

*PARKS MEDICAL-LEGAL
CONSULTING PRESENTS:*

Vicarious Liability

Legal Definition

- ▣ *The TORT doctrine that imposes responsibility upon one person for the failure of another, with whom the person has a special relationship (such as parent and child) employer and employee, or owner of vehicle and driver), to exercise such care as a reasonably prudent person would use under similar circumstances.*



Legal Doctrine

- ▣ Vicarious liability is a legal doctrine that assigns liability for an injury to a person who did not cause the injury but who has a particular legal relationship to the person who did act negligently. It is also referred to as imputed Negligence. Legal relationships that can lead to imputed negligence include the relationship between parent and child, Husband and Wife, owner of a vehicle and driver, and employer and employee. Ordinarily the independent negligence of one person is not imputable to another person.

Other Theories of Liability

- ▣ Other theories of liability that are premised on imputed negligence include the Respondeat Superior doctrine and the family car doctrine.
- ▣ The doctrine of respondeat superior (Latin for "let the master answer") is based on the employer-employee relationship. The doctrine makes the employer responsible for a lack of care on the part of an employee in relation to those to whom the employer owes a duty of care. For respondeat superior to apply, the employee's negligence must occur within the scope of her employment.

Responsibility of the Employer

- ▣ The employer is charged with legal responsibility for the negligence of the employee because the employee is held to be an agent of the employer. If a negligent act is committed by an employee acting within the general scope of her or his employment, the employer will be held liable for damages. For example, if the driver of a gasoline delivery truck runs a red light on the way to a gas station and strikes another car, causing injury, the gasoline delivery company will be responsible for the damages if the driver is found to be negligent. Because the company will automatically be found liable if the driver is negligent, respondeat superior is a form of Strict Liability.

Negligence

- ▣ Another common example of imputed negligence is attributing liability to the owner of a car, where the driver of the car committed a negligent act. This type of relationship has been labeled the family car doctrine. The doctrine is based on the assumption that the head of the household provides a car for the family's use and, therefore, the operator of the car acts as an agent of the owner. When, for example, a child drives a car, registered to a parent, for a family purpose, the parent is responsible for the negligent acts of the child at the wheel.

Contributory Negligence

- ▣ Liability can also be imputed to an owner of a car who lends it to a friend. Again, the driver of the car is acting as the agent of the owner. If the owner is injured by the driver's negligence and sues the driver, the owner can lose the lawsuit because the negligence of the driver can be imputed to the owner, thereby rendering him contributorily negligent. This concept is known as imputed contributory negligence.

Nurses and Vicarious Liability

- ▣ Analysis of closed claims against healthcare facilities can provide nursing professionals opportunities to critique and improve their practice. While the following case occurred in an assisted-living facility, the case is applicable to most any healthcare setting. The facts of the case have been disguised and modified, but the underlying issues remain the same.



Case Study

- ▣ An elderly female assisted-living facility resident requires a mechanical-transfer device from bed to wheelchair and back. She is maximum assist with bed mobility. She has episodic confusion.
- ▣ After the evening meal, a certified nursing assistant (CNA) returns the resident to her room. The CNA transfers the resident to the bed by himself using the mechanical-transfer device. The resident is already in the bed when another CNA arrives to aid with turning, positioning and incontinence care.

Case Study

- ▣ The resident weighs approximately 190 pounds and is unable to assist with turning and positioning. She is in a hospital bed with enabler bars in permanent upright position; there are no side rails. Both CNAs stand on the same side of the bed. They roll the resident over for incontinent care and she falls off the bed onto the floor, pinning her between the wall and the bed, and she cries out in pain.
- ▣ One CNA notifies the nurse on call and is ordered to call 911. At the hospital, X-rays reveal a fractured cervical spine. The patient is treated conservatively with immobilization. While hospitalized, she becomes febrile with pneumonia. She becomes septic and dies. The assisted-living facility is sued.

Standard of Care

- ▣ **Standard of care: 1.** A diagnostic and treatment process that a clinician should follow for a certain type of patient, illness, or clinical circumstance. Adjuvant chemotherapy for lung cancer is "a new standard of care, but not necessarily the only standard of care." (New England Journal of Medicine, 2004)
- ▣ **2.** In legal terms, the level at which the average, prudent provider in a given community would practice. It is how similarly qualified practitioners would have managed the patient's care under the same or similar circumstances. The medical malpractice plaintiff must establish the appropriate standard of care and demonstrate that the standard of care has been breached.

Standard of Care

- ▣ For our purposes as Legal Nurse Consultants and nurses the legal definition is the one that is applicable. Facility policies and procedures, professional resources and literature, clinical practice and other sources provide the basis for standard of care. Federal or state regulations, compliance and accreditation organizations do not define standard of care.



Standard of Care as Related to the Example

- ▣ In this case, although the CNAs are not considered professionals, the nurse supervisor, who was the only nurse employed at the facility, must ensure their treatment of the resident is consistent with the standard of care. What's more, the nurse's responsibility is not absolved just because she is not in the building; she is vicariously liable for the acts of the subordinate CNAs.

Issues with Standard of Care

- ▣ There are a number of standard of care issues in this case. First, the use of the mechanical-transfer device requires two people. Standard of care dictates one person is to stay with the resident or patient to prevent falling or other safety problems while the other manipulates the device. There also was a question about where the resident was positioned in bed, at either edge or in the middle, which would make a difference to fall risk.



Liability: Not just for Individuals

- ▣ Any entity, not only a person, can be held liable for civil damages. Hospitals can therefore be asked to pay damages for any number of reasons, such as direct negligence, premise liability, etc. Vicarious liability is indirect legal liability, typically arising from an employer-employee relationship, which is not the situation here. However, vicarious liability can also arise from a principal-agent relationship, and under some circumstances, an independent contractor can be deemed to be an agent. That means Independent LNC's as well.

Hospital Liability

- ▣ How can hospitals be held liable for the negligent acts of its doctors and staff? Vicarious liability is a legal doctrine in which a party is held legally responsible for the negligence of another because of its relationship to the wrongdoer. Courts have generally used the employer-employee or the agency principle to hold a hospital vicariously liable for the negligence of its health care providers. Where there is an employer-employee relationship (e.g., nurses and some doctors hired by the hospital), respondeat superior is the basis for liability. Respondeat superior means "let the master answer." The idea behind this rule is to ensure that the employer, as supervisor, will enforce the proper work standards to avoid risk of harm.

Enforcing Competency

- ▣ The director of nursing in the nursing home and the nurse manager, nursing supervisor or nurse executive in the hospital, have a supervisory role even though they're not at the bedside. Part of the responsibility of being a nurse manager is ensuring staff training and competency levels are consistent with the job description and with standard of care. If staff members are not competent, they should not be left unsupervised. Upon review of the facility's policies and procedures, there was no documentation of training addressing the use of the mechanical-transfer device, turning and positioning related to special circumstances such as residents who are obese, safety issues or falls.

Supervision and Training

- ▣ Because this facility had a history of residents falling, one would have anticipated training concerning falls would have been a high priority. Generic policies and procedures are not adequate to address facility- or resident-specific training for staff. When questioned, the CNAs were unaware of mechanical-transfer device operation expectations and did not understand why their positioning at the bedside was problematic when the fall occurred.



Independent Contractor

- ▣ Where the negligent actor is an independent contractor rather than an employee, respondeat will not apply. An institution usually does not exercise substantial control over the actions of independent contractors. Most doctors who work in private hospitals are independent contractors, as they do not draw a hospital salary, nor are their work hours and work duties controlled or defined by the hospital. Having physicians as independent contractors in stead of employees thus inoculates the hospital from vicarious liability.

Other Circumstances

- ▣ However, depending on the facts, some courts have used an underlying agency relationship to impute liability to the hospital (*Sword v. NKC Hospitals, Inc.*, 714 N.E. 2d 142, Ind., 1999). Agency may be established if there is some degree of control, even if minimal, that is exerted on the doctor, especially where patients are not informed that their treating doctors are independent contractors. The relationship may be construed as an apparent or ostensible agency, where there is some representation that the doctor works for the hospital.

Imputing Hospital Liability

- ▣ Alternatively, when the patient relies on the hospital in seeking treatment, it is called agency by estoppel. Finally, courts have occasionally used the legal doctrine of nondelegable duty to find a hospital liable, holding that the services provided, as in the radiology or emergency departments, are a hospital's "inherent function."



Case Example #2

- ▣ A recent Florida case that received prominent media coverage illustrates the issue of vicarious liability: The ship's doctor aboard a Carnival cruise ship failed to diagnose acute appendicitis in a 14-year-old girl with several days of abdominal symptoms. The patient's appendix ruptured, which eventually resulted in sterility. The parents sued the cruise line as a codefendant, which denied liability because the doctor was not an employee, a fact specifically disclosed on the cruise ticket.



Case #2

- ▣ Although the doctor's contract stated that he was an independent contractor, the District Court of Appeal of Florida reasoned that in a claim based on agency, it is the right of control rather than actual control itself that matters. It therefore held that "for purposes of fulfilling cruise line's duty to exercise reasonable care, ship's doctor is an agent of cruise line whose negligence should be imputed to cruise line, regardless of contractual status ascribed to doctor" (*Carlisle v. Carnival Corp., et al*, 864 So.2d 1, 2003).

Case #2

- ▣ However, the Florida Supreme Court subsequently quashed this decision because federal maritime law protects shipowners from liability flowing from the medical negligence of shipboard physicians (*Carlisle v. Carnival Corp., et al*, 953 So.2d 461, 2007).



Conclusion

- ▣ While Vicarious liability may not be of concern for most nurses working in the Hospital setting, it is still an important part of nursing malpractice that should be understood by all nurses. Don't be fooled in to thinking that you are covered by your hospital for any negligent act, it is always a good idea to have your own separate malpractice insurance. CRNA's, Nurse Practitioners, Nurse Midwives and Legal Nurse Consultants and independent contractors are all fair game for vicarious liability lawsuits. Every state has different statutes take the time to learn yours and learn what your options are if you are faced with this form of liability. This is not a substitute for legal advice, seek council to understand your rights.

THE END

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