Hospital Risk Management

Issues to Consider to Minimize Exposure in Litigation

By Milanna Datlow

Hospitals face broad exposure to litigation, with causes of action ranging from negligence to statutory violations of trade practice laws. Lessons learned from Connecticut can be instructive across the country.

Hospitals, just as all businesses, face many risk-management challenges. In addition to delivering high-quality patient care and ensuring patient safety and well-being, hospitals must comply with regulatory standards, adhere to data security and billing protocols, and be mindful of legal pitfalls when they advertise their services or engage the services of outside medical providers. To deal with these challenges, hospital management should seek legal advice to navigate the risks and minimize exposure to litigation effectively.

This article addresses some legal issues that can expose hospitals to litigation in Connecticut.

Negligence Claims Against Hospitals

The first steps toward decreasing the hospital litigation exposure risks in Connecticut, in addition to maintaining professional standards of care, are understanding the relationship between corporate negligence and professional negligence, or medical malpractice, and the distinction between actual agency and apparent agency.

Corporate Negligence

Corporate negligence is the failure of the hospital's governing board of directors to maintain the required standard of conduct. *Buckley v. Lovallo*, 481 A.2d 1286 (Conn. App. Ct. 1984) (noting that corporate negligence is not synonymous with the medical malpractice standard). Under the corporate negligence doctrine, a medical institution is liable if it fails to uphold the proper standard of care owed to a patient, which is to ensure the patient's safety and well-being while at the hospital.

Under Connecticut law, to sustain a corporate negligence claim against a hospital, a plaintiff is generally required to establish, through expert testimony,

■ Milanna Datlow is an associate at the Managed Care + Employee Benefit Litigation Group of Robinson & Cole LLP, Hartford Office. She concentrates her practice in the areas of the Employee Retirement Income Security Act (ERISA); life, health and disability benefit litigation; and related insurance coverage issues. She has experience defending cases involving allegations of medical malpractice and hospital negligence. *The author gratefully acknowledges Anthony Corleto, Bernard Gaffney, and Eric Niederer, partners at Wilson Elser, for their support, comments, and assistance with this publication.*

> the standard of care to which [the] defendant [is] to be held and a violation of the standard.… Specifically, the plaintiff is required to produce expert testimony of the standard of care applicable to similar hospitals similarly located… and expert testimony that the hospital's conduct did not measure up to that standard.

Neff v. Johnson Memorial Hospital, 889 A.2d 921(Conn. App. Ct. 2006) (internal quotation marks omitted) (citation omitted). *See also Doe v. Saint Francis Hosp. & Medical Center*, 309 Conn. 146, 200 n.45, 72 A. 3d 929 (2013) ("a corporate negligence case requir[es] expert testimony on the standard of care applicable to similarly situated hospitals").

While courts may consider violating an employer's work rules to be evidence of negligence, "such a violation does not establish the applicable duty of the hospital to its patients, since hospital rules, regulations and policies do not themselves establish the standard of care…. [T]his general principle, however, applies only in cases in which there was no expert testimony that the hospital's bylaws, rules or regulations did coincide with the legally applicable standard of care in the relevant community." *Doe v. Saint Francis Hosp. & Medical Center, supra,* 309 Conn. 199 (internal quotation marks omitted) (citation omitted). Of note, hospitals are under a legal duty imposed by Connecticut State Department of Health regulations to abide by their bylaws. *See* Regs. Conn. State Agencies §19-13-D3 (b) (1) (A). *Gianetti* v. *Norwalk Hospital*, 557 A.2d 1249 (Conn. 1989). Hospitals in other states may have a similar duty.

Examples of allegations of corporate negligence in Connecticut case law include, among other things, failure to (1) follow the rules and procedures established by the hospital's bylaws in credentialing medical staff and granting privileges to physicians to deliver medical services; (2) hire, train, and supervise personnel properly to discharge their duties under the hospital's policies and procedures; (3) have proper and adequate personnel and equipment on hand to handle medical, surgical, and anesthesia emergencies; (4) maintain a sufficient number of nurses and other medical personnel on duty; and (5) have in place and enforce proper rules, regulations, standards, and protocols for keeping medical records.

Additionally, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulations protect patients' privacy rights. HIPAA violations are investigated by the Office for Civil Rights of the US Department of Health and Human Services, and financial penalties are issued to organizations that breach regulations. To avoid HIPAA violations, HIPAA-covered healthcare providers, among other things, *shall* (1) perform an organization-wide, risk analysis to identify risks to the confidentiality, integrity, and availability of the protected health information (PHI); (2) enter into a HIPAA-compliant business associate agreement with all vendors that have access to PHI; (3) introduce measures to safeguard ePHI (electronic PHI) access control properly; (4) issue timely breach notifications; (5) secure and permanently destroy PHI after the retention period expires; and (6) maintain security and privacy of PHI under HIPAA, i.e., no unauthorized disclosure of PHI to persons or companies that are not on the authorization form, to the patient's employer after patient's authorizations expired, or in a press release.

While HIPAA makes no provision for the private right of action to sue for loss and damage caused by the violation of privacy, some states allow a private cause of action for HIPAA violations. The Connecticut Supreme Court held that recognizing a cause of action for the breach of the duty of physician–patient confidentiality by the disclosure of medical records is not barred by HIPAA and is permissible. *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*, 175 A.3d 1 (Conn. 2018). The court used HIPAA as the standard of care that exists to protect the confidentiality of patient medical records from unauthorized disclosure. *Id.*

Professional Negligence (Medical Malpractice)

If a physician responsible for the patient's care is directly employed by the hospital, the hospital is exposed to a negligence claim under the vicarious liability doctrine, also known as respondeat superior, Latin for "let the master answer." Vicarious liability makes the employer responsible for the actions of its employee performed within the scope of employment. It is based on "the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss." *Jagger v. Mohawk Mountain Ski Area, Inc.*, 269 Conn. 672, 693 n.16, 849 A.2d 813 (2004) (internal quotation marks omitted) (citation omitted).

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Actual Agency

Before vicarious liability can be imposed, however, there must be sufficient evidence produced to warrant a finding of agency between the parties. *Alvarez* v. *New Haven Register, Inc.*, 735 A.2d 306 (Conn. 1999).

Agency is an agreement between parties that authorizes the principal to control certain aspects of the agent's conduct. *Bellsite Development, LLC v. Monroe*, 122 A.3d 640 (Conn. App. Ct. 2015), *cert. denied*, 122 A.3d 1279 (Conn. 2015). Demonstrating "the existence of an agency relationship" requires "(1) a manifestation by the principal that the agent will act for him [or her]; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking." *Gagliano v. Advanced Specialty Care, P.C.*, 189 A.3d 587, 593 (Conn. 2018) (internal quotation marks omitted).

In addition, determining whether the parties have such a relationship involves considering different factors, such as "whether the alleged principal has the right to direct and control the work of the

agent; whether the agent is engaged in a distinct occupation; whether the principal or the agent supplies the instrumentalities, tools, and the place of work; and the method of paying the agent." *Id*. One "essential ingredient of agency is that the agent is doing something at the behest and for the benefit of the principal." *Id*. (internal quotation marks omitted). In medical malpractice actions, the third element—an understanding between the parties that the principal will be in control of the undertaking—is usually the most contentious. Specifically, what the "undertaking" includes, and how broadly or narrowly it should be interpreted, are issues of fact in every case.

Under such circumstances, the physicians are not the hospital's employees since there is no direct or contractual relationship between them. However, there has been an erosion of the concept that a hospital is not responsible for the acts of someone who is not its employee.

With respect to control, it is "the general *right* to control, and not the actual exercise of specific control, that must be established." *Id*. at 594. Agents can have "considerable discretion and independence in *how* they perform their work" but "still be deemed subject to the principal's general right to control." *Id*. (citing and quoting 1 Restatement (Third), Agency §1.01, cmt. c (2006) ("a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment")) (emphasis in original). Thus, the mere fact that physicians must be free to exercise independent medical judgment does not preclude the trier of fact from finding the existence of a principal–agent relationship between a hospital and a physician. *Id*.

Accordingly, to determine actual agency, a Connecticut court will consider, in addition to the employment agreement, the hospital's standard rules, procedures, regulations, protocols, payment, and other arrangements to determine whether the hospital retained authority to control the delivery of medical care by the physicians who work inside its facility. The actual application by courts of the expanded "general right to control" test to establish actual agency is yet to be seen.

Apparent Agency

It is a common practice that hospitals do not hire doctors directly, but rather contract with private entities to provide medical services; and those entities, in turn, hire physicians who treat patients. Under such circumstances, the physicians are not the hospital's employees since there is no direct or contractual relationship between them. However, there has been an erosion of the concept that a hospital is not responsible for the acts of someone who is not its employee.

In *Cefaratti v. Aranow*, 141 A.3d 752 (Conn. 2016), the Connecticut Supreme Court recognized vicarious liability for the medical malpractice of the hospital's *apparent* agent, an independent physician, if the hospital held out that physician as having authority to act for the hospital, *and* the patient relied on that appearance of agency.

Depending on context, "apparent agency" can have two distinct meanings: (1) the apparent scope of authority of an actual agent (who exceeded actual authority), or (2) someone who is not actually an agent is treated as if he or she were an agent, having apparent authority to act as an agent for a principal without regard to the existence of actual authority. *Id*. In either case, the hospital is liable if it took steps in public view to portray the physician as possessing authority to act for the hospital in the particular situation, and the patient justifiably believed that the hospital had conferred agency authority. As for conferring apparent authority to act as an agent,

> two important facts [must] be clearly established: (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority; and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority.

Id. at 758.

In *Cefaratti*, the Connecticut Supreme Court adopted two alternative standards for establishing apparent agency with respect to a physician who is not an actual agent, depending on whether (1) the patient chose the hospital, and the hospital selected the physician to treat the patient; or (2) the patient chose the physician and was treated at the hospital where the physician had privileges.

Where a patient chose a medical facility and was assigned a healthcare provider, detrimental reliance is presumed. In that situation,

> the plaintiff may establish apparent agency by proving that (1) the principal 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.

Cefaratti v. Aranow, 141 A.3d at 771.

For example, in *Greene v. Quraishi*, the court granted summary judgment for lack of apparent agency where the plaintiff did not submit any evidence to substantiate that he relied on the defendants' representations about wound care services other than a copy of the facility's webpage, which, by itself, without an affidavit or a testimony that either the plaintiffs or the referring doctor selected the facility on the basis of the representations made on the webpage, was insufficient to create a material dispute pertaining to the existence of apparent agency. No. CV136045815S, 2017 WL 960733, at *4 (Conn. Super. Ct. Jan. 25, 2017),

Where a patient chose the physician and was treated at the hospital where

the physician had privileges, the plaintiff must prove that he or she detrimentally relied on the appearance that the physician was a hospital agent or employee. Under such circumstances, to establish apparent agency, the plaintiff must prove the following:

> (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 or employee or apparent agent or employee possessed the necessary authority; and (3) the plaintiff detrimentally relied on the principal's acts, *i.e.*, the plaintiff would not have dealt with the tortfeasor if the plaintiff had known that the tortfeasor was not the principal's agent or employee.

Cefaratti v. Aranow, 141 A.3d at 771.

Thus, the second standard adopted in *Cefaratti* incorporates the apparent scope of authority of an actual agent but adds the third requirement—detrimental reliance; the plaintiff has to show that he or she would not have submitted to the medical treatment of the physician at the hospital if the plaintiff had known that the physician was not the hospital's agent or employee.

In *Cefaratti*, the Connecticut Supreme Court declined to rule on whether a hospital can rebut the appearance of an agency relationship by posting signs indicating that medical providers are not agents or employees of the hospital, or by requiring the patients to sign disclaimers to that effect in nonemergency situations. This issue will have to be decided in another case.

Connecticut Unfair Trade Practices Act Claim

A healthcare provider can be subject to a Connecticut Unfair Trade Practices (CUTPA) claim if an entrepreneurial or business aspect of the provision of services is implicated. Medical malpractice claims recast as CUTPA claims cannot form the basis for a CUTPA violation. *Haynes v. Yale-New Haven Hospital,* 699 A.2d 964 (Conn. 1997).

Advertising, solicitation of business, and billing practices have been deemed entrepreneurial activities subject to CUTPA. *See Suffield Dev. Assocs. L.P. v. National Loan Investors L.P.*, 802 A. 2d 44 (Conn. 2002). For instance, an alleged false representation that someone was a properly credentialed professional, in this case a certified clinical nurse specialist, was held to be entrepreneurial. *Holt v. Levine*, 29 Conn. L. Rptr. 20, 2001 WL 76279, at *5 (Conn. Super. Ct. 2001). An allegation that a physician's referral of the plaintiff, a pharmaceutical representative, to the defendant, Laser Center, for a dermatological procedure in exchange for doing business with the plaintiff and other pharmaceutical representatives, was deemed entrepreneurial. *Caplin v. Laser Center of Northeastern Connecticut*, 2009 WL 1424712, at *5–6 (Conn. Super. Ct. 2009). *See also Builes v. Kashinevsky*, 48 Conn. L. Rptr. 538, 2009 WL 3366265, at *3–4 (Conn. Super. Ct. 2009) ("[t]here is no doubt that alleged practice of altering medical records to avoid negligence claims is a proper claim under CUTPA"); *Gallinari v. Kloth*, 148 F. Supp. 3d 202, 215–16 (D. Conn. 2015) (deeming misrepresentation and concealment "about the Compound Medication in order to artificially inflate its price" entrepreneurial).

However, a decision to treat a patient in a particular manner, allegedly motivated by commercial concerns, has been held not to make the act "entrepreneurial." *See Bridgeport Hosp. v. Cone*, 2000 WL 254579, at *2–3 (Conn. Super. Ct. 2000). *See also Bridgeport Hosp. v. Cone*, 2000 WL 1705739, at *4–5 (Conn. Super. Ct. 2000).

What Can a Hospital Do to Minimize Exposure to Litigation?

Hospitals face the challenge of minimizing the risks of litigation exposure while maintaining a high quality of care and patients' confidence in quality and accountability. Here are some recommended steps to address those concerns, many of which may help in other states, as well:

- Maintain an in-house quality assurance program to abide by the bylaws, rules, and regulations.
- Provide regular training to personnel regarding the hospital's policies and procedures.
- Review privacy and data-security policies and procedures and third-party contracts with vendors to safeguard against improper disclosure of personal health information.
- Review independent contractor and employment agreements and the hospital's standard rules, procedures, regulations, and protocols to assure that the hospital limits its general right to control the delivery of medical care by the physicians who work inside its facility.
- Include disclaimers in the advertising materials indicating that medical providers are not agents or employees of the hospital.
- Use liability disclaimers in admission forms to the effect that medical providers are not agents or employees of the hospital.
- Establish effective controls over business solicitation and billing practices to avoid CUTPA violations in Connecticut.