patient to be familiar with the law of respondeat superior and so to inquire of each person who treated him whether he is an employee of the hospital or an independent contractor."[40]

Except for those patients who have a pre-existing physician-patient relationship, almost all patients enter the hospital through the emergency room. They seek treatment from the hospital itself, as an institution.[41] Even those patients who enter the hospital to be treated by their personal physician or a chosen specialist will presumably receive some medical services from physicians whose names they will not know until they receive the bill.[42]

IV. Why Require Reliance at All?

If reliance by the patient on the appearance of an employer-employee relationship between hospital and physician is required, there will be a high percentage of cases in which the hospital will not be held vicariously liable. When the services of medical personnel such as radiologists, anesthesiologists, and pathologists are used, the patient usually never sees the physician at all. In the emergency room, patients are often unconscious or under great stress when they arrive, and are unlikely to have any real awareness of how or by whom they are being treated.[43] Some courts have responded in recent years by applying the "enterprise theory" of vicarious liability to hospitals.

---

38. *See, e.g.*, Whitlow v. Good Samaritan Hosp., 536 N.E.2d 659, 663 (Ohio Ct. App. 1987).

39. Gamble v. United States, 648 F. Supp. 438, 442 (N.D. Ohio 1986).

40. Capan v. Divine Providence Hosp., 430 A.2d 647, 649 (Pa. Super. Ct. 1980).

41. Grewe v. Mount Clemens Gen. Hosp., 273 N.W.2d 429, 435 (Mich. 1978); *see generally*, Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256-57 (Ky. 1985) (citing several cases applying ostensible agency to emergency room physicians).

42. *See, e.g.*, Stratso v. Song, 477 N.E.2d 1176, 1185-86 (Ohio Ct. App. 1984)(anesthesiologist).

43. *See, e.g.*, Walker v. Winchester Mem. Hosp., 585 F. Supp. 1328, 1331 (W.D. Va. 1984); Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255 (Ky. 1985).

Under the "enterprise theory," the risk of loss for injuries caused by those acting on behalf of and for the benefit of the "enterprise" is allocated to the "enterprise" itself. The enterprise treats these costs as part of the cost of doing business, and is in the best position to distribute the costs as part of its charges to its customers.[44]

In *Hardy v. Brantley*,[45] the court applied the following approach to the vicarious liability of a hospital:

> Hospitals hold themselves out to the public as offering and rendering quality health care services. . . . If they do their job well, the hospital succeeds in its chosen mission, profiting financially and otherwise from the quality of emergency care so delivered. On such facts, anomaly would attend the hospital's escape from liability where the quality of care so delivered was below minimally acceptable standards. All of this is surely so whether the high or low quality of emergency care is delivered by physician, nurse, paramedic or any other person engaged by the hospital.[46]

In *Jackson v. Power*,[47] the Supreme Court of Alaska held that an acute care hospital "has a non-delegable duty to provide non-negligent physician care in its emergency room."[48] Similarly, the Kentucky Supreme Court held, in *Paintsville Hospital Corp. v. Rose*,[49] that "the operation of a hospital emergency room open to the public, where the public comes expecting medical care to be provided through normal operating procedures within the hospital, falls within the limits for application of the principles of ostensible agency and apparent authority."[50] And, much to the dismay of the three dissenting judges, the majority opinion did not discuss reliance at all. In the view of the dissent, "[t]he majority opinion, . . . without expressly saying so, . . . abolishes reliance upon the alleged ostensible agency as a necessary prerequisite to the imposition of liability upon the ostensible principal."[51]

---

44. Stewart v. Midani, 525 F. Supp. 843, 849-50 (N.D. Ga. 1981) (citing WILLIAM L. PROSSER, THE LAW OF TORTS § 69, at 459 (4th ed. 1971) and FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 26.1 (1956)).

45. 471 So. 2d 358 (Miss. 1985).

46. *Id.* at 371.

47. 743 P.2d 1376 (Alaska 1987).

48. *Id.* at 1385. *But see* Albain v. Flower Hosp., 553 N.E.2d 1038, 1048 (Ohio 1990) (expressly rejecting the existence of any "nondelegable duty to assure the absence of negligence in the medical care provided by private independent physicians granted staff privileges by the hospital").

49. 683 S.W.2d 255 (Ky. 1985).

50. *Id.* at 258.

51. *Id.* at 260 (Vance, J., dissenting).

V. Hospital Can Be Indemnified by Physician

It is unrealistic to believe that hospitals can effectively inform their patients of the independent contractor status of most of the physicians rendering services to patients in the hospital.[52] Many patients, because of their presently impaired physical or mental condition and their limited ability to comprehend and understand sophisticated legal concepts, cannot be deemed to have made an informed choice to look only to the physician for compensation in the event of negligent treatment.[53] It is, therefore, entirely reasonable to put the hospital in the position of guarantor by imposing upon the hospital vicarious liability for the negligence of any physician providing services in the hospital if that physician appears to the public to be an agent or employee subject to some control or supervision by the hospital.

Nonemployee physicians providing medical services in the hospital have a contractual relationship with the hospital. As such, the parties are free to make any agreement they wish between themselves.[54] In addition to its common law right to indemnification when held vicariously liable, the hospital can provide in its nonemployee physician contracts that the physician will defend, indemnify and hold the hospital harmless from all claims and liabilities resulting from the physician's negligence.[55] To be sure that this right of indemnification will effectively shield the hospital from financial loss, the hospital should require that every physician have professional liability insurance with appropriately high limits,[56] and that the hospital be included as an additional insured.[57]

VI. Conclusion

A hospital should not be able to use contractual arrangements to insulate itself from liability for acts of medical malpractice committed upon its premises by physicians who appear to be agents or employees of the hospital.[58] Most hospitals present themselves to the public as "full ser-

52. For what I consider to be rather naive and unrealistic suggestions of steps a hospital could take to inform its patients, see Phoenix & Schlueter, *supra* note 11, at 890-91.

53. Classen, *supra* note 19, at 498.

54. Hardy v. Brantley, 471 So. 2d 358, 369 (Miss. 1985).

55. *Id.* at 362, 369; Arthur v. Saint Peters Hosp., 405 A.2d 443, 446 n.4 (N.J. Super. Ct. Law Div. 1979).

56. *Hardy*, 471 So. 2d at 362.

57. In some cases it might be more effective for the hospital to obtain insurance for itself and all its physicians on a group basis. The cost of this insurance could then be allocated to the physician as part of the overall contractual arrangement.

58. *See* Hannola v. City of Lakewood, 426 N.E.2d 1187, 1190 (Ohio Ct. App. 1980).

vice health care facilit[ies] . . . committed to excellence."[59] They seldom attempt to inform patients of the employment status of their physicians, nor is it likely they could do so effectively.[60] Because hospitals invite the public to rely on their competence in the provision of health care, it seems eminently fair to allow the public also to rely on the hospital as a guarantor of compensation if something goes wrong. The hospital will be entitled to indemnification from a negligent physician, and the ultimate economic burden will fall, as it should, on the person who was at fault. In this way, users of medical services will be better protected against the losses resulting from medical malpractice, with minimal ultimate expense to the hospital.[61] The hospital can readily reduce or eliminate its exposure to claims by carefully selecting and supervising all physicians who provide services in the hospital, and requiring that they are financially responsible.

59. Phoenix & Schlueter, *supra* note 11, at 887.

60. *Id.*; *see also supra* notes 44-52 and accompanying text.

61. The only ultimate cost to the hospital would be the occasional case where the physician's insurance and personal assets were insufficient to pay a negligence claim.