Ruling may up risk for 'apparent authority'

Risk managers take some solace in knowing that not every allegation of malpractice will fall on the hospital, that sometimes the individual physician or physician group will be responsible for defending the claim. But there is cause for concern with a recent court ruling that could increase the chance of the hospital being held responsible under the "apparent authority" concept.

Also known as "ostensible authority," "apparent authority" is the idea that the patient sometimes can reasonably assume the doctor was performing as a hospital employee even if that is not actually the case. The theory was confirmed recently by a New Jersey state appellate court, which held that a hospital may be vicariously liable for a staff doctor whom a patient reasonably believes is providing treatment on behalf of the hospital. In *Estate of Cordero v. Christ Hospital*, the plaintiffs asked the Superior Court of New Jersey to reconsider the trial court's dismissal of vicarious liability claims against the hospital. *(Editor's note: The appellate ruling can be found on the web site: www.sitemason.com/files/hR0RBm/njmalpracticedecision.pdf.)*

The case involved Ramona Cordero, an insulin-dependent diabetic, who was treated by a member of an anesthesiologist group that contracted with the hospital. Before the day of the surgery, Cordero had never met the anesthesiologist, who wore no identification showing his affiliation with the anesthesiology group. He also did not advise Cordero that the hospital assumed no responsibility for the anesthesiologist. Cordero suffered brain damage from the procedure. She remained in a vegetative state until her death 3½ years later.

At trial, the court dismissed the claim for vicarious liability, saying the plaintiffs failed to present evidence either that the hospital "actively held out" the doctor as its agent or that it misled the patient into believing that he was its agent.

The appellate court, however, concluded that affirmative action is not necessary to mislead the patient. In its ruling, the court explained that while a hospital is generally immune from liability for the negligence of independent contractors, such as doctors, there is an exception when the hospital's actions or omissions suggest that the doctors act on its behalf. The court cited a number of factors that can determine whether the doctor has been "clothed with the trappings" of apparent authority:

- whether the hospital provided the physician;
- the nature of the medical care and whether it is typically an integral part of treatment received at a hospital (e.g., anesthesiology, radiology, emergency care, etc.);
- notices of the relationship or disclaimers of responsibility;
- the patient's opportunity to reject care or select a different physician;
- the patient's prior contacts with the doctor;
- special knowledge about the doctor-hospital relationship.

The hospital's contract with the anesthesia group established a system under which the arrival of a specialist with no prior contact with the patient, and who did not explain his relationship with the hospital, could lead a reasonable person to assume that the doctor was an agent of the hospital, the court concluded. Most importantly for risk managers to note, the court pointed out that the hospital failed to take any action to deter this reasonable inference. Considering the circumstances, the appellate concluded that the plaintiffs could pursue their vicarious liability claim against the hospital, and also that the plaintiffs were entitled to a rebuttable presumption that Cordero believed the doctor to be the hospital's agent.

Cases alleging apparent authority are becoming more common, says **Claire Miley**, JD, a health care attorney at Bass Berry in Nashville, TN.

"We are seeing a growing number of these cases, especially with respect to hospital-based specialists, such as anesthesiologists, radiologists, and emergency medicine doctors. Courts are making it harder for hospitals to disavow liability for

EXECUTIVE SUMMARY

A recent appeals court ruling in New Jersey could put hospitals at higher risk for "apparent authority" liability in which a jury can hold the hospital responsible for the actions of a nonemployee physician. The case should prompt risk managers to review and improve methods for clearly distinguishing nonemployees.

- Signage and waivers may reduce the risk.
- Apparent authority is not a new threat, but the ruling may solidify its legitimacy in other courts.
- Pay attention to details when describing physician and hospital relationships.

SOURCES

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the actions of these types of doctors, and patients are increasingly successful in asserting that they reasonably believe that these types of doctors 'work for' the hospital," she says. "Thus, with respect to these specialties, hospitals may have to increase their efforts to dispel any impression that the doctor is acting on behalf of the hospital."

Steven R. Antico, JD, an attorney with Garfunkel Wild in Hackensack, NJ, says the New Jersey ruling could have influence across the rest of the country. Some jurisdictions already have dealt with the question of apparent authority and issued similar rulings; but in those jurisdictions without settled case law, plaintiffs may point to the New Jersey ruling as support for their arguments.

"This New Jersey case spoke quite succinctly and clearly, saying a hospital could have additional exposure if it does not take addition steps to eliminate or substantially mitigate that exposure," he says. "The apparent authority doctrine is one that risk managers must seriously consider and ask themselves if they are adequately conveying to patients that a doctor may be providing service in the hospital but is in fact independent of the hospital."

Miley and Antico say hospital risk managers need to put patients on notice that independent staff doctors are not employees of the hospital and do not act on the hospital's behalf. Inserting a disclaimer into the patient's consent to treatment form may help to accomplish this purpose but may not be enough to avoid liability. **(See article, right, for more advice on how to avoid apparent authority.)**

Risk managers should consider having hospital staff specifically call attention to the disclaimer when interacting with the patient. Giving the patient an opportunity to find another physician if the patient does not want to receive treatment from the on-call anesthesiologist, radiologist, or other doctor may further protect the hospital, Miley says.

"Additionally, hospitals may consider removing any hospital insignia from the lab coats and scrubs worn by independent staff doctors and may instead require these doctors to wear identification showing that they are nonemployees," Miley says. "And when hospitals post listings of their independent staff physicians on their web sites, the hospitals may want to make clear that they do not employ these doctors."

None of those steps guarantee that a court won't find apparent authority, but Antico says the efforts establish a record of good faith and intent.

"You can point to all the efforts you made to inform the patient, to make the doctor's status clear and distinct from the hospital," he says. "It still might not be enough for the court, but you'll be in a better position than some hospitals that have to try to argue that the patient should have just known about the intricacies of hospital staffing and physician contracts." ■

Details matter with 'apparent authority'

David V. Kramer, JD, an attorney with DBL Law in Crestview Hills, KY, points out that a disclaimer on the consent form must be worded carefully to ward off claims of "apparent authority."

"The language should be framed in such a way that the hospital doesn't seem to be undermining patients' confidence in the quality of the care provided by doctors or its medical staff," he says. "Also, since many hospitals do employ some hospital-based physicians, this language should be carefully crafted to avoid misleading patients into thinking that no doctors whatsoever work for the hospital, when in fact, some do."

Small details can make a difference in these cases, says **Robert M. Wolin**, JD, an attorney with the law firm of Baker Hostetler in Houston. He recalls an Idaho case in which the court focused on the fact that the physician's scrub shirt had the hospital's name on it. The patient reasonably assumed that the doctor worked for the hospital, the court determined.

"We recommend that you do not allow that kind of misunderstanding by letting contract physicians wear hospital scrubs or other garments that include the hospital's logo. They should wear clothing that clearly displays their own name along with the physician group they belong to," he says. "This can seem like such a

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