



HOSPITAL AGENCY FOR NON-EMPLOYEE NEGLIGENCE

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With the advent of managed care and a constantly changing ownership structure for many health care providers, it is difficult to know who should be included as a defendant in a medical negligence case. In years past, it could be safely assumed that most non-physician providers were employees of the institution where the care was provided. Physicians, on the other hand, could be either independent contractors or employees. Thus, in a case involving claims of nursing negligence, you could safely name the hospital or clinic as a defendant and use the doctrine of respondeat superior.

If the claim involved negligence of a physician, such as a radiologist or anesthesiologist, you might sue both the physician and the hospital, using the doctrine of agency to impose liability on the hospital. If the care occurred at a clinic, you might determine if the clinic was a partnership or corporation and, if the latter, include it as a respondeat superior defendant as well.

The landscape is now much more obscure, and the attorney handling a medical negligence claim must carefully evaluate the status of the providers involved in the negligent care. In many cases, hospitals have purchased entire clinics, so that a physician employed

at the clinic is actually an employee of a hospital, and the hospital may be located in another city. An example are previously independent clinics throughout Western Washington that have been acquired by Virginia Mason Medical Center.

If the hospital is a public hospital district, the physician may actually be an employee of the governmental entity, thus triggering the strict statutory tort claims procedures. Stevens Hospital (a/k/a Snohomish County Public Hospital District No. 2) recently acquired the practices of a number of primary care physicians who now operate as the "Stevens Health Network." Although there seems to be confusion about the physicians' employment status, they receive paychecks from the Hospital District so presumably are employees of the District.

Some institutions have "contracted out" entire departments, such as radiology, so that non-physician staff are employed by another entity, and the radiologists may be independent contractors. In other cases, an employee of one entity may be "loaned" to yet another entity, obscuring which entity is the employer and thus liable under respondeat superior. In some cases, the physicians may be employed by a separate corporation, which then contracts with a clinic or HMO to provide medical services.

If there is enough time before a statute of limitations expires, a lawsuit

can be brought against at least one clearly-determined defendant, and then discovery can occur to sort out the role and status of each of the providers who may have been negligent. In many cases, however, there is not enough time to conduct such discovery or there are delays in responding to discovery that create traps for the plaintiff's attorney. Two ways to avoid the traps are, first, to name as a defendant every individual provider who was involved in the care (assuming they can be readily identified from the medical records, which often is not the case) or, second, to rely on the doctrine of agency to hold the "parent" institution responsible for each providers' negligent care, regardless of actual employment or contractual relationship.

The leading case on hospital agency is Adamski v. Tacoma General Hospital, 20 Wn. App. 98, 112, 579 P.2d 970 (1978). Adamski is most often cited for the principle that a physician may be an ostensible agent of a hospital, but the case also established that a hospital may be vicariously liable for a physician's negligence when the facts and circumstances of their relationship show that it is one of actual principal and agent, despite efforts by the hospital to characterize the physician as an independent contractor.

The plaintiff in Adamski had injured himself playing basketball and presented himself for emergency care at defendant hospital. The emergency

room physician treated his injury negligently and a severe infection ensued. The physician was not an employee of the hospital, but of Tacoma Emergency Care Physicians, Inc., a professional services corporation. That entity provided emergency care to patients at the hospital under a contract. The hospital moved for summary judgment on the ground that the physician (or his employer) was an independent contractor, not its agent or employee. The court of appeals in *Adamski* ruled that it was error for the trial court to grant summary judgment to the hospital, holding that there was a genuine issue as to whether the physician was the hospital's agent in fact, or alternatively, the hospital's ostensible agent.

Adamski is a seminal case in Washington. Its holding is based on an analysis of several cases nationwide holding hospitals liable for the doctors who work at them. It is cited with approval by *Adcox v. Children's Orthopedic Hosp. & Medical Ctr.*, 123 Wash.2d 15, 36-7, 864 P.2d 921 (1993). *Glover v. Tacoma General Hospital*, 98 Wash.2d 708, 719, 658 P.2d 1230 (1983), explains that *Adamski* holds that the question of agency is generally an issue of fact.

ACTUAL AGENCY

In applying an actual agency analysis, the *Adamski* court reversed summary judgment on the following grounds: (1) the patient sought treatment primarily from the hospital; (2) the patient had no choice of its physician, and, moreover, the hospital was deemed to have chosen the physician by virtue of its contract with TECP "for emergency room staffing"; and

(most importantly) (3) the doctor "was performing 'an inherent function of the hospital, a function without which the hospital could not properly achieve its purpose,' [citation omitted], i. e., [the doctor] was an integral part of the total hospital function or enterprise," citing *Beeck v. Tucson General Hosp.*, 18 Ariz. App. 165, 170, 500 P.2d 1153 (1972). The court also describes element (3) as the "significant relationship" test.

The court specifically found that the fact the doctor in *Adamski* did not receive a salary was not conclusive, and stressed that a genuine issue of whether the doctor was the hospital's agent arose when one considered "all the facts and circumstances." The court also stated that where a "significant relationship" is found, "it should make no difference that the physician is compensated on some other basis than salary or that he bills his patients directly," and that "[t]hese are artificial distinctions, the efficacy of which has long since disappeared and to the perpetuation of which we do not subscribe."

The court also relied heavily on *Beeck*, 18 Ariz. App. 165 (1972), cited above. In *Beeck*, an actual agency case, the patient had signed a consent form acknowledging that "all" her physicians were independent contractors, and not agents or employees of the hospital. The *Adamski* court pointed out that this clause did not affect the court's analysis of whether the doctor in question was in fact the hospital's agent or not.

The "significant relationship" factor in *Adamski* focuses on whether the physician is performing an inherent function of the hospital, a function

without which the hospital could not properly achieve its purpose. Applying this factor to the most commonly disputed areas of hospital/physician agency— emergency room physicians (as in *Adamski*), radiologists, anesthesiologists, and pathologists – it can readily be concluded that no modern hospital could achieve its purposes without such specialists providing services on behalf of the hospital.

OSTENSIBLE AGENCY

The *Adamski* court adopts the test of the Restatement (Second) of Agency §267 for imposing vicarious liability on a principal for the acts of its apparent agent, on a theory of "holding out" or "ostensible agency." The principal is liable when it (1) represents through its acts or omissions that the apparent agent is its servant or other agent, and (2) thereby causes a third party justifiably to rely upon the care or skill of such apparent agent. A "holding out" or representation may arise "when the hospital acts or omits to act in some way which leads the patient to a reasonable belief he is being treated by the hospital by one of its employees." The court specifically held that no affirmative misrepresentation need be shown to hold the principal liable.

In *Adamski*, the court focused on several points in reversing the summary judgment. It found the plaintiff, actually believed he was being treated by a hospital employee; he was not advised to the contrary; his discharge instructions could be interpreted as an invitation to return; and the form carried the title "Tacoma General Hospital Emergency Care."

Washington Pattern Instruction 105.02.03 – Apparent Agency – sets

forth a list of factors as well. The factors mirror the facts and circumstances analysis for actual agency set forth in Adamski, but seem to confuse the concepts of actual and ostensible agency. The factors are: (1) whether the patient sought treatment primarily from the hospital or from the physician; (2) whether it was the hospital who designated the physician to perform the services in question; (3) whether the type of care provided was an integral part of the hospital's operation; (4) whether the hospital handled the billing for the services of the physician; (5) whether the hospital provided drugs and supplies utilized by the physician; (6) the nature and duration of any hospital-physician agreements; and (7) whether the hospital made any representations to the patient, verbally or in writing, regarding their relationship with the physician. The instruction also states that this list is not exclusive and that no one factor is controlling.

Although the Pattern Instruction is apparently applying the Adamski ostensible agency analysis, two of the listed factors – the billing procedures of the hospital and the provision of drugs and supplies – would not likely be known to the patient at the time of receiving treatment, and thus could not affect the patient's "reasonable belief" that the physician is an agent of the hospital.

Some hospitals may be inadvertently strengthening the ostensible agency concept in their advertisements. We have all seen large newspaper ads for Swedish Hospital in which it talks of "our physicians" being outstanding in their fields, and invites a phone call to the hospital for referral to a physician. Such ads would lead a patient to be-

lieve that he is seeking care from the hospital rather than an independent physician who merely has admitting privileges at Swedish.

MEDICARE REGULATIONS

A recent wrinkle in the hospital agency fabric stems from regulations adopted by the Federal government as conditions for participation in the Medicare program. 42 CFR Part 482.12(e) requires that:

"The governing body [of the hospital] must be responsible for services furnished in the hospital whether or not they are furnished under contracts

(1) The governing body must ensure that the services performed under a contract are provided in a safe and effective manner."

With regard to anesthesia, an area in which agency is often disputed and litigated, the regulations go on to state, in §482.52, that:

"If the hospital furnishes anesthesia services, they must be provided in a well-organized manner under the direction of a qualified doctor of medicine or osteopathy.

The service is responsible for all anesthesia administered in the hospital."

In the comments contained in the Federal Register (at 51 Fed Reg 116 (1986), it is clear that the Federal government was applying the same "inherent function" analysis that underlies the Adamski ruling:

The [regulations were] intended to clarify that the hospital has ultimate responsibility for services, whether they are provided directly, such as by its own employees, by leasing, or through arrangement, such as formal contracts, joint ventures, informal

agreements, or shared services. Because many contracted services are integral to direct patient care and are important aspects of health and safety, a hospital cannot abdicate its responsibility simply by providing that service through a contract with an outside resource. For purposes of assuring adequate care, the nature of the arrangement between the hospital and the 'contractor' is irrelevant. The [regulations], therefore, proposed to specify that the governing body must be responsible for these services and that the services must be provided in a safe and effective manner ... 51 Fed Reg 116 (1986), 22015.

To date, I know of only one trial court – in Florida – that has held that these regulations created a non delegable duty on the part of a hospital, and thus found that the negligent care provided by an independent contractor resulted in liability on the part of the hospital. However, I am also aware that these regulations are beginning to be cited and relied upon by plaintiffs' attorneys around the country, and it is likely there will be additional rulings interpreting the effect of the regulations on the agency status of physicians and others who provide services within a hospital setting.

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