

Vicarious Liability for Healthcare Facilities

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Goals of Presentation

- ▶ A hospital may be held vicariously liable for the tortious acts of its employees.
- ▶ We will explore the various theories of vicarious liability that may be alleged against healthcare providers and review the ways healthcare providers may protect themselves against vicarious liability situations.

Concepts of Vicarious Liability

- ▶ “Captain of the Ship” doctrine
- ▶ *Respondeat superior*
- ▶ Ostensible agency doctrine
- ▶ Corporate negligence and negligent credentialing

“Captain of the Ship” Doctrine

- ▶ A surgeon in charge of an operation is liable for negligence committed by operating room staff during the period they are under surgeon’s supervision and control even though they are employees of the hospital.
- ▶ Abrogated by Montana legislature.
 - Mont. Code Ann. § 27-1-738

Respondeat Superior

- ▶ Latin for “let the master answer.”
- ▶ Employer is responsible for the negligence of its employees when the employee is acting within the scope of his/her employment.



Acting outside the scope of employment

- ▶ Conduct does not further employer's interests, or
- ▶ No objection causal connection between employment and the tortious act



Ostensible Agency Doctrine

- ▶ It is reasonable for the patient to believe that the care in question was being rendered by the hospital or by its agent; or
- ▶ the care in question was advertised or otherwise represented to the patient as care rendered by the hospital or its agents.
- ▶ For example, ER physicians, radiologist, pathologists



Abrogated by Montana Legislature

- ▶ Mont. Code Ann. § 28-10-103
- ▶ The courts have not applied or interpreted this statute in case law.



§ 28-10-103. Actual v. Ostensible Agency – Limitation

- (1) An agency is either actual or ostensible. An agency is actual when the agent is really employed by the principal. An agency is ostensible when the principal intentionally or want of ordinary care causes a third person to believe another to be the principal's agent when that person is not really employed by the principal.
- (2) Except as provided in sub-section(3), for purposes of a malpractice claim, as defined in 27-6-103, liability may not be imposed on a healthcare provider, as defined in 27-6-103, for an act or omission by a person or entity alleged to have been an ostensible agent of the healthcare provider at the time that the act or omission occurred.

§ 28-10-103. Actual v. Ostensible Agency – Limitation

- (3)(a) Sub-section(2) is not applicable unless the healthcare provider has instituted a policy or practice requiring persons providing independent professional services to have insurance of a type and in the amount required by the rules and regulations of the medical staff, by the medical staff bylaws, or by other similar healthcare facility rules or regulations. The insurance provided for in this sub-section must be in effect for the period of time during which a medical malpractice action must be brought as provided in 27-2-205.
- (b) **Failure of a healthcare provider providing independent professional services to comply with the policy or practice implementing sub-section(3)(a) constitutes unprofessional conduct pursuant to 37-1-316(17) and 37-2-304.**

Corporate Negligence/Negligent Credentialing

1. Fails to use reasonable care in the maintenance of safe and adequate facilities and equipment;
2. Fails in its duty to select and retain only competent physicians; and
3. Fails in its duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients.

Employee Discrimination

- ▶ Form of *Respondeat Superior*.
- ▶ Hospital may be liable for a supervisor's discrimination on the basis of gender, race, religion.
- ▶ Title VII prohibits discrimination on the basis of gender, such as not hiring women for certain positions. Federal courts have refused to extend Title VII coverage to discrimination based on sexual orientation, sexual attractiveness, sexual activity, marital status or sexual morality.
- ▶ Sexual harassment claims are based upon two different legal theories:
 1. "quid pro quo"
 2. "hostile environment."

Quid Pro Quo Harassment

- ▶ Includes unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature when submission to such conduct is either (1) made explicitly or implicitly a term or condition of an individual's employment or (2) used as the basis for employment decisions affecting the individual.



Hostile Work Environment

- ▶ Defined as unwelcome sexual advances, requests for sexual favors, or any conduct of a sexual nature having the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.



Avoiding Liability & Sexual Harassment Claims

- ▶ Employer may avoid liability by showing:
 - (1) the employer exercised reasonable care to prevent and promptly correct sexual harassment and
 - (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunity provided by the employer.



Limiting Potential Exposure

- ▶ An employer must disseminate and enforce an effective sexual harassment policy which incorporates effective procedures for report, investigation, and discipline of sexual harassment in the workplace.
- ▶ Employers remain liable for sexual harassment of fellow employees where the employer knows or should know of the conduct, and fails to take immediate and appropriate corrective action.
- ▶ Employers may also be liable for the acts of non-employees, for example patients, where the employer knows or should know of the conduct and fails to take corrective action.



Spoliation of Evidence

- ▶ Recently, the Montana Supreme Court stated "...[W]e strongly caution healthcare providers that once notice is given of a pending claim and until final resolution of that claim, all records that may be implicated in the treatment of the patient should be retained, regardless of any records-retention or destruction policy, and regardless that the record may not pertain only to the claiming patient's care or treatment. *Estate of Willson v. Dr. Brice T. Addison*, 2011 MT 179.

Impact of Decision on Healthcare Providers