**Establishing Agency in Medical Malpractice Cases Part I: The Basics**

By MARK McGRATH

It is an all too familiar story. With 9(j) opinions in hand, and a month to go before the statute runs, you file your blue ribbon medical malpractice case. From your perfectly organized set of medical records, you identify the providers whose negligence caused or contributed to your client's injuries. Ever the diligent advocate, you serve interrogatories and requests for production of documents with the complaint. The defendants all obtain thirty-day extensions in which to answer and respond to discovery. When the discovery responses finally arrive, one month after the statute has run, you learn that one of the people who rendered care and treatment to your client was not employed by the defendants, but by a third-party contractor. He might be a laboratory technician, an emergency room physician or even a laboratory technician. Whoever he might be, all that matters is the fact that the statute has run, and you are one defendant shy of a complete set.

Confronted with these scenarios, plaintiff's attorneys have for years relied upon the law of agency to establish liability against hospitals and other defendants when care was rendered to the client by a provider whose identity and existence were not known to the plaintiff at the time of filing. Like so much of professional negligence law, however, the path is stony and bristling with thorns.

**Control is the Key**

The issue whether one person or entity will be deemed the agent of another will turn upon the degree of control exerted by the principal. Simply put, an agent is a person or entity who has been authorized by a principal, either by direct communications of authority or manifestations of assent, to act on the principal's behalf. In legal terms, agency has been held to be a fiduciary relationship which results from manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to act. Colony Associates v. Fred L. Clapp & Co., 60 N.C. App. 634, 300 S.E.2d 37 (1983).

In malpractice cases, the most typical scenario involves attempts by the plaintiff to impose liability against a hospital for the negligence of a person rendering care and treatment within the hospital. In this setting, the plaintiff will typically be contending that the person upon whom he is trying to establish primary liability is the agent of the hospital. The hospital, on the other hand, will likely argue that the third party is not an agent or employee, but an independent contractor.

Determining whether a relationship is that of principal and agent, employer and employee, or that of employer and independent contractor will turn upon whether the party for whom the work is being done has the right to control the person rendering service with respect to the manner or method of doing the work. Willoughby v. Kenneth W. Wilkins, M.D., 65 N.C. App. 626, 310 S.E.2d 90, rev. denied, 310 N.C. 631, 315 S.E.2d 697 (1983). In the hospital setting, the hospital will be deemed to have established an agency relationship with a third-party when it exercises control over the services performed by the third-party.

**Proving Control**

How can a plaintiff establish that a hospital exerted sufficient control over a third-party to be deemed that party's principal? The first place to look is the contract between the hospital and the third party. For

example, what does the agreement say about the degree of oversight, supervision and control that the hospital can exert over the putative agent? Does the contract describe the relationship as being an independent contractor arrangement? While this description will not be dispositive, it will be a factor to be considered.

Look also to the course of dealing between the parties. Aside from what the contract says, how have the hospital and purported agent behaved over time? Has the hospital supervised, evaluated and directed the third-party's performance of its work, or has the hospital maintained a mostly hands-off policy? These are the kinds of questions that need to be posed in depositions and throughout the discovery process.

**Apparent Agency**

When there is insufficient evidence of control over the alleged agent, plaintiffs may in some circumstances find comfort in the doctrine of apparent agency. Where control and oversight are the touchstones of actual agency, apparent agency is based on an appearance created by the principal that a third-party is its agent. Based largely on principles of estoppel, apparent agency can be established by proving that a third-party has been held out by the principal in such a way that reasonably invites reliance on the appearance of agency, even though no actual agency relationship exists between the parties.

While not a malpractice case, Crinkley v. Holiday Inns, Inc., 844 F.2d 156 (1988), provides a useful illustration of this principle. In Crinkley, plaintiff alleged an inadequate security claim against Holiday Inns, Inc., the franchisor/corporate parent of Holiday Inn hotels across the country. Holiday Inns, Inc. took the position that its local franchisee was the party who owned and operated the hotel, and that, therefore, Holiday Inns, Inc. could not be held liable for any negligence on the franchisee's part. The court held that there were a number of factors suggestive of an apparent agency relationship between the franchisee and the corporate parent, including (1) the corporate parent allowed the franchisee to use its trade name, trademarks and logo; (2) these marks were displayed about the hotel, and (3) the principal's national advertising campaign did not distinguish between hotels owned and operated by the corporate parent/franchisor and those owned and operated by independent franchisees.

**Consequences of Agency**

Consequences of the agency relationship are profound. First, and most significantly, the principal will be held vicariously liable for the torts of its agents. For example, if an anesthesiologist is found to be negligent and an agent of a hospital, liability will be imposed against the hospital under the doctrine of respondeat superior, even if the anesthesiologist is not a party to the case.

Moreover, notice to the agent of a dangerous condition can be imputed to the principal. Using the preceding example, assume that the anesthesiologist became aware over a course of years that a certain medical device was routinely failing during surgeries. The hospital might claim that it had no information to indicate that the device was defective. If an agency relationship is established between the hospital and the anesthesiologist, notice of the problem will likely be imputed to the hospital.

**Scope of Liability**

Agency liability is not without its limits. In order to impose liability against the principal for the torts of its agent a plaintiff must prove that the agent committed the tort within the course and scope of the agency relationship. Put another way, the negligence must be committed within the line of duty and in exercising the functions of employment.

Consider the same hospital/anesthesiologist relationship as an example. If the anesthesiologist injures a patient during an operation by failing to maintain her blood pressure, this would clearly be deemed to fall within the course and scope of his agency relationship with the hospital. The hospital hired the doctor to render anesthesia services, and the injury occurred while the doctor is rendering such services. Assume, on the other hand, that the surgery goes swimmingly, and instead the doctor inadvertently backs into the hapless patient in the parking lot three days after the operation. In this scenario, the hospital would be on solid ground arguing that the injury occurred outside the course and scope of the agency relationship.

Even when negligence is committed by an agent outside the course and scope of employment, plaintiffs can still argue that the principal ratified the conduct of the agent. Using the prior examples, assume that our hypothetical anesthesiologist has a practice of modifying intravenous lines in a certain way to expedite the infusion of fluids during surgery, a practice that is decried by the hospital's experts as being so far beyond the realm of good practice as to constitute willful, wanton and gross negligence. Assume for the sake of the example that jurors could reasonably conclude that this kind of egregious conduct takes the conduct outside the course and scope of the doctor's employment by the hospital. Now assume that the anesthesiologist's practice of modifying IV lines is brought to the hospital's attention, and that the hospital does nothing to address the practice. Under these circumstances, the hospital may be deemed to have ratified the negligent conduct, even if it arguably occurred outside the course and scope of the agency relationship. As a result, the hospital could be held vicariously liable for the negligence of the anesthesiologist.

**Conclusion**

Applying agency principles to the complexities of modern healthcare can be a daunting task. In my next installment, we will take a look at the ways in which these principles have been applied by the appellate courts in malpractice cases.