Apparent Agency Now Permitted In Medical Malpractice Actions

In its newly-released decision in Cefaratti v. Aranow, a divided Connecticut Supreme Court (4-3) has significantly expanded the scope of potential liability and available theories of recovery against Connecticut hospitals and other institutional defendants in medical malpractice actions. Addressing an issue that had received inconsistent treatment at the trial court level for years and one that was settled in favor of hospitals by the Appellate Court, the Supreme Court held that hospitals may be held liable for the negligent acts or omissions of non-employee physicians on a theory of apparent agency.

The Supreme Court adopted two alternative standards for establishing apparent agency in tort cases. First, a plaintiff may establish apparent agency by proving that: (1) the principal (hospital) held itself out as providing certain services; (2) the plaintiff selected the principal on the basis of its representations; and (3) the plaintiff relied on the principal to select the specific person who performed the services that resulted in the harm complained of by the plaintiff. This test is geared toward hospitals that use non-employee physicians or independent contracted physician groups to staff specialty and/or "on call" services such as emergency room services, anesthesiology, radiology, and pathology. Given the language used by the Court, we believe that hospitals are now liable, for example, for the conduct of any physician in these areas who is assigned to the patient through the emergency room, for all anesthesia services provided to patients regardless of whether their surgeon is an employee or not, and /or for out-patient diagnostic imaging services. As a practical matter, the standard used by the Court does not absolve the hospital of responsibility for simply informing the patients of the nature of the independent contractor relationship. Until there are enough to decisions to confirm our conclusion, the hospitals should continue to display signage and inform patients through consents that these physicians are not employees. But the trend is clear: hospitals will likely be the excess insurance carrier for their contracted groups.

Second, a plaintiff may establish apparent agency by proving that: (1) the principal held the apparent agent or employee out to the public as possessing the authority to engage in the conduct at issue, or knowingly permitted the apparent agent or employee to act as having such authority; (2) the plaintiff knew of these acts by the principal, and actually and reasonably believed that the agent possessed the necessary authority; and (3) the plaintiff detrimentally relied upon the principal's acts, i.e., the plaintiff would not have dealt with the agent-tortfeasor if he/she had known that the tortfeasor was not the principal's agent or employee. The Supreme Court recognized that the second standard is narrow and that it will be rare for a plaintiff to be able to prove "detrimental reliance." This test will likely be employed

by plaintiffs looking to claim that non-employee doctors with medical staff privileges are the responsibility of the hospital. Even while these circumstances were deemed "rare" by the court, there will be plaintiff's lawyers who will attempt to create an agency relationship. This will likely be true, for example, where a patient has been admitted and complications arise, requiring a consult from a specialist who happens to be "on-call." Hospitals must now take steps to ensure that patients are informed that on-call physicians are not employees and that the patient is free to choose some other specialist if they so desire.

These unfortunate developments may also be met with a change in the contractual relationships between hospitals and their contracted groups and/or attending staff. Hospitals may want to consider indemnification agreements and/or high minimum insurance limits in order to protect themselves from the increased risk of liability that the decision creates.

Contact Us

Neubert, Pepe & Monteith, P.C. has extensive experience in representing institutional healthcare providers throughout Connecticut and defending claims of vicarious liability. If you have any questions or would like further information, please contact Michael Neubert, Eric Stockman, or Gretchen Randall at 203.821.2000 or www.npmlaw.com.

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