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MEDICAL MALPRACTICE LAW

Courts Have Redefined Hospital Liability for the Malpractice of Independent Physicians

By JEFFREY R. BABBIN

Plaintiffs in medical malpractice cases have at times sought to hold a hospital liable for the alleged negligent acts of physicians not employed by the hospital. Some cases involve community physicians who treat their patients at the hospital; others involve hospitals contracting with independent physician groups to provide emergency, radiology, anesthesiology or pathology services at the hospital. Plaintiffs' efforts to transcend traditional norms of agency or vicarious liability in claims against hospitals have met with mixed results in Connecticut.

In *Cefaratti v. Aranow*, 321 Conn. 593 (2016), the Connecticut Supreme Court resolved a difference in opinion among lower courts and recognized tort liability for the negligent acts of an apparent agent. Apparent agency liability is rooted in contract law, but *Cefaratti* spelled out the parameters for apparent agency liability for medical malpractice. The case involved a surgeon who had left a surgical sponge in the patient's abdominal cavity during gastric bypass surgery. The hospital argued that it could not be liable for the alleged malpractice of a surgeon who had hospital privileges but was not its agent or employee.

The patient had selected the surgeon based on her own research, although she also attended informational sessions at the hospital led by the surgeon's staff, and a seminar conducted by the surgeon at the hospital. The patient alleged that these programs at the hospital made her believe that the surgeon was a hospital employee. The hospital won its summary judgment motion, but by a 4-3 vote the Supreme Court reversed and recognized apparent agency as a basis for tort liability.

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Cefaratti adopted the test set forth in the Restatement (Third) of Agency §2.03 (2006), which provides: "Apparent authority is

the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." That test, according to *Cefaratti*, merges the doctrines of apparent authority (i.e., an agent who exceeds actual authority) and apparent agency (i.e., someone never an agent of the principal). In either instance, a principal can be liable for actions taken outside of an actual agency relationship, but the key ingredient is that the principal and not the alleged agent took steps in public view to portray the alleged negligent actor as possessing authority to act for the principal, and the affected person justifiably believed that the principal had conferred agency authority.

The Supreme Court did not, however, open up the floodgates for litigation against hospitals for the acts of community physicians. The injured party must still allege and prove detrimental reliance on the appearance of agency or authority. That is, the patient must show she relied on the hospital's actions in cloaking the surgeon with the appearance of being an agent or employee. Nevertheless, where a patient chooses the hospital, and the hospital selects the physician to treat the patient, the court will presume detrimental reliance. This could potentially arise, for example, if a patient arrives at the hospital to use emergency or radiology services or a patient chooses a hospital for the reputation of its cardiology programs and meets caregivers when first visiting the hospital. Therefore, under *Cefaratti*, a plaintiff may establish apparent agency by proving: "(1) the principal held itself out as providing certain services; (2) the plaintiff selected the principal on the basis of its representations; and (3) the plaintiff relied on the principal to select the specific person who performed the services that resulted in the harm complained of by the plaintiff."

The Supreme Court recognized a different scenario, where the patient selects a community physician, perhaps based on reputation, and is treated at the hospital where the physician has privileges. In that case, the Supreme Court will not presume that the patient relied on a reasonable belief that the hospital has appeared to confer agency authority on the physician. The court explained: "It would make little sense to hold a principal vicariously liable for the negligence of a person who was not an agent or an employee of the principal when the plaintiff would have dealt with the apparent agent regardless of the principal's representations." In this second scenario, the plaintiff must prove that: "(1) the principal held the apparent agent or employee out to the public as possessing the authority to engage in the conduct at issue, or knowingly permitted the apparent agent or employee to act as having such authority; (2) the plaintiff knew of these acts by the principal, and actually and reasonably believed that the agent or employee or apparent agent or employee possessed the necessary authority; and (3) the plaintiff detrimentally relied on the principal's acts, i.e., the plaintiff would not have dealt with the tortfeasor if the plaintiff had known that the tortfeasor was not the principal's agent or employee." The court emphasized that this is a narrow path to establishing tort liability for the acts of an apparent agent, and it will be the "rare tort action" where the plaintiff can prove detrimental reliance under this scenario.

In *Cefaratti*, the patient had herself chosen the surgeon, so the

Supreme Court treated her case as falling within this second scenario and remanded for the trial court to give the plaintiff a chance to prove that she detrimentally relied on her belief that the surgeon was the hospital's agent or employee. The court "emphasize[d] that, to meet this burden, the plaintiff must set forth facts and evidence capable of raising a reasonable inference that she would not have allowed [the surgeon] to perform the surgery if she had known that he was not [the hospital's] agent or employee."

Can a hospital take steps to minimize the risk of apparent agency liability, even where the patient has not chosen the physician providing the services? Some jurisdictions have allowed hospitals to post signs that medical providers are not agents or employees of the hospital or to require patients to sign disclaimers to that effect. However, that disclaimer may not be effective in emergencies or other situations where a court believes there is no informed patient choice of provider. *Cefaratti* acknowledged differences between jurisdictions but stated that the court need not answer this question at this time.

That unanswered question raises a related issue not yet fully resolved in Connecticut. Plaintiffs have at times argued that a hospital has a nondelegable duty to provide emergency or other services to patients treated at the hospital, so even if independent contractors provide those services, the hospital is automatically liable for physician malpractice. Under that theory of liability, there is no need to prove apparent agency. A trial court decision in *Noel v. Lawrence & Memorial Hospital*, 53 Conn. Supp. 269 (2014), accepted that nondelegable duty theory for emergency room services, although it recognized that other Connecticut trial court decisions have gone the other way. *Noel* might be an anomaly as, more recently, the Connecticut Appellate Court affirmed a trial court ruling striking a claim that a hospital in Stamford had a nondelegable duty to a plaintiff treated by an independent contractor physician group in its emergency room. See *Tiplady v. Maryles*, 158 Conn. App. 680, 701-04 (2015). *Tiplady* found no common-law or federal regulatory basis for imposing a nondelegable duty on hospitals for emergency services. Yet, due to a peculiar state public health regulation, the Appellate Court noted that its decision applied to hospitals in such municipalities as Stamford with more than one hospital, and it left for another day how to apply its decision in towns with a single hospital. See id. at 703 n.10.

The full scope of *Tiplady* is not yet known, and the Supreme Court has not reviewed the issue. Nevertheless, the Supreme Court's decision in *Cefaratti* on the scope of apparent agency or authority in cases where the patient has not selected the physician could reduce the importance of the nondelegable duty doctrine in some circumstances. ■

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