Hospitals are Not the Insurer of Last Resort

By John T. Sly, Esq.

One of the most vexing issues facing hospitals is the question of whether they are vicariously liable for the actions of independent health care providers practicing in their facilities. In this article I argue that hospitals are not the insurer of last resort, and only stand as vicarious principals for independent health care providers in limited circumstances.

The Relevant Law

The law of Maryland is that a party is not liable for the negligence of another unless the tortfeasor is that party's agent and the agent acts within the scope of his authority and to further the interest of the principal. See, e.g., *Hollander v. Pan Am World Airways, Inc.*, 332 F. Supp. 96 (1973). Thus, to find a hospital liable for the actions of an independent health care provider, he/she would first have to be found to have been the hospital's agent for purposes of the plaintiff's care. *Hetrick v. Weimer*, 67 Md. App. 522, 508 A.2d 522 (1986), *reversed on other grounds*, 309 Md. 536, 525 A.2d 643 (1987). The facts of most cases involving care rendered by an independent health care provider lead unequivocally to the conclusion that they are not agents of the hospital so that the hospital is entitled to summary judgment on this issue.

Maryland courts have distinguished between a situation where a patient enters an emergency department and is treated there by personnel he/she believes to be employees of the hospital and where a private physician cares for a patient in the hospital. In *Mehlman v. Powell*, 281 Md. 269, 378 A.2d 1121 (1977), Judge Eldridge of the Maryland Court of Appeals noted that "all appearances suggest and all ordinary expectations would be that the Hospital emergency room, physically part of the Hospital, was in fact an integral part of the institution." *Mehlman*, 281 Md. at 274. Thus, the Court of Appeals concluded that "the staff of the [Hospital] emergency room were its employees, thereby causing the decedent to rely on the skill of the emergency room staff, and that the Hospital is consequently liable to the decedent as if the emergency room staff were its employees." *Id.* at 275. Recently, the Court of Appeals confirmed that care rendered in the emergency department is presumptively performed by agents of the hospital. *See Debas v. Nelson*, 389 Md. 364, 885 A.2d 802 (2005).

Mehlman is predicated on the health care provider being a member of the emergency department's staff and caring for the patient in the emergency department. In this limited circumstance, Maryland law assumes that a patient would expect the health care provider to be an employee of the hospital and therefore imposes vicarious liability on the hospital for that health care provider's negligence. In reality, this is a legal fiction imposed due to public policy concerns. In other words, while we recognize that the emergency physicians are legally independent, the law will not permit a hospital to disavow a principal/agency relationship.

However, where a provider is not a member of the emergency department and does not care for the patient in the emergency department, vicarious liability has not been imposed on the hospital. To do otherwise would be to place the hospital in the position of the insurer for all actions taken by all health care providers in the hospital. To avoid this outcome, Maryland courts have been careful not to extend the Mehlman exception to the general law governing the liability of principals for the actions of independent contractor health care providers to such a degree as to swallow the general principal-agent rule.

In *Hetrick*, the Court of Special Appeals addressed a situation where a pregnant woman, Jody Ann Hetrick ("Ms. Hetrick") presented to Anne Arundel Medical Center suffering from nausea, vomiting, abdominal pain, and several other symptoms. *Hetrick*, 67 Md. App. at 527. She was in approximately her thirty-first week of pregnancy. Id. She came under the care of her obstetrician and his associate. *Id.* Surgery was performed that revealed Ms. Hetrick was suffering from severe preeclampsia which had allegedly been undiagnosed by her obstetrician for over one week. Id.

Ms. Hetrick agreed to undergo a caesarean section even though she knew the baby would be born prematurely. Id. Immediately before the surgical delivery, Ms. Hetrick met a pediatrician and neonatologist for the

Continued on page 8

New Members

John D. Adams
Joan Adelman
Amy Askew
Jessica Boston
James A. Buck
Elizabeth Durham Cardona
Andre M. Forte
Michael W. Fox
Julie L. Galbo-Moyes
Leslie W. Gawlik
Kate E. S. Haaf
John T. Hamilton
Christopher D. Heagy
Kristin P. Herber
Lydia S. Hu
Tiffany A. Mazzulli
Timothy P. McGough
Daniel P. Moloney
John J. Murphy
Ryan Earl Naugle
Andrew T. Nichols
Lara K. Simon
M. David Stallings
Tracy L. Steedman
Mark J. Strong
Dennis C. Whelley
Jennifer L. Wilson

(HOSPITALS) *Continued from page 6*

first time. She testified that the pediatrician introduced himself and said, "I'm here for the baby." Id. She further testified that she did not know that the pediatrician had been called in by her own doctors and, indeed, stated that she assumed he was from the hospital. *Id.* at 527 & 529. The child was born in very poor condition and eventually died.

Plaintiff in Hetrick alleged, inter alia, that the pediatrician was the apparent agent of the hospital. However, the Court of Special Appeals rejected Plaintiffs' contention. *Id.* at 534. The Court noted that, "The principal-agent relationship is created, therefore, only if a third party has been misled by and relies upon the apparent authority of the supposed agent." *Id.* at 522–33, quoting *Klein v. Weiss*, 284 Md. 36, 61, 395 A.2d 126 (1978). The *Hetrick* Court further pointed out that, "'Apparent authority results from certain acts or manifestations by the alleged principal to a third party leading the third party to believe that an agent had authority to act.'" *Id.* at 533 (emphasis in original). To have been held liable for the acts of the pediatrician, the hospital would have had to have said or done something to cause Ms. Hetrick to believe that the pediatrician was its agent. *Id.* at 533. Ms. Hetrick's subjective assumption that the pediatrician was affiliated with the hospital was not enough to impose liability on the hospital. *Id.* at 534.

Maryland law on this issue is in accord with other leading jurisdictions, though there is a minority of states that disagree. For example, in *King v. Mitchell*, 31 A.D.3d 958, 819 N.Y.S.2d 169 (2006), a New York appellate court held that a hospital may not be held vicariously liable under apparent agency principles for the alleged malpractice of an independent anesthesiologist who participated in a surgery that was performed by a physician chosen by the patient. The evidence indicated that the anesthesiologist introduced himself to the patient shortly before the surgery and was employed by an independent group that had contracted to work at the hospital. The patient argued that the hospital had held the anesthesiologist out as its agent by providing consent forms and a questionnaire that related to anesthesia and (a) contained the hospital's logo; and (b) did not explain that the anesthesiologist was not a hospital employee. *King*, 31 A.D.3d at 959–60.

The trial court denied the hospital's motion for summary judgment on the grounds of apparent agency. The appellate court reversed and held that the apparent agency claim failed as a matter of law. In so doing, the court explained that, in order to maintain an apparent agency claim against a hospital, a patient must show that the hospital held the physician out as its agent and that the patient reasonably relied upon the appearance of agency in accepting the physician's services. The court then concluded that although it would be "preferable" for hospitals to disclose the status of physicians working on their premises, a failure to make such disclosure, by itself, does not rise to the level of a representation of agency. *King*, 31 A.D.3d at 960. The court also reasoned that the patient had not relied on the purported appearance of agency in selecting the hospital. Finally the court cited the patient's admission that the anesthesiologist's employment status had not affected her decision to accept his services. *King*, 31 A.D.3d at 960–61. The *King* court, like the Hetrick court, distinguished cases where hospitals have been held vicariously liable under apparent agency principles for the malpractice of an independent emergency room physician, pointing out that a patient who seeks emergency room care looks to the hospital — rather than to a particular doctor — for treatment.[1] *King*, 31 A.D.3d at 960.

Helpful strategies

Hospitals should be concerned when they are brought into a case involving a plaintiff whose damages allegedly extend beyond an independent physician's personal policy limits. The unmistakable conclusion is that plaintiff is setting the hospital up to be the insurer of last resort. The result is unappealing to both a private practitioner —who will likely see a demand for his policy limits — and the hospital.

In many instances, a private physician initially sees a plaintiff in a private office and then provides care at the hospital. Therefore, no affirmative representations are made by the hospital to support a theory of apparent agency and, because the doctor never saw the patient in the emergency room, the indicia of agency assumed by *Mehlman* is not present.

As discussed in this article, vicarious liability should not be assumed for the acts of independent health care providers. In my experience, plaintiff attorneys are often willing to voluntarily dismiss a hospital defendant who aggressively argues that it is not the vicarious principal for the health care provider. If voluntary dismissal is not forthcoming, an appropriate motion for summary judgment should be filed. This usually assists both the hospital and the private practitioner.

Mr. Sly is a trial attorney and partner at Waranch & Brown, LLC.

[1] *Another New York court recently refused to extend the apparent agency doctrine beyond the emergency room setting in* Rizzo v. Staten Island University Hospital, *29 A.D.3d 668, 815 N.Y.S.2d 162 (2006).*