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WHEN SHOULD HOSPITALS BE RESPONSIBLE?

State judges take differing view of vicarious liability claims

By ELLIOTT B. POLLACK

Connecticut has never promulgated rules about the vicarious tort liability of hospitals for the actions of hospital-based physicians. Recent decisions from the Hartford and Stamford Superior Courts addressed the issue yet again.

Most, if not all, Connecticut hospitals have developed exclusive arrangements with a subset of specialists whose essential services are required within the hospital, frequently on a 365/24 basis, and whose practice patterns are not conducive to the hospital dealing with multiple independent practitioners. For example, it is fairly typical for radiology, anesthesiology, pathology and emergency departments to each be staffed by members of one practice group. At the same time, hospitals adopt rules barring any physician, other than members of the group, from rendering the same services within the hospital.

Among the many reasons for this phenomenon is the difficulty of permitting economic competitors to jockey for time and patients within the same narrow physical practice space. For example, the need to provide around-the-clock anesthesiology services might create access and scheduling conflicts in operating suites if competing groups were permitted to render services.

As a result, American hospitals have created monopolies of sorts for physicians in these practice areas. Not surprisingly, patients who assert negligence on the part of one of these physicians often perceive that they are not independent of the hospital as, for example, their personally selected surgeon.

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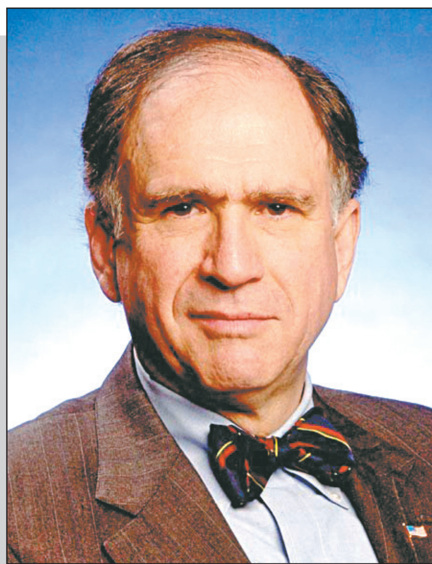

Predictably, patients alleging injuries caused by hospital-based caregivers also started filing claims against the hospital within which the services were rendered. The basis of these claims often is that the conduct of the pathologist or the emergency room physician caregiver imposed liability on the hospital based on an implied or express agency relationship.

Two decisions rendered within 30 days of each other by judges sitting in the Hartford and Stamford Superior Courts afford rather different insights into how our trial judges react to this claim, one that has not been conclusively addressed by the Supreme Court.

Tripartite Test

In the Hartford ruling decided in December, Judge Joseph M. Shortall was asked by Charlotte Hungerford Hospital in Torrington to reject a vicarious liability claim against it flowing from the allegedly negligent actions of an emergency department physician.

While not employed by it, the physician in *Joh v. Schmidt* was contractually bound to Charlotte Hungerford, through his professional corporation, to treat emergency room patients. Arguing that Connecticut does not recognize a claim of "apparent agency" as a basis for vicarious tort liability, the hospital also maintained that if such a claim were to be recognized, the plaintiff could not establish that his relative relied on the physician as the hospital's agent when he was brought there by ambulance in 2005, the day before he died.

Turning to a 1983 Supreme Court holding having nothing to do with health care, Judge Shortall relied on *Beckenstein v. Potter & Carrier Inc.*, which establishes a tripartite test for agency under Connecticut law. First, the principal must indicate that the agent is to act for it. Secondly, the agent must accept the undertaking. And finally, the principal and agent must agree that the principal "will be in control of the undertaking."

Reviewing the emergency services contract between Charlotte Hungerford and the physicians' professional corporation, the court found that the first two tests were satisfied and easily so. As to the question of control, the court eloquently noted: "As is true of all products of a negotiation, there is something for everyone in the contract."

Contrasting the contract in *Beckenstein*, which dealt with the purchase of roofing materials, Judge Shortall commented on the complexity of "a continuing undertaking between the hospital and the [physicians'] corporation by which the [hospital's] work of evaluating and treating emergency department patients was to be carried out by the [professional corporation] under the

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hospital's supervision and monitoring."

Expressing doubt as to the degree of control exercised by the hospital over an individual physician's performance of clinical duties in its emergency room, the court denied the summary judgment motion. It relied on the rule that this must be the outcome when "there is a genuine issue as to [material] fact . . ." Notwithstanding, a close reading of this decision makes one wonder if the plaintiff could expect to obtain a favorable jury charge on the control issue.

Guidance From Alaska

The Stamford case, decided by Judge Kevin Tierney on Jan. 18, involved a malpractice claim against a radiologist.

The case took a different analytical approach, with the court not ruling on the merits and ultimately denying the hospital permission to pursue its summary judgment motion for procedural reasons. In the course of its discussion of the hospital's position, the Stamford court examined an Alaska decision which upheld a vicarious liability claim against a hospital for the actions of its emergency room physician.

In *Jackson v. Power*, the 1987 Alaska Supreme Court ruling, the vicarious liability claim was based on enterprise liability, non-delegable duty and apparent authority. The ruling relied on the hospital's inability to legally delegate its duty to maintain an emergency room. Anyone who performed the function, the court concluded, would also have to render the hospital vicariously liable for negligence.

Judge Tierney distinguished the Alaska ruling from the facts presented by the plaintiff in *Steward v. Stamford Radiological Associates P.C.* The plaintiff had not established that Stamford Hospital had an obligation to offer hospital-based radiological services, the court commented, noting that the federal mandate relating to emergency room services is more specific than that dealing with radiology services.

Believing that it was necessary, at trial, for testimony concerning a host of regulatory requirements to be the subject of further evidence thereby possibly, again, creating an issue about material facts, Judge Tierney denied the hospital the opportunity to proceed on its summary judgment motion. He did not refer to *Beckenstein* or to the control issue which tripped up Charlotte Hungerford's effort to terminate that case.

It remains to be seen whether the *Beckenstein* agency test is proper to apply in vicarious liability claims against hospitals. Of course, it is the physicians who practice medicine and it is only they who must make the necessary clinical judgments to treat patients.

Whatever the exclusive contractual relationship between a physician corporation and the hospital may be, the patient appearing at the hospital has no choice but to accept care from those selected by the hospital to do so. This should be enough, in the author's view, to impose vicarious liability on the hospital irrespective of the improbability of satisfying the control prong of the *Beckenstein* test.

The immediate lesson to be drawn is that in limiting patients' choice of physician in these specialties, hospitals can expect to be asked to explain to Connecticut's courts why they should not also be held to answer in damages when their designated providers have committed malpractice. ■