Institutional Negligence and Negligent Credentialing: Potential Liability for Hospitals

Traditionally, hospitals have been held liable in medical malpractice actions for the care and treatment provided by its employee nurses or by physicians who have been found to be apparent agents of the hospital. Defense counsel should be aware of the tort of “institutional negligence” and its progeny, “negligent credentialing,” as additional areas of potential liability for their hospital clients. Both are causes of action independent from the medical malpractice allegations directly involving the care provided to a patient.

What is Institutional Negligence?

Hospitals have a duty, independent of the duties owed by their physicians and nurses, to assume responsibility for the care of their patients. Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N.E.2d 253 (1965). This duty involves the hospital’s managerial and administrative roles, along with the enforcement of its rules and regulations. Frigo v. Silver Cross Hosp. and Medical Center, 377 Ill. App. 3d 43, 876 N.E.2d 697 (1st Dist. 2007). A hospital must act as a “reasonably careful hospital” to satisfy this duty. Frigo, 876 N.E.2d at 721.

In Darling, Illinois first adopted institutional negligence as an independent cause of action against a hospital. 211 N.E.2d 253. The plaintiff presented to the hospital with a broken leg. His leg was eventually amputated, and the plaintiff alleged inadequate supervision by the nursing staff. The court held: “[t]he Standards for Hospital Accreditation, the state licensing regulations and the defendant’s bylaws demonstrate that the medical profession and other responsible authorities regard it as both desirable and feasible that a hospital assume certain responsibilities for the care of the patient.” Darling, 211 N.E.2d at 257. The court stated, “custom is relevant in determining the standard of care,” and “[i]n the present case the regulations, standards, and bylaws which the plaintiff introduced into evidence, performed much the same function as did evidence of custom.” Darling, 211 N.E.2d at 257.

A hospital may be found liable for institutional negligence even when the defendant physician’s care is not found to be negligent. In Longnecker v. Loyola University Medical Center, the plaintiff alleged negligence on the part of the hospital in failing to ensure that the physician understood his role during a heart transplant. 383 Ill. App. 3d 874, 876, 891 N.E.2d 954, 956 (1st Dist. 2008). The jury found in favor of the defendant doctor but against the defendant hospital on the institutional negligence count, and the trial court set aside the verdicts as inconsistent. Id. The appellate court reversed, finding that the verdicts were not inconsistent. Longnecker, 891 N.E.2d at 957, noting that “a defendant hospital is judged against what a reasonably careful hospital would do under the same circumstances.” Longnecker, 891 N.E.2d at 963.
Negligent Credentialing – *Frigo v. Silver Cross*

Negligent credentialing is a tort that falls under the institutional negligence umbrella. A negligent credentialing claim is alleged against the hospital and takes issue with the care and treatment provided by a physician. It stems from a public policy position that hospitals have a duty to protect their patients by retaining competent physicians for their medical staff. *Frigo v. Silver Cross Hospital and Medical Center*, 377 Ill. App. 3d 43, 876 N.E.2d 697 (1st Dist. 2007), citing *Insigna v. LaBella*, 543 So.2d 209 (Fla. 1989).

In *Frigo*, the plaintiff underwent elective bunion surgery on her foot at the hospital. A podiatrist performed the surgery. Complications arose and the plaintiff’s foot eventually required amputation. The plaintiff then filed a medical malpractice lawsuit against the doctor and the hospital, alleging the doctor should have waited until the plaintiff’s foot ulcer healed before operating. During discovery, the plaintiff learned the doctor had been granted category II surgical privileges at the hospital, even though he had not met the requirements for such privileges. *Frigo*, 876 N.E.2d at 703. The plaintiff then amended her complaint to add a count of negligent credentialing against the hospital. The doctor settled with the plaintiff prior to trial, leaving the hospital as the only defendant. *Id.*

The hospital’s president and CEO testified that the hospital is accredited by JCAHO (Joint Commission on Accreditation of Healthcare Organizations, now The Joint Commission). As such, the hospital must abide by The Joint Commission’s credentialing standards, as well as the hospital’s rules, bylaws, and medical staff recommendations when granting privileges to its physicians. *Frigo*, 876 N.E.2d at 701.

The doctor first applied for category II surgical privileges at the hospital in 1992. *Frigo*, 876 N.E.2d at 704. At that time, the hospital’s rules and regulations required that the doctor have “additional post-graduate training,” which could be in the form of the completion of an approved surgical residency or to be Board Certified or Board Eligible in podiatric surgery. *Id.* The doctor had completed a primary care residency, not a podiatric surgery residency, and was not Board Certified or Board Eligible in podiatric surgery, but he was granted category II surgical privileges.

In 1993, the requirements for category II surgical privileges at the hospital were amended. The new rules required a physician to: (1) be a licensed podiatrist in Illinois; (2) have completed a 12-month podiatric surgical residency program; (3) have successfully completed the written eligibility examination; and (4) have completed at least 30 category II procedures. *Frigo*, 876 N.E.2d at 724. When the doctor reapplied for category II surgical privileges after 1993, he did not meet the amended requirements. The medical staff recommended that he be granted category II surgical privileges through a “grandfather” clause in the hospital’s rules. However, there was no such clause within the hospital bylaws. *Frigo*, 876 N.E.2d at 725.

In addition to her medical experts, the plaintiff produced an expert in healthcare administration at trial. This expert established the standard of care of a hospital granting privileges to its medical staff. *Frigo*, 876 N.E.2d at 707. The expert testified that the hospital acted unreasonably when it ignored its own rules in granting category II privileges to the doctor in both 1992 and after the 1993 amendments. *Id.* The defendant hospital countered with a health care administration expert who testified that the credentialing requirements changed from 1992 to 1993, that it would have been unreasonable for the hospital to require the doctor to have to complete another residency, and that it is common to “grandfather” physicians by granting them privileges without requiring a return to formal training. *Frigo*, 876 N.E.2d at 710. The plaintiff’s expert asserted that “grandfathering” is a common practice, but can only be applied when the physician is correctly credentialed initially. *Frigo*, 876 N.E.2d at 708. A hospital cannot “grandfather” a physician who did not meet the requirements under the original rules. *Id.* The jury returned a verdict in favor of the plaintiff on the negligent credentialing count and awarded damages in the amount of $7,775,668.

The hospital appealed, and the Illinois Appellate Court for the First District affirmed the verdict. *Frigo*, 876 N.E.2d at 720. The appellate court found to succeed on a claim for negligent credentialing, the plaintiff must prove: (1) the hospital failed to meet the standard of reasonable care in granting privileges to the physician whose care is at issue in the lawsuit; (2) the physician breached the applicable standard of medical care while practicing pursuant to the negligently-granted privileges; and (3) the negligent granting of privileges was a proximate cause of the plaintiff’s injuries. *Frigo*, 876 N.E.2d at 723. The court further held that expert
testimony is required to establish the hospital’s standard of care for physician credentialing, and whether the hospital breached the standard of care. *Id.*

The appellate court rejected the hospital’s argument that information reviewed by its credentialing committee is protected under the Medical Studies Act ("MSA"), and should not have been introduced into evidence. *Frigo*, 876 N.E.2d at 716. The court found that the hospital bylaws and Joint Commission standards were generated in the ordinary course of business, and that the evidence introduced was not generated by or for the specific use of the hospital’s peer-review committee, as is required to be protected under the MSA. *Frigo*, 876 N.E.2d at 717.

The hospital also argued the Hospital Licensing Act ("HLA") immunizes its credentialing decisions against liability. However, the appellate court ruled the immunity clause of the HLA, found at 210 ILCS 85/10.2, applies only to physicians harmed by a hospital’s peer-review process. It does not protect a hospital against liability for the negligent treatment of a patient. *Frigo*, 876 N.E.2d at 720.

Finally, the hospital also argued the trial court erred in instructing the jury on the negligent credentialing count because the instruction given was inapplicable to that case. *Frigo*, 876 N.E.2d at 727. Specifically, the trial court gave IPI Civil (2006) No. 30.23, which states that a defendant is liable not only for injuries which are caused directly by its own negligence, but also for any injuries that arise from the treatment provided for those injuries, even if the subsequent medical care is negligent. *Id.* The court disagreed with the hospital, finding that IPI Civil (2006) No. 30.23 was proper because the hospital was negligent when it allowed the doctor to perform the procedure, and that the procedure resulted in the amputation of the plaintiff’s foot. *Frigo*, 876 N.E.2d at 728. The appellate court added that this instruction is to be used when “there is evidence that a subsequent health care provider caused or aggravated the injury.” *Frigo*, 876 N.E.2d at 727, citing Notes on Use for IPI Civil (2006) No. 30.23.

The plaintiff in *Frigo* produced evidence that the hospital’s rules and regulations required that a physician meet specific standards to be granted category II surgical privileges, that the doctor did not meet these standards, and that the negligent surgery would not have occurred had the hospital followed its own guidelines and denied the doctor those surgical privileges. The result was a $7.8 million verdict.

Defense counsel should consider advising their hospital clients to periodically review, and revise if necessary, their medical staff bylaws to ensure their compliance with The Joint Commission standards. It is also important for hospitals to follow their internal rules, regulations, and bylaws, along with the Joint Commission requirements in granting privileges to their medical staff. If a hospital client is sued for the care and treatment provided to a patient by a staff physician, defense counsel should review the credentialing file of that physician early in the litigation to ensure that the appropriate guidelines were followed in granting the privileges relevant, even if no negligent credentialing claim has yet been made.

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