



When is a hospital liable for a physician's malpractice?

Who's on first when it comes to liability — the doctor or the hospital? Look to ostensible agency.

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A hospital, not being a natural person, does not practice medicine. (*Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1420.) Its liability for a physician's malpractice must therefore be based upon a theory of vicarious liability. It is well known that a hospital is liable for a physician's malpractice when the physician is actually employed by or is the ostensible agent of the hospital. (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 103.)

At one time, hospitals were charitable organizations providing services to society's lowest classes and therefore, enjoyed charitable immunity. Today, however, hospitals are akin to corporations, whether profit-seeking or not, and are no longer protected by charitable immunity. The traditional rules of respondeat superior were once not applicable because physicians were not considered to be subject to control by hospital boards because of their specialized skill and training. This also no longer holds true. An often cited passage from a New York court states it best:

The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a

large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility. (*Bing v. Thunig* (1957) 2 N.Y.2d 656, 666.)

Although this passage is forty years old, it is still very relevant today. In light of the modern structure of hospitals, most jurisdictions, including California, now apply a theory of ostensible agency to impose liability on hospitals for a physician's negligence.

While actual agency exists when the agent is really employed by the principal, ostensible agency may be implied by the facts. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 502.) If a principal's acts lead others to believe that he has conferred authority upon an agent, he cannot assert, as against third parties who have relied on that conduct, that he did not intend to provide such power. (*Id.*, citing *Tomerlin v. Canadian Indemnity Co.* (1964) 61 Cal.2d 638, 644.)

Ostensible agency In California

The theory of ostensible agency is grounded in the doctrine of estoppel. There must be representations by the principal; justifiable reliance by the third party; and a change in position or injury from relying on some representation.

This requires a reasonable belief in the agent's authority before the principal can be held liable and such belief must be generated by the principal's conduct. The third party relying on the apparent authority, however, may not be guilty of neglect himself.

In California, ostensible agency is defined by statute. California Civil Code section 2300 provides: "[a]n agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Civil Code section 2334 further provides that a "[a] principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof."

The burden of demonstrating ostensible agency is on the party asserting the relationship.

Although the existence of an agency relationship is usually a question of fact, it can become a question of law when the facts can be viewed in only one way. (*Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 658.) To reiterate, the issue of ostensible agency concerns what the alleged principal by his acts has led others to believe. (*Ermoian*, 152 Cal.App.4th at 506, citing *Tomerlin*, *supra*.) (Emphasis in the original.)

First application of ostensible agency to a hospital

In California, ostensible agency was first applied to a hospital context in *Stan-*



hope v. Los Angeles College of Chiropractic (1942) 54 Cal.App.2d 141. In *Stanhope*, a large object fell on the plaintiff and he was rushed to the defendant, College of Chiropractic, which was two blocks away from the incident. The plaintiff had never been to the hospital and knew no one associated with it. After taking X-rays, a physician told plaintiff that he suffered no broken bones. A few days later, another X-ray at another hospital showed that he had broken his vertebra.

The defendant in *Stanhope* argued that it was not liable because the radiologist who reviewed the initial X-rays was not its employee or agent. The court found that the hospital failed to put the plaintiff on notice that the X-ray laboratory, which occupied the ground floor of the defendant college was not a part of the college.

Relying on Civil Code section 2300, the court inferred ostensible authority from the mere fact that the plaintiff sought treatment at a hospital without being informed the doctors were independent contractors. Specifically, it found that, contrary to the defendant's argument, the plaintiff was not required to inquire who were employees and who were independent contractors as he was being carried from room to room while suffering excruciating pain. The *Stanhope* holding was subsequently adopted by the California Supreme Court in two other hospital liability cases involving negligent anesthesiologists. (*Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154; *Seneris v. Haas* (1955) 45 Cal.2d 811.)

Recent application of ostensible agency to a hospital

More recently, ostensible agency was examined by the Court of Appeal in the Fourth District, Division Two in *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448. In *Mejia*, the plaintiff experienced neck pain and went to the emergency room of a local hospital. The X-ray technician misread

the plaintiff's X-ray and failed to diagnose that she had a broken neck. The plaintiff was discharged. The next morning, she woke up paralyzed.

The plaintiff sued the hospital, the emergency room physician, and the radiologist, who was employed as an independent contractor by the hospital. The trial court granted nonsuit in favor of the hospital at the close of the plaintiff's case based on the conclusion that the radiologist was not the ostensible agent of the hospital. The appellate court reversed.

The *Mejia* court explained that the relevant Civil Code sections require proof of three elements:

The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one.

Such belief must be generated by some act or neglect of the principal sought to be charged.

The plaintiff, in relying on the agent's apparent authority, must not be guilty of negligence.

The three elements listed above are the same as the two elements applied by most other jurisdictions: (1) conduct by the hospital that would cause a reasonable person to believe there was an agency relationship and (2) reliance on that apparent agency relationship by the plaintiff. (*Id.* at pp. 1456-7.)

The court noted the first element of ostensible agency is generally satisfied when the hospital holds itself out to the public as a provider of care. "[A] hospital is generally deemed to have held itself out as the provider of care, unless it gave the patient contrary notice." (*Id.* at p. 1453.) In the context of emergency rooms, prior notice may not be sufficient to avoid liability, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information. (*Id.* at pp. 1453-1454.)

Reliance is established when the plaintiff looks to the hospital for services,

rather than to an individual physician. (*Id.* at p. 1454.) Further, reliance need not be proven by direct testimony. In fact, courts may presume reliance absent evidence that the plaintiff knew or should have known the physician was not an agent of the hospital.

Hospitals are generally deemed to have held themselves out as the provider of services **unless they give the patient contrary notice**, and the patient is generally presumed to have looked to the hospital for care. Unless the patient had some reason to know of the true relationship between the hospital and the physician – for example, where the hospital gave the patient actual notice or where the patient was treated by his personal physician – ostensible agency is readily applied. (*Id.* at pp. 1454-1455.)

This past summer, the issue of ostensible agency was addressed again by the Fourth District, Division Two – this time in a wrongful life case in *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475. There, the court provided an examination of the historical application of ostensible agency, including a discussion of *Stanhope* and *Mejia*. It concluded that case precedent established that a plaintiff is not required to show she actually believed that the doctors were employed by the hospital, changed her position or otherwise relied to her detriment that the doctors were the hospital's agents. (*Id.* at p. 505.) Because the hospital ran and staffed the clinic where the plaintiff was cared for and was an integral part of the hospital as the place where obstetrical services were provided to indigent patients, the clinic was in fact part of the hospital. The appearance that the hospital created was that the hospital was the provider of care to the plaintiff. And there was no evidence that the doctors were agents of the hospital. The facts in *Ermoian* supported the conclusion that substantial evidence did not exist to support the lower court's finding that the physicians were not ostensible agents of the hospital. (*Id.* at p. 510.)



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Application to your case

In your case, it must be demonstrated that the plaintiff sought treatment at the defendant hospital. Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient is treated by his or her personal physician, ostensible agency applies.

Certain facts will be of significance to your case. If the physician is not employed at any other hospital or the physician uses the hospital's equipment in treatment or administers drugs that are supplied by the hospital, ostensible agency may be inferred. In addition, where a physician has a regular on-call duty at the hospital, ostensible agency will also apply.

In the case where a plaintiff is provided notice of agency by way of a consent or authorization form, the issue of proving ostensible agency is more difficult. At the summary judgment stage, it must be argued that agency should be left to the trier of fact. At the trial stage, it cannot be argued that the

plaintiff did not read or understand the notice. In the absence of fraud and imposition, a party is bound by contract provisions and is estopped from complaining that the terms are unfamiliar or contrary to his intentions or understanding. (*Jefferson v. Department of Youth Authority* (2002) 28 Cal.4th 299, 303; *Williams v. California Physicians' Service* (1999) 72 Cal.App.4th 722, 739.)

In cases where a number of physicians provide care, your best approach is to demonstrate that those specialists who are not specifically listed in the notice or personally seen by your client, such as a radiologist reviewing your client's X-rays, do not fall within the purview of that notice. It will be left for the jury to determine whether or not agency may be implied to your case in that instance.

Remember that patients look to hospitals for medical care and reasonably presume that the physicians providing care are acting on the behalf of the hospital. Every trier of fact could relate to this. Unless a patient knew or had some reason to know of the actual relationship between the physician and the hospital, ostensible agency is readily inferred.

And the hospital remains liable for the negligent acts that caused injury to your client.

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(Editor's note: This article follows on the heels of an article written by regular columnist Shirley K. Watkins and September Hopper on "Expansion of ostensible agency liability under *Ermoian: Proof Requirements*," which appeared in our November 2007 issue. If you are interested in an analysis of *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448 and *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, you can check out the Watkins article online at www.plaintiffmagazine.com.)