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General Principles Relating to Hospital Liability

Anthony Viorst, Esq.

A. Basis for Hospital Liability

Under the doctrine of respondeat superior, an employer is vicariously liable for the tortious acts of its employees that are committed while acting within the scope of employment.¹ In *Bing v. Thunig*,² the New York Court of Appeals explicitly rejected the view that, due to a lack of control, hospitals could not be held vicariously liable for the negligent acts of doctors and nurses. In reaching this holding, the court noted that “the special skill of other employees (such as airplane pilots, locomotive engineers, chemists, to mention but a few), has never been the basis for denying the application of respondeat superior” liability.³ The court found support for this holding in a survey of recent cases, which revealed that, since the mid-1940s, “the immunity rule [for hospitals] has been rejected in every jurisdiction where the court was unfettered by precedent, [and] the doctrine has been overruled and abandoned in a number of states where nonliability has long been the rule.”⁴ A survey of cases decided since *Bing* reveals that, in virtually every jurisdiction that has examined the issue, hospitals have been subjected to respondeat superior liability for the torts of their employee-nurses and employee-doctors.⁵

Hospitals, like other corporations, sometimes seek to defend against claims

of respondeat superior liability on the grounds that the tortfeasor was an independent contractor, rather than an employee. In such situations, the most important factor in determining whether a worker qualifies as an employee is the alleged employer’s right to control the acts of the purported employee. In making this determination, courts have considered the following factors: (1) whether the employer maintains control over the type and method of work performed; (2) whether the employer furnishes the necessary tools and equipment to perform the work; (3) whether the employer pays maintains control over the hours worked; and (4) whether the employer has the right to terminate the employer-employee relationship without liability.⁶

Even where a doctor or nurse is not an employee of the hospital, liability may attach if the doctor or nurse was furnished through the hospital’s own institutional processes and was not selected by the patient.⁷

In Colorado, hospitals employing physicians to provide medical services cannot be held vicariously liable for the negligence of those physicians.⁸ The rationale for this rule is that hospitals have no legal right to control the performance of the physicians they employ, and hospitals cannot engage in the practice of medicine.⁹

Regardless of whether it is subject to vicarious liability for the acts of its doctors or nurses, a hospital can always be held directly liable, for its own negligence, under the doctrine of “corporate liability.” This doctrine recognizes the existence of a duty, independent of that of doctors or nurses, which is owed directly by the hospital to the patient.¹⁰

The hospital’s liability for doctor negligence, which is based upon well-established principles governing medical malpractice, is not the subject of this outline. Rather, this outline will focus upon those cases relating to a hospital’s vicarious liability for nurse negligence, and a hospital’s direct liability for its own negligence.

B. Causes of Action against Hospitals Based Upon Nurse Negligence¹¹

The standard of care applicable to nurses is that of a reasonable professional.¹² This minimum standard may be augmented by standards and protocols adopted in individual hospitals.¹³

There are innumerable factual scenarios in which a nurse might be negligent. Some simple examples include failure to raise side rails on a hospital bed, allowing a flammable substance to remain on a sheet during an operative procedure, application of a

scalding hot water bottle to a patient and failure to furnish a patient with a wheelchair.¹⁴ Several recurring claims of nurse negligence are discussed below.

1. Administration of Medication

One common area of nurse negligence is the improper administration of medication.¹⁵ A nurse, and the hospital employing him or her, will generally be held liable for such action, if the drug was administered in a manner that was contrary to the physician's orders.¹⁶ However, a hospital will generally not be held liable where a nurse, acting upon the orders of an attending physician, administers a drug that is contraindicated:

The primary duty of a hospital's nursing staff is to follow the physician's orders, and a hospital is normally protected from tort liability if its staff follows the orders. Nevertheless, if the doctor's orders are to be a hospital's shield from tort liability, it cannot at the same time maintain that a deviation which causes injury cannot be a basis for tort liability...¹⁷

Despite this general rule, a hospital nurse may be liable for injuries sustained by a patient where he or she "knows that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders."¹⁸

2. Nurse's Failure to Verify Informed Consent

In Colorado, as in virtually every other state, the duty to obtain informed consent is that of the treating physician,¹⁹ and not that of the hospital or its employees.²⁰ Nonetheless, in those cases in which no consent form has been signed, or in which the signed consent form refers to a different procedure than that which was actually performed, the hospital may be liable, based upon the failure of its nurses to verify that informed consent has been obtained:

In obtaining a consent form, a nurse is not acting as a "borrowed servant" of the doctor, but as an employee of the hospital because the task of obtaining a properly executed form is administrative and does not involve professional skill or judgment. (Citations omitted). "A hospital has a responsibility for the exercise of due care by a nurse as well as by other employees while she is performing acts of a character which, though constituting a part of the patient's treatment as prescribed by the attending physician, do not require either the application or the understanding of the specialized technique possessed by a skilled physician or surgeon." (Citations omitted). The verification that a consent form has been properly executed and is part of the patient's records does not require application of medical judgment and the hospital may be liable under some circumstances for the nurses' failure to obtain the form in violation of its internal procedure.²¹

3. Nurse's Failure to Take Appropriate Action when Informed Consent Lacking

If a nurse becomes aware that a physician is performing a procedure for which consent has not been obtained, that nurse should take appropriate steps to notify the operating physician and/or her supervisor that consent for the procedure is lacking.²²

Likewise, regardless of what the consent form might say, if a nurse is explicitly told by a patient that consent for the planned procedure is lacking, the nurse should contact the operating physician and/or her supervisor that consent for the procedure is lacking:

...[A]ppellant alleges and offers evidence that when she protested to the hospital nurses that she did not want the hemorrhoidectomy and had not consented to it, the hospital staff

failed to report this to the surgeon or to anyone in a supervisory position. A hospital may be held liable for its own negligence...We cannot say as a matter of law that merely because the physician is ultimately responsible for obtaining consent for medical procedures, that a hospital is therefore totally insulated from liability for all acts relating to such procedures. Nor can we say that ordinary prudence would not require some inquiry by a nurse into the correctness of performing a surgical procedure over the direct, unambiguous, verbal objection of the patient...²³

C. Causes of Action Based Upon Direct Corporate Liability of Hospital

A hospital has a duty to act in the same manner that an ordinary hospital would have done under the same or similar circumstances.²⁴ This standard of care may be augmented by the hospital's internal policies and bylaws.²⁵ However, hospital rules alone do not reflect the standard of care.²⁶

The direct obligations of a hospital include: (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules.²⁷

1. Actions Relating to Facilities and Equipment

As noted above, a hospital may be liable for its negligence in furnishing defective equipment for use by physicians and surgeons in treating patients.²⁸ In *Lamb v. Candler Gen Hosp.*,²⁹ the Georgia Supreme Court affirmed the following standard of care applicable to a hospital in furnishing equipment and facilities:

A hospital owes to its patients only the duty of exercising ordinary care

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to furnish equipment and facilities reasonably suited to the uses intended and such as are in general use under the same, or similar, circumstances...³⁰

In *Lamb*, the court found that the plaintiff had stated a viable claim where she alleged that the hospital failed to replace disposable parts in the instrument involved in the case, as required for its safe performance.³¹

2. Negligent Credentialing

Most jurisdictions permit injured hospital patients to bring claims against the hospital for negligently credentialing unqualified physicians.³² This claim can relate to the initial granting of privileges, or to the failure to revoke privileges. The elements of such a claim have been described as follows:

A hospital has a direct duty to grant and to continue such privileges only to competent physicians...In order to recover for a breach of this duty, a plaintiff injured by the negligence of a staff physician must demonstrate that but for the lack of care in the selection or retention of the physician, the physician would not have been granted staff privileges, and the patient would not have been injured.³³

In the recent past, many states have implemented statutes prohibiting a hospital from disclosing documents or testimony presented during the credentialing process.³⁴ And some states have gone so far as to immunize from civil liability those persons or entities that participate in the credentialing process.³⁵ Those states that grant immunity to hospitals for their actions in the credentialing process have effectively nullified any negligent credentialing claim that might be brought in that state. Although one state court has upheld the validity of such a statute as against a constitutional challenge,³⁶ other states may not reach the same result.

In Colorado, the Court of Appeals recently held that C.R.S. §12-36.5-203,

which immunizes credentialing committees from damages in civil actions, prohibits many claims for negligent credentialing.³⁷ However, not all negligent credentialing claims are precluded. Negligent credentialing claims can still be maintained when a credentialing committee has acted without a "reasonable belief that the action was in furtherance of quality health care," or "after a reasonable effort to obtain the facts of the matter."³⁸

3. Negligent Supervision

Hospitals, like all other corporate entities, have a duty to supervise their employees.³⁹ To the extent that they fail to provide appropriate oversight of their employees, and the lack of oversight results in injury, they may be found liable.

4. Actions Relating to Rulemaking

A hospital has a duty to use reasonable care in formulating the policies and procedures that govern its medical staff and non-physician personnel.⁴⁰ In *Air Shields, Inc. v. Spears*,⁴¹ Southmore Hospital had policies and procedures addressing the percentage of exposure to supplemental oxygen for an infant in an incubator, but no policy addressing the duration of exposure to supplemental oxygen. It was general medical knowledge at the time that the duration of exposure to supplemental oxygen was as dangerous as the percentage. Under these circumstances, the Texas Supreme Court held that there was enough evidence to demonstrate negligence on the hospital's part in formulating, or failing to formulate, appropriate policies and procedures.

5. Other Potential Claims

a. Hospital Handling of Records

In addition to the duties outlined above, a hospital has a duty to use reasonable care in maintaining medical records.⁴² Consistent with this duty, it has been held that a patient states a viable claim when he alleges injury

based upon a hospital's failure to preserve x-ray readings.⁴³

The federal Health Insurance Portability and Accountability Act ("HIPAA"),⁴⁴ and its implementing regulations, prohibit medical-service providers, including hospitals, from disclosing medical records or other patient information, except under limited circumstances. It is not clear whether patients whose records are wrongfully disclosed have a viable cause of action against the medical-service provider making the disclosure. While at least one court has held that a private right of action exists to enforce violations of HIPAA,⁴⁵ other courts have held that only the Secretary of Health and Human Services may enforce its provisions.⁴⁶

b. Third-Party Enforcement of Hospital Bylaws

A patient may be entitled to bring a third-party breach of contract claim, based upon a hospital's failure to enforce its bylaws. This issue arises most frequently in situations where a negligent doctor has no liability insurance coverage to compensate an injured patient, despite the fact that the hospital bylaws require all doctors practicing at the hospital to carry such insurance. Under these circumstances, the patient may assert a claim that he is a third-party beneficiary of the hospital bylaws. The viability of this novel claim is not clear at this time.⁴⁷

D. Conclusion

In medical malpractice cases, plaintiff's counsel should always consider the possibility of adding the hospital as a defendant. Inclusion of the hospital can be beneficial in those situations where the lines of liability between the treating physician and the hospital nurses are not entirely clear. It can also be helpful in those situations where both the doctor and the nurses bear some responsibility for the injury, and an apportionment of liability will be necessary. And, in those cases in which the plaintiff has suffered

a catastrophic injury, the addition of the hospital, another insured party, can help to ensure that the plaintiff receives the compensation necessary to be made “whole.”


Anthony Viorst practices law in Denver, where he specializes in the fields of personal injury, medical malpractice, and appeals. He has successfully litigated numerous district court cases on behalf of injured plaintiffs, and has won dozens of cases before the Colorado appellate courts. Many of those appellate decisions have advanced Colorado law in ways that benefit CTLA members and their clients.

Endnotes

- ¹ HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND RELATIONSHIP*, §52 (2d ed. 1990).
- ² *Bing v. Thunig*, 143 N.E.2d 3, 5 (N.Y. 1957).
- ³ *Id.* at 5.
- ⁴ *Id.* at 7. The court cited cases from 14 different jurisdictions in which hospital liability was rejected or overruled. *Id.* at n.3 & n.4.
- ⁵ See *Stroder v. Horowitz*, 775 So.2d 1175, 1179 (La. App. 2000); *Romero v. Schulze*, 974 P.2d 959, 964 (Wyo. 1999); *Sword v. NKC Hosp., Inc.* 714 N.E.2d 142, 149-50 (In. 1999); *Tobia v. Cooper Hosp. Univ. Med. Ctr.*, 643 A.2d 1, 6 (N.J. 1994); *Wallerstein v. Hosp. Corp. of Am.*, 573 So.2d 9 (Fla. App. 1990); *Alford v. Phipps*, 523 N.E.2d 563, 571 (Ill. App. 1988); *Keller v. Mo. Baptist Hosp. of Sullivan*, 800 S.W.2d 35, 37 (Mo. App. 1990); *Jackson v. Power*, 743 P.2d 1376, 1378 (Alas. 1987); *Edmonds v. Chamberlain Mem. Hosp.*, 629 S.W.2d 28, 30 (Tenn. App. 1981); *Reynolds v. Swigert*, 697 P.2d 504, 507 (N.M. App. 1984); *Themins v. Emanuel Lutheran Charity Bd.*, 637 P.2d 155, 158 (Ore. App. 1981); *Rucker v. High Point Mem. Hosp.*, 202 S.E.2d 610, 616 (N.C. App. 1974); *Tonsic v. Wagner*, 329 A.2d 497 (Penn. 1974); *Beeck v. Tucson Gen. Hosp.*, 500 P.2d 1153, 1155-57 (Az. App. 1972); *Davidson v. Youngstown Hosp. Ass'n*, 250 N.E.2d 892, 896 (Ohio App. 1969); *Moeller v. Hauser*, 54 N.W.2d 639, 645 (Minn. 1952).
- ⁶ *Perkins v. Reg'l Transp. Dist.*, 907 P.2d 672, 674 (Colo. App. 1995); KRISTYN S.


- APPLEBY, JOANNE TARVER, *USE OF MEDICAL CONSULTANTS*, §8.52 *Medical Records Review* (3d Ed. Aspen Publishers Online 1998).
- ⁷ See, e.g., *Pamperin v. Trinity Memorial Hosp.*, 423 N.W.2d 848, 849-50 (Wis. 1988); *Jackson* at 1381-82; *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256-58 (Ky. 1985); *Mehlman v. Powell*, 378 A.2d 1121, 1123-24 (Md. 1977).
 - ⁸ *Russell v. Pediatric Neurosurgery, P.C.*, 15 P.3d 288, 291 (Colo. App. 2000) (citing *Rosane v. Senger*, 149 P.2d 372 (Colo. 1944) and *Moon v. Mercy Hosp.*, 373 P.2d 944 (Colo. 1962)).
 - ⁹ *Id.*

- ¹⁰ *Malanowski v. Jabamoni*, 688 N.E.2d 732 (Ill. App. 1997) (citing *Darling v. Charleston Hospital*, 211 N.E.2d 253 (Ill. 1965)).
- ¹¹ These principles are equally applicable to technicians employed by a hospital. See *Bellamy v. Appellate Dept.*, 50 Cal. App. 4th 797, 801 (Cal. App. 1996) (“[T]he hospital conceded the [plaintiff’s] fall was proximately caused by the negligence of its technician and that it was liable unless the suit was time-barred.”).
- ¹² See *Wood v. Rowland*, 592 P.2d 1332, 1335 (Colo. App. 1978).
- ¹³ See *Miller v. Hood*, 536 S.W.2d 278, 282 (Tex. Civ. App. 1976) (hospital liable where nurse ordered to administer injection in anterior thigh and “nurse did not



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- follow those instructions”); *Bernardi v. Community Hospital Ass’n*, 443 P.2d 708 (1968) (hospital liable where doctor ordered nurse to inject drug into gluteal region, but nurse injected drug into sciatic nerve).
- ¹⁴ These examples are listed in *Coursen v. New York Hosp. - Cornell Med. Ctr.*, 499 N.Y.S.2d 52, 53-54 (N.Y. App. Div. 1986).
- ¹⁵ See *Miller* at 282 (hospital liable where nurse ordered to administer injection in anterior thigh and “nurse did not follow those instructions”); *Bernardi v. Cmty. Hosp. Ass’n*, 443 P.2d 708 (Colo. 1968) (hospital liable where doctor ordered nurse to inject drug into gluteal region, but nurse injected drug into sciatic nerve).
- ¹⁶ See *South Bend Osteopathic Hosp., Inc. v. Phillips*, 411 N.E.2d 387 (Ind. App. 1980) (affirming judgment against hospital based upon nurse’s negligent hypodermic injection).
- ¹⁷ *Toth v. Cmty. Hosp. at Glen Cove*, 239 N.E.2d 368 (N.Y. 1968); see also *Walstad v. Univ. of Minn. Hosps.*, 442 F.2d 634, 641 (8th Cir. 1971) (under Minnesota law, any liability for administering penicillin to patient was properly imputed to doctor, rather than hospital, because nurse administered drug only at doctor’s direction).
- ¹⁸ *Id.* at 266.
- ¹⁹ *Bloskas v. Murray*, 646 P.2d 907, 912-13 (Colo. 1982).
- ²⁰ *Krane v. St. Anthony Hosp. Sys.*, 738 P.2d 75 (Colo. App. 1987).
- ²¹ *Butler v. South Fulton Med. Ctr., Inc.*, 452 S.E.2d 768, 772 (Ga. App. 1994).
- ²² See *Marsh v. Crawford Long Hosp. at Emory Univ.*, 444 S.E.2d 357 (Ga. App. 1994) (trial court erred in granting summary judgment in favor of hospital, where record reflected that nurses assisting in operating room knew that doctor was performing a different and more radical procedure than the one listed on the consent form, and yet raised no question about whether the doctor was performing correct procedure); accord, *Butler*, 452 S.E.2d at 772.
- ²³ *Urban v. Spohn Hosp.*, 869 S.W.2d 450, 452-53 (Tex. App. 1993).
- ²⁴ *Denton Reg’l Med. Ctr. v. LaCroix*, 947 S.W.2d 941, 951 (Tex. App. 1997); accord, *Mills v. Angel*, 995 S.W.2d 262, 268 (Tex. App. 1999).
- ²⁵ *Id.*
- ²⁶ *Mills* at 268 (Tex. App. 1999); *Darling v. Charleston Hosp.*, 211 N.E.2d 253, 257 (1965) (hospital bylaws “aided the jury in deciding what was feasible and what the defendant knew or should have known...[but] did not conclusively determine the standard of care”).
- ²⁷ *Thompson v. Nason Hosp.*, 591 A.2d 703 (Pa. 1991).
- ²⁸ *Denton*, 947 S.W.2d at 950; *Lamb v. Candler Gen Hosp. Inc.*, 413 S.E.2d 720 (Ga. 1992).
- ²⁹ *Lamb*, 413 S.E.2d 720.
- ³⁰ *Id.*
- ³¹ *Id.*
- ³² See e.g., *Mills*, 995 S.W.2d at 275; *Rodrigues v. Miriam Hosp.*, 623 A.2d 456, 462-63 (R.I. 1993); *Albain v. Flower Hosp.*, 553 N.E.2d 1038 (Ohio 1990); *Insinga v. LaBella*, 543 So.2d 209, 211 (Fla. 1989); *Raschel v. Rish*, 488 N.Y.S.2d 923, 925 (N.Y. App. Div. 1985); *Benedict v. St. Luke’s Hosps.*, 365 N.W.2d 499, 504 (N.D. 1985); *Elam v. College Park Hosp.*, 183 Cal. Rptr. 156, 165 (Cal. App. 1982); *Kitto v. Gilbert*, 570 P.2d 544, 550 (Colo. App. 1977); *Ferguson v. Gonyaw*, 236 N.W.2d 543, 550 (Mich. App. 1975); *Mitchell County Hosp. Auth v. Joiner*, 189 S.E.2d 412, 414 (Ga. 1972).
- ³³ *Id.*
- ³⁴ See OH. REV’D CODE 2305.25; AZ. REV’D CODE, 32-1405.1(E). These provisions have been enforced and upheld. *Trangle v. Rojas*, 782 N.E.2d 617 (Oh. 2002); *Sun Health Corp v. Myers*, 70 P.3d 444 (Ariz. App. 2003).
- ³⁵ See e.g., 210 ILCS 85/10.2 (West 1996) (precluding the imposition of civil liability against a hospital, or any member of its staff, for acts taken with regard to a credential committee); Tex. Rev. Civ. State. Ann. Art. 4495b (A “health-care entity...that, without malice, participates in medical peer review activity...is immune from any civil liability...”).
- ³⁶ See *St. Luke’s Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 507-509 (Tex. 1997).
- ³⁷ *Kauntz v. HCA-Healthone, LLC*, 174 P.3d 813, 817-819 (Colo. App. 2007).
- ³⁸ *Id.*
- ³⁹ *Oehler v. Humana, Inc.*, 775 P.2d 1271 (1989).
- ⁴⁰ *Denton Reg’l Med. Ctr. v. LaCroix*, 947 S.W.2d 941, 951 (Tex. App. 1997); accord, *Mills*, 995 S.W.2d at 268.
- ⁴¹ *Air Shields, Inc. v. Spears*, 590 S.W.2d 574, 578 (Tex. App. 1979).
- ⁴² *Fox v. Cohen*, 406 N.E.2d 178, 182 (Ill. App.1980); accord, *Malanowski v. Jabamoni*, 688 N.E.2d 732 (Ill. 1997).
- ⁴³ *Rodgers v. St. Mary’s Hosp. of Decatur*, 597 N.E.2d 616 (Ill. 1992).
- ⁴⁴ 29 U.S.C. §1001 *et seq.*
- ⁴⁵ *Stang v. Clifton Gunderson Health Care Plan*, 71 F. Supp.2d 926, 932 (W.D. Wis. 1999).
- ⁴⁶ *Means v. Indep. Life & Acc. Ins. Co.*, 963 F. Supp. 1131 (M.D. Ala. 1997).
- ⁴⁷ See *President v. Jenkins*, 814 A.2d 1173, 1189 (N.J. 2003) (provision in hospital bylaws requiring doctors to furnish proof of insurance did not “give rise to a corresponding duty on the part of [the] hospital to monitor and enforce the physician’s compliance” with the provision); *State Farm Fire & Cas. Co. v. Nikitow*, 924 P.2d 1084, 1087-88 (Colo. App. 1996) (plaintiff was not a third-party beneficiary of chiropractor’s contract with his associates obligating them to obtain malpractice coverage, and thus could not enforce that contract).

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