Medical Malpractice Update

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Hospital Vicarious Liability at Trial: A Review of Proper Jury Instructions

Introduction

Hospitals and medical practices are often sued based upon the actions of the physicians and nurses who provide care on behalf of those entities. The cause of action in these cases against the institutions is negligence based upon respondeat superior. Bagent v. Blessing Care Corp., 224 Ill. 2d 154, 165 (2007). To be successful in such claims, the plaintiff must show that the providers were actual or apparent agents of the hospital or practice, that the agent deviated from the standard of care, and that the deviation was a cause of the injury. Wilson v. Edward Hosp., 2012 IL 112898, ¶ 18. The concept of respondeat superior can be fairly nebulous, to a jury as well as attorneys, and it is important for the jury instructions to be clear and to state the law accurately. During a study on the effectiveness of jury instructions, researchers found that even lay terms can be confusing to jurors. Shari Seidman Diamond et al., The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps, 106 NW. U. L. REV. 1537, 1539 (2012). The study cited a products liability case that involved an alleged negligent product, and explored its relationship with the corporation from which it was purchased. Id. at 1559. One of the jury instructions explained that a corporation can only act through its various list of agents, and that a separate company was the defendant’s agent as it related to the claims in the case. Id. Many of the jurors did not find that an agency relationship existed until after one of the jurors identified the specific instruction on the issue. Id. at 1560. The following column discusses the appropriate jury instructions in cases brought against hospitals and medical practices based upon the actions of its agents.

Jury Instructions in Agency Cases

Illinois Pattern Jury Instructions, Civil, Nos. 50.01 through 50.16 apply to civil cases in which claims have been brought pursuant to vicarious liability based on agency, and apply to different situations depending on which parties have been sued and whether agency has been admitted. Illinois Pattern Jury Instructions, Civil, Nos. 50.01-50.16 (West 2011) (IPI).

IPI 50.01 and 50.02 are given when there is no issue as to agency. Id. Both instructions were given in Doe v. University of Chicago Medical Center, a medical malpractice action that involved the care and treatment of a patient by the hospital’s employees, a surgeon, and a nurse. Doe v. Univ. of Chi. Med. Ctr., 2014 IL App (1st) 121593. In Doe, the plaintiff was on the list for a kidney transplant. Doe, 2014 IL App (1st) 121593, ¶ 15. The plaintiff received a call from a transplant nurse letting her know of an organ match. Id. The nurse was responsible for providing patients with factual information about the donor including any high risk behavior, and the surgeon was ultimately responsible for discussing the risks with the patient and obtaining informed consent. Id. ¶ 37. The donor was a homosexual man, however, and the patient subsequently developed HIV and hepatitis. Id. ¶ 17. The plaintiff later brought a claim against the transplant surgeon and the hospital
claiming that she was not informed of the donor’s high risk status. \textit{Id.} ¶ 10. The plaintiff dismissed the surgeon prior to trial and proceeded only against the hospital. \textit{Id.}

At trial, the court gave the defendant’s instruction No. 14, which was a modified version of IPI 50.01. \textit{Id.} ¶ 75. The modified instruction as given to the jury stated:

The defendant [hospital] is the principal and [the surgeon] is its agent. If you find that [the surgeon] is liable, then you must find that the defendant [hospital] is liable. However, if you find that [the surgeon] is not liable, then you must find that [the hospital] is not liable.

\textit{Id.} ¶ 75. While it mentioned the surgeon, the instruction did not state that the jury must find the hospital liable if its other agent, the nurse, was found liable. \textit{Id.} ¶ 76. The jury was also given IPI 50.02, tendered by the plaintiff, which asserted that both the physician and the nurse were agents of the defendant hospital, and that any act or omission on the part of the agents was an act or omission of the hospital. \textit{Id.} The jury found in favor of the defendant, and the plaintiff filed a motion for a new trial, arguing that the court allowed an improper jury instruction. \textit{Id.} ¶ 66. The trial court conceded that IPI 50.01 as modified was not an accurate statement of the law, but denied the motion reasoning that there was no prejudice to the plaintiff because the remaining instructions allowed the jury to consider whether the hospital was negligent for the actions of both agents. \textit{Id.} The plaintiff appealed and the appellate court reversed, agreeing with the plaintiff. \textit{Id.} ¶ 3.

The appellate court found that the modified instruction as given allowed the jury to only consider the acts or omissions of the surgeon, and not the nurse, in determining liability for the hospital. \textit{Id.} ¶ 79. It therefore should have been used exclusively. \textit{Id.} ¶ 84. The court went on to point out that the plaintiff had sued the hospital based upon a theory of \textit{respondeat superior} for the actions of its agents, the surgeon and nurse, and the jury should have received instructions based upon the party’s theory of the case. \textit{Id.} ¶ 83. IPI 50.02 was the only appropriate instruction given because the principal was the only defendant at trial, and the plaintiff alleged negligence by both the surgeon and the nurse. \textit{Id.} ¶ 80. The instruction given by the defendant was misleading because it only allowed the jury to consider the actions of the surgeon. \textit{Id.} The court found that the appropriate instruction did not cure the error, especially in light of the fact that the two instructions were in conflict with each other. \textit{Id.} ¶ 86. The appellate court ordered a new trial because the erroneous jury instruction caused serious prejudice to the plaintiff’s opportunity to obtain a fair trial. \textit{Id.}

In civil cases where at least some element of agency is in question, the court should give either IPI 50.03 or IPI 50.04. IPI 50.03 & IPI 50.04, notes on use. The court gives IPI 50.03 when a plaintiff sues both the principal and the agent, it charges the jury with IPI 50.04 when a plaintiff names only the principal. \textit{Id.}

Oftentimes in medical malpractice actions, the principal’s liability is based upon a claim of apparent agency. The Supreme Court Committee on Jury Instructions in Civil Cases has drafted special instructions to address these cases. The court gives IPI 105.10 in medical malpractice actions when both the principal, typically a hospital or other medical institution, and agent are sued, the claim against the principal is based only upon a theory of apparent agency, and the plaintiff relied upon the principal in “holding out” the individual as an agent. IPI 105.10. When only the principal is sued in such cases, IPI 105.20 is used. IPI 105.20.

An illustration of the use of these instructions is found in the seminal apparent agency case of York v. El-Ganzouri, 353 Ill. App. 3d 1 (1st Dist. 2004). The plaintiff, an orthopedic surgeon, suffered complications from knee surgery and filed suit against the anesthesiologist and the anesthesiology group, as well as hospital, based upon apparent agency for
the actions of the physician-defendant. *York*, 353 Ill. App. 3d at 3. The hospital denied that the anesthesiologist was its apparent agent, arguing that the plaintiff relied upon his son, an anesthesiologist resident, and not the hospital, in providing the anesthesiologist for surgery. *Id* at 6. The trial court gave the plaintiff’s version of IPI 105.10, which stated that to establish apparent agency, the plaintiff must prove: “(1) the hospital held itself out as a provider of anesthesia services and that the plaintiff neither knew nor should have known that the anesthesiologist was not an employee of the hospital; and (2) the plaintiff did not choose the defendant-anesthesiologist but relied upon the hospital to provide anesthesia services.” *Id* at 33 (quoting *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525 (1993)) (internal quotations omitted.) The hospital’s proposed modified version of IPI 105.10 was the same, except that it stated the plaintiff must prove it held itself out as a provider of complete anesthesia services, and that the plaintiff “or others” relied upon the hospital for those services. *York*, 353 Ill App. 3d at 33. Both of the defendant’s variances were derived from the Notes on Use and Comment to IPI 105.10. *Id*. The jury found in favor of the plaintiff and the defendant appealed. *Id*.

The Illinois Appellate Court First District agreed with the plaintiff on these issues. *Id*. The court found that to establish apparent agency, the plaintiff need only show that he relied upon the hospital for the services that were involved in the alleged malpractice, not all medical services. *Id*. In addition, the court did not require the plaintiff to include the “or others” language as it related to reliance because even though evidence was presented that the plaintiff relied upon his son to choose an anesthesiologist, the given instruction did not preclude the jury from considering the son’s involvement and therefore was appropriate. *Id*.

**Conclusion**

The decision whether to give or deny a jury instruction is within the discretion of the trial court. *Doe*, 2014 IL App (1st) 121593, ¶ 72. If there is no issue as to whether an agency relationship existed, IPI 50.01 or 50.02 is appropriate to use in most cases. IPI 50.03 or 50.04 should be given when agency is contested. For claims of apparent agency in medical malpractice cases only, IPI 105.10 or 105.20 are to be used. Regardless of which instructions are given, the language must comport with current law. *Id*. ¶ 77. It is important for counsel who represent the defendants on claims alleging vicarious liability to review current case authorities to ensure that the jury instructions that are proffered to the court accurately state the law and that it is applied correctly to the facts presented in the case, specifically the evidence to support its position regarding agency. *Id*.

**About the Author**

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